



The University of the State of New York

The State Education Department State Review Officer

No. 08-131

Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:

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

Law Offices of Skyer, Castro, Foley & Gersten, attorneys for respondents, Jesse Cole Foley, 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 respondents for their son's tuition costs at the Brooklyn Autism Center Academy (BAC) for the 2007-08 school year. The appeal must be sustained.

At the time of the impartial hearing, the student was attending a kindergarten class at BAC (Parent Exs. A; B). BAC is a private school which has not been approved by the Commissioner of Education as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7). BAC is described in the hearing record as a school that uses applied behavioral analysis (ABA) for children diagnosed with autism (Tr. p. 410). The student's eligibility for special education services as a student who is classified as autistic is not in dispute in this appeal (Dist. Ex. 15; see 34 C.F.R. § 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

The educational history of the student is described in detail in Application of a Child with a Disability, 06-132, and will not be repeated herein. Briefly, the student is described in the hearing record as having deficits in attention, reciprocity, social/play skills, and language (Dist. Ex. 1 at p. 1). His medical history is significant for repeated ear infections, decreased appetite, difficulty sleeping and an allergy to nuts, dairy and wheat (id.).

In October 2006 and November 2006, a private pediatric psychiatrist completed a psychoeducational summary of the student as a result of a referral by his parents in order to assist them in "appropriate educational planning" (Dist. Ex. 1 at p. 1). The report indicated that the

student was attending a general education preschool and, as per his IEP, was receiving 12-month educational instruction and related services including occupational therapy (OT), physical therapy (PT), speech-language therapy, and special education itinerant teacher (SEIT) support (*id.*).¹ The evaluator's behavioral observations of the student included that the student had difficulty participating fully in the testing process due to attention, language and reciprocity difficulties, although he was able to benefit from repetition, redirection, cueing and repeated demonstrations in order to understand more complex and novel directions (*id.*). Administration of the Weschler Preschool and Primary Scale of Intelligence – Third Edition (WPPSI-III) revealed a verbal IQ score of 83 (low average), a performance IQ score of 79 (borderline) and a full scale IQ score of 79 (borderline) (*id.* at p. 6). The evaluator opined that, while the student's full scale IQ score rated just below the average range, it was likely that his actual potential was within the low average to average range and that the student's difficulties with language, attention and reciprocity impeded his ability to demonstrate his full cognitive potential (*id.* at p. 4). The student's performance on the WPPSI-III indicated relative strengths in basic word knowledge and using small amounts of verbal information (*id.*). It indicated weaknesses in imitating models, participating in tasks that required visual attention and scanning, and participating in verbal tasks that were unstructured, that required pragmatic skills or that required processing or producing larger amounts of verbal information or engaging and accessing his language consistently and efficiently (*id.*). The student's pre-academic skills were assessed using the Bracken Basic Concept Scale – Expressive (Bracken) which yielded a percentile rank of 25 (average) on the school readiness composite subtest (*id.* at p. 3). The evaluator opined that the result suggested a solid learning potential, although the student would be "at risk" in a large classroom environment due to his attention, pragmatic language and reciprocal interaction difficulties (*id.*). The parents completed the Pervasive Developmental Disorder – Behavior Inventory (PDD-BI), which revealed that the student had difficulties in sleeping, responsiveness, semantic and pragmatic language, social awareness and flexibility, and difficulty regulating his attention (*id.*). The evaluator recommended a small class setting with opportunities for interaction with peers of good cognitive ability that provided for high levels of individual attention, continuation of speech-language therapy, OT, and a small peer play group to promote pro-social functioning (*id.* at pp. 4-5).

In a progress report dated January 10, 2007, the student's speech-language therapist summarized the student's progress on goals which had been addressed through his home-based speech-language therapy (Dist. Ex. 2 at p. 1).² The student's speech-language goals included improving pragmatic, receptive and expressive language skills (*id.* at pp. 1-2). The student was reported to have learned new language skills in a rote manner, memorized words and sequences although often confusing word order, and used incorrect phrases such as saying "open the door" when he wanted the page in a book turned (*id.* at p. 3). He was noted to require prompting and practice to generalize skills to new situations and to generate language functionally and spontaneously (*id.*). The speech-language therapist reflected that the student's inattention to verbal information inhibited his purposeful use of language, i.e., he answered "yes" to any yes/no question even when he understood and could answer the question appropriately (*id.*). The student had

¹ The Education Law defines special education itinerant services (commonly referred to as "SEIT") as "an approved program provided by a certified special education teacher . . . , at a site . . . , including but not limited to an approved or licensed prekindergarten or head start program; the child's home; a hospital; a state facility; or a child care location as defined in [§4410(8)(a)]" (Educ. Law § 4410[1][k]).

² The hearing record reflects that the student received five individual 60-minute therapy sessions per week at home (Dist. Ex. 2 at p. 1).

recently begun to generate some language on his own, using phrases he has heard others say, such as "we went to the park," but he usually used just one word to make his needs and wants known (id.). For example, he would say "cookie" instead of using a sentence to ask for a cookie (id.). The student was noted to be able to produce a complete sentence to make a request when he was given a prompt (id.). The speech-language therapist reported that the student's lack of attention to verbal directions and information resulted in inconsistent performance, the student required several repetitions and physical prompting to respond to directions and, although had he had made progress in processing, comprehension and use of language, he remained "severely impaired" for his age (id.). The speech-language therapist also noted that the student's significant language delays contributed to his "behavioral difficulties," and that the behaviors negatively impacted his ability to attend to activities and demonstrate comprehension of verbal information (id. at p. 4). She further noted that although the student's play skills and interaction with adults had improved, he continued to demonstrate significantly impaired play skills for his age level, especially with peers (id.). The therapist recommended that the student continue receiving speech-language therapy to address his delays (id.).

In a progress report dated January 15, 2007, the student's occupational therapist described the student's current level of functioning and the progress he had made as a result of his participation in OT sessions (Dist. Ex. 3 at p. 1).³ Therapeutic activities in the sessions focused on improving the student's sensory regulatory and modulatory behaviors, including improving his attention span, motor planning and transition skills (id.). The student's therapy also addressed increasing the student's muscle strength, coordination, visual motor and eye hand coordination skills, and fine and gross motor skills (id.). The therapist reported that the student was performing with significant delays in gross and fine motor skills, and that his severe communication deficits, poor regulatory behaviors, and sensory regulatory challenges interfered with his ability to engage in the learning process necessary to acquire the skills needed for academics and social engagement (id. at p. 2). The student's inability to process sensory information negatively impacted his ability to sustain attention, which then impacted his ability to acquire gross and fine motor skills (id.). However, the student was reported to respond very well to intense sensory input provided by his work in the sensory gym, which work resulted in a tremendous increase in the student's level of alertness and his ability to learn and use non-verbal and verbal instructions following those activities (id.). The student was reported to demonstrate significant improvement in eye contact, sustained visual regard and relatedness to others following sensory motor activities, and the therapist recommended that the student continue to receive three 60-minute individual sessions of OT services per week in an "office-based setting" to afford the student the opportunity for continued use of sensory techniques to address his deficits (id.).

In an undated preschool teacher questionnaire, the student's preschool teacher at his last attended preschool⁴ indicated that the student had not made any academic or social/emotional progress, that his interactions were facilitated by his SEITs, and that based on the student's inability to follow simple directions, she did not feel the student would be ready for a kindergarten curriculum (Dist. Ex. 4 at p. 1; see Tr. p. 116). She further stated that the student's then current classroom setting was not appropriate for him as his skills and attention span were not age appropriate and he was totally dependent on his SEITs for guidance and direction (Dist. Ex. 4 at

³ The progress report indicated that the student had been receiving OT at a private agency since June 2004 (Dist. Ex. 3 at p. 1).

⁴ The hearing record reveals that the student had attended three different preschools (Tr. pp. 643-44).

p. 4). The teacher reported that the student would benefit from a small class that could provide teachers and support staff to accommodate his needs (id. at p. 2).

On March 19, 2007, the student's preschool teacher, program director, and one or both of the parents completed the Gilliam Autism Rating Scale (GARS) (Dist. Ex. 5). However, the GARS score summary included in the hearing record was not fully completed (id. at pp. 1, 4, 5).

In a progress report dated March 21, 2007, the student's physical therapist indicated that she had provided the student with PT services two times per week at his home and that, although he had made steady gains, he continued to present with difficulty in "ball skills," sensory processing, jumping, running, refinement of his gait pattern, stair negotiation without his hands on the rails, safety awareness, and overall muscle strength (Dist. Ex. 6 at p. 3). The therapist recommended that the student continue receiving PT services at the same level of frequency, duration and group size in order to continue to address his areas of difficulty, and to help with the student's attention, focus, safety and spatial awareness, overall muscle strength and tone, and orthopedic concerns, as well as to acquire age appropriate gross motor skills (id.).

On March 22, 2007, a district social worker completed a classroom observation of the student at his mainstream preschool setting, which included 16 peers, two teachers and the student's SEIT (Dist. Ex. 7 at p. 1). Activities that took place during the observation included snack time, looking at books on the rug, a teacher directed group lesson that was described by the observer as a multifaceted multimedia lesson that included music, and free play time (id. at pp. 1-7). The observation report reflected that the student did not initiate any interactions with peers without the assistance of his SEIT and that he was either unresponsive or responded negatively to peers when they interacted with him (id. at pp. 1, 3-4, 6). The student required verbal and physical prompts from his SEIT to participate even minimally in classroom activities and he was stated to often have "no seeming awareness of or reaction to the activit[ies]," and showed "little affect and gazed a lot at the walls, windows and ceiling" when his SEIT spoke to him (id. at p. 1). The student was able to follow basic directions regarding the classroom routine when given prompts, such as to go wash his hands, to return his placemat and to sit on the reading rug (id. at p. 2). However, his participation in both structured and unstructured activities was described as showing marked off-task, noncompliance and nonpurposeful "stimming" behaviors and he was noted to have attempted to leave the room (id. at pp. 2-5). The student was briefly able to sit quietly and to attend to books while on his SEIT's lap and after repeated attempts to engage him, the student answered one question correctly about the book, although the engagement soon evolved into simple page flipping with the student having no focus on content (id. at p. 3). The observer reported that the student had repeated difficulty maintaining a seated position on the rug during the lesson, even with physical assistance to reposition him, and he often laid down, put his fingers in his mouth, laughed and showed no interest in the lesson (id. at p. 5).

By letter to the parents dated March 29, 2007, the Committee on Special Education (CSE) chairperson notified the parents that a CSE "Review IEP meeting" had been scheduled for the student on April 17, 2007 (Dist. Ex. 8). The letter contained a list of individuals who were invited to participate in the meeting (id.). It also informed the parents of their right to participate fully and to bring other individuals with knowledge about the student to the meeting (id.).

By another letter to the parents dated March 29, 2007, the district social worker informed the parents that he had received from them the reports the district had requested to prepare for the review of the student, that he had done an observation of the student, that he needed the student's

physical exam, and that he wanted to do a social history update by telephone (Dist. Ex. 9). He also requested that the parents contact him to schedule a date for the student's review (id.).

By letter dated April 5, 2007, the student's father responded to the March 29, 2007 request of the district social worker by enclosing a copy of the student's June 2007 physical exam and by stating that he had requested a progress report from the student's SEIT (Dist. Ex. 10). The student's father reflected that he was available in person any day for a meeting and he stated that the social worker should contact the student's preschool to arrange for one of the student's teachers to participate by telephone since the student's father wanted the input of the preschool (id.).

On April 11, 2007, the student's SEIT prepared an educational progress report that reflected the student's ability to function in the "typical kindergarten classroom" that the student was then attending (Dist. Ex. 11).⁵ The report reflected that the student had made "substantial progress throughout the year," with increased interest in communicating and playing with his peers, increased development and use of imaginative play skills to interact with peers and adults, and increased independence in the classroom routines such as transitioning from one activity to another and performing "circle time activities" (i.e., attendance, weather, line-leader duty) (id.). The SEIT reported that the student continued to show "significant delays" in social and communication repertoires and that he needed to continue to be exposed to typical peer models in order to "increase [his] fluency and generalize social and communicative repertoires across home and school settings" (id.).

On April 13, 2007, a private psychologist prepared an addendum to his previous report dated November 2006 (see Dist. Ex. 1), that added that the student's difficulties with language, attention and reciprocity impeded his ability to "function consistently without intense supports" (Dist. Ex. 13). The report reflected that the student had significant difficulty processing and producing larger amounts of verbal information and engaging and accessing his language consistently and efficiently (id.). The report also reflected that the student's nonverbal skills were underdeveloped and impacted by his difficulties with attention and reciprocity (id.). The psychologist stated that the student's "therapy program" should not be reduced as he was "at significant risk for regression" and required continuation of a 12-month program which included ABA services, intensive speech-language therapy and OT for a minimum of 35-40 hours per week (id.). Although the psychologist stated that the student benefited from better language and social models, he also stated that, in order to meet IEP goals, the student required 1:1 intensive language-based behavioral interventions by an experienced SEIT throughout the day and an in-home program including ABA, OT and speech-language services (id.).

A social history update was prepared by the district social worker on April 16, 2007 (Dist. Ex. 14 at pp. 1-2). The updated history, containing information that was gathered from the parents, reflected that the parents felt that the student was doing "very well" in his then current mainstream setting with SEIT support, and that the parents would like the student to be in a similar setting for kindergarten (id. at pp. 2-3). The parents indicated that the student's "tantrumming" had diminished greatly, and that this behavior was "more mild" and that it generally related to frustration due to his lack of ability to communicate (id. at p. 3). The parents stated that there had

⁵ Although the SEIT report indicated that the student was attending a kindergarten classroom, testimony by the district representative indicated that the student was attending a "pre-K" program at the time of the SEIT progress report in April 2007 (Tr. p. 33). A psychological addendum also indicated that the student was attending a preschool class in April 2007 (Dist. Ex. 13 at p. 1).

been an increase in the student's eye contact and his attention to the teachers and the SEIT, that the student's language was more spontaneous and that his play was more imaginative (*id.* at pp. 3-4). The parents reported that the "team" had "worked to extinguish" the student's "stimming" behaviors, including hand-flapping, toe-walking, rolling of his eyes and fixating on spinning objects and repetitive activities (*id.* at p. 4). They further reported that the student had begun to develop "rudimentary reading and writing skills," was drawing, cutting and pasting and had attended particularly well to activities involving music (*id.*). Similar progress in the home was also noted by the parents, with additional progress noted in the student's ability to show affection, perform independent self care skills and become more manageable in the community and in social situations (*id.* at pp. 3-4).

A handwritten note in the hearing record dated April 17, 2007 that did not indicate who it was addressed to and appears to have been signed by the parents, stated "Parent request [sic] to have teachers speak first so that they could return to classroom. Then, other information would be discussed with parent and team" (Dist. Ex. 12).

The CSE convened on April 17, 2007 to develop the student's IEP (Dist. Ex. 15). Meeting attendees included the parents, a district representative who also attended as a district psychologist, a district social worker, a district special education teacher who was also a general education teacher, and an additional parent member (*id.* at p. 2). A general education teacher from the student's preschool, the student's SEIT, and the director of the student's preschool participated in the meeting by telephone (*id.*). The CSE recommended that the student receive 12-month programming in a 6:1+1 special class in a special school with related services of 30-minute individual PT sessions twice per week, 30-minute individual OT sessions three times per week, and 30-minute individual speech-language therapy sessions three times per week, all to be received in a separate location (*id.* at pp. 1, 26). In the area of academic performance and learning characteristics, the IEP noted that the student's scores on the WPPSI-III indicated that the student's overall intellectual functioning was in the borderline range, although his true ability was difficult to determine due to a fluctuation in attention, reciprocity and verbal processing and was probably higher than indicated (*id.* at p. 4). The student's overall school readiness composite scores reflected performance at the lowest end of the average range on the Bracken, and also reflected that, in spite of his difficulties, he evidenced pre-academic skills (*id.*). The student's present speech-language performance scores indicated that he had a severe communication disorder with deficits in pragmatic, receptive and expressive language skills, that he had great difficulty generalizing his vocabulary knowledge to other contexts, had difficulty attending and had demonstrated negative behaviors at times (*id.* at p. 3). The IEP reflected that the student was able to follow familiar one and two-step directions, was able to identify and label a variety of common objects and actions, could answer some "wh" questions and would typically use one word utterances, but could produce longer utterances when prompted and provided with a model (*id.*). The IEP stated that the student's academic management needs included a consistent and predictable routine, positive reinforcement, visual cues, teacher prompts, preferential seating, use of clearly spoken audible voice, gestures that enhance the message and slower speaking rate to increase comprehension, simply stated verbal directions repeated when necessary and supervision at the beginning of tasks to ensure that the student understood the directions (*id.* at p. 5). The IEP also reflected that the student's present social/emotional performance included the ability to name his peers and play side by side with them, but that he had significant delays initiating interaction with them (*id.* at p. 6). The IEP also reflected that the student exhibited some attention seeking behaviors and became "frustrated in particular circumstances by biting his hand and screaming" (*id.*). The IEP stated that "[g]aps in [the student's] social and communication skills can be attributed to th[o]se behaviors emerging"

(id.). The student was noted to require prompts to make eye contact and facilitation to interact with others (id.). The IEP reflected that the student's behaviors did not seriously interfere with instruction and could be addressed by the classroom special education teacher (id. at p. 7). The IEP described the student as in good health and noted that he was gaining weight normally, had normal hearing and vision, and had allergies to wheat, gluten, dairy and nuts (id. at p. 8). The student was described as demonstrating 12-month delays in gross and fine motor skills and as having difficulty attending to age-appropriate table top activities, although this was noted to be secondary to his "underlying sensory processing difficulties" (id.). He was also stated to demonstrate "3 muscle strengths" and "poor postural stability" with "generalized low muscle tone" (id.). The IEP included goals and objectives in OT, PT, speech-language therapy, social interaction skills, reading, math, classroom communication and socialization skills, and adaptive physical education (id. at pp. 11-22). The IEP stated the initiation date of the recommended programming and related services was May 1, 2007 (id. at p. 2).⁶

The district sent a Final Notice of Recommendation (FNR) dated July 11, 2007 to the parents that indicated that the April 17, 2007 CSE recommended programming and related services as detailed above (Dist. Ex. 16). The FNR identified a specific school site for the student and provided the name, address and telephone number of the school (id.). The FNR stated that the student's April 17, 2007 IEP was enclosed, and invited the parent to call or write to the CSE chairperson to discuss the recommendation or arrange a meeting (id.).

The student's father testified that he toured BAC on August 6, 2007 and thereafter, applied for the student's admission to BAC (Tr. p. 663).

On August 8, 2007, the student's father sent an email to the principal of the recommended school site with several questions, including questions about the use of the gym and outside playground, the location for art and music, the use of the "library/resource center," the entrance that would be used by the students and the specifics about how assignment to a particular classroom was made (Tr. p. 656; Dist. Ex. 27 at pp. 4-5). The principal responded to the questions by email on the same date (Dist. Ex. 27 at pp. 4-6).

In a letter dated August 9, 2007, the student's father notified the CSE that he and the student's mother had attempted to visit the recommended class site, but were informed that the program would not be in effect until September 2007 (Parent Ex. C). The student's father stated that they had visited another school, where they were able to meet with the principal of the recommended school (id.). The student's father requested to be provided with a class profile for the classroom recommended for the student, stating that he and the student's mother needed it to make an informed decision about the student's placement (id.). The parents did not receive a class profile in response to this letter (Dist. Ex. 27 at p. 4).

On August 17, 2007, the parents signed a contract enrolling the student at BAC (Dist. Ex. 20).⁷

⁶ Although the IEP indicates May 1, 2007 as the initiation date of the IEP, a district witness testified at the impartial hearing that this was a clerical error and that the parent had requested the student's program be deferred until the end of the student's 2006-07 school year (Tr. pp. 128-29, 130; see Dist. Ex. 15 at p. 2).

⁷ The student's father testified that although some of the dates for signatures on the contract were stated as July 17, 2007, that was an error (Tr. pp. 665-66).

The parents sent a letter dated August 20, 2007 to the CSE chairperson informing him that they were unilaterally placing the student at BAC as of the first day of the 2007-08 academic year, that they intended to seek funding from the district for the placement, and that they rejected the IEP and placement proposed by the CSE (Parent Ex. B). The parents stated that the IEP and placement denied the student a free and appropriate public education (FAPE) on both procedural and substantive grounds, further specifying that no valid IEP was created, that the parents were denied meaningful participation in the development of the IEP and that the CSE did not recommend an appropriate placement that would provide the student with suitable and functional grouping (id.).

On August 23, 2007, the student's father emailed the principal of the proposed district school and informed her that he was "working to temporarily place" the student in a school while "sort[ing] out" concerns about a "proper classroom environment to maximize [the student's] potential" (Dist. Ex. 27 at pp. 3-4). The student's father stated that the principal was previously unable to provide a class profile and asked, if it was still not possible to receive a profile, that he be allowed to visit the actual classroom recommended for the student once the school year began (id. at p. 4). The principal replied by email on the same day, stating that the district "would be happy to have [him] visit the site and the actual classrooms" and that it was "anxious to work with [him] and provide the best possible placement for [the student]" (id. at p. 3).

On September 14, 2007, and then again on September 19, 2007, the student's father sent an email to the principal to arrange a time to visit the classroom recommended for the student (Dist. Ex. 27 at pp. 2-3). The principal responded by email on September 19, 2007 and arranged for the student's father to visit the classroom the following day (id. at pp. 1-2). The student's father visited the classroom on September 20, 2007 (Tr. p. 669).

The parents, through their attorney, filed a due process complaint notice dated October 30, 2007 (Parent Ex. A). In the due process complaint notice, they claimed that the April 17, 2007 IEP was both procedurally and substantively inappropriate to meet the student's needs (id. at p. 1). Specifically, among other things, they claimed that: (1) the annual goals and short-term objectives were generic and vague; (2) the goals were not measurable as the methods of measurement for the goals were not included on the IEP; (3) the CSE failed to conduct a functional behavioral assessment (FBA) prior to the April 17, 2007 IEP meeting and there was no behavior intervention plan (BIP); and (4) objectives relating to student's social/emotional needs were insufficient (id. at pp. 1-3). Regarding the offered classroom and class location, the parents stated that they were concerned that the student would not have access to the cafeteria and that they had not received any information about the functional levels of the students in the proposed program (id. at p. 3).

An impartial hearing convened for eight days from January 30, 2008 through September 5, 2008 (Tr. pp. 1, 20, 234, 390, 567, 736, 838, 896). The district called four witnesses, two of whom were rebuttal witnesses, and submitted 26 documents into evidence (Tr. pp. 25, 238, 752, 841; Dist. Exs. 1-20, 22-27).⁸ The parents called four witnesses, including the student's father, and submitted six documents into evidence (Tr. pp. 398, 570, 612, 639; Parent Exs. A-F).

⁸ District Exhibit 21, a seven page document titled "Brooklyn Autism Center Student Progress Report" dated January 22, 2008, is contained in the hearing record and was referred to during testimony at the impartial hearing, but the hearing record does not reflect that it was admitted into evidence.

In a decision dated October 2, 2008, the impartial hearing officer found that the district substantively failed to offer the student a FAPE for the 2007-08 school year (IHO Decision at p. 16). She further found that the parents' unilateral placement of their son at BAC was appropriate and that equitable considerations favored an award of tuition reimbursement to the parents (id.). She ordered the district to reimburse the parents, upon reasonable proof of payment, for the cost of the student's tuition for that school year (id. at p. 17). With respect to her finding that the district failed to offer the student a FAPE, the impartial hearing officer determined that the goals on the student's April 17, 2007 IEP were generic and that they were based on grade level rather than on the specific educational needs of the student (id. at p. 15). She also found that some of the annual goals and short-term objectives were not measurable and did not adequately reflect the student's current levels of skills as indicated in his evaluations (id. at pp. 15-16). The finding that the district failed to offer the student a FAPE was also based on the impartial hearing officer's determination that the appropriate methodology for the student was ABA discreet trial instruction, but that the program proposed by the district utilized different methodologies, with an emphasis on TEACCH (id. at p. 16).⁹

The district appeals the decision of the impartial hearing officer, alleging that it met its burden of proving that the district offered the student a FAPE for the 2007-08 school year. Additionally, the district alleges that the impartial hearing officer's concerns with regard to the goals and objectives in the IEP are without merit, as are the impartial hearing officer's concerns over the alleged emphasis on the TEACCH methodology at the recommended placement. Regarding the methodology utilized at the recommended placement, the district states, among other things, that it was "clear error" for the impartial hearing officer to base her finding, in whole or in part, on the type of methodology utilized at the recommended placement because the parents did not claim in their due process complaint notice that the recommended placement used the wrong methodology for the student. The district further alleges that the parents did not demonstrate that BAC was appropriate for the student, and that equitable considerations preclude tuition reimbursement even if the district did fail to provide the student with a FAPE.

In their answer, the parents assert that the impartial hearing officer properly found that the district failed to show that it offered the student a FAPE for the 2007-08 school year. The parents also assert that they met their burden of proving that BAC was an appropriate placement for the student and that equitable considerations favor an award of tuition reimbursement.

Two purposes of the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]).

⁹ TEACCH stands for "Treatment and Education of Autistic and Related Communication Handicapped Children" and is described in the hearing record as a methodology where instructors "teach to the student's individual needs, and learn new concepts when they're on the one on one, and then they take those one on one concepts that are being taught, and then they come together as a group" (Tr. p. 182). It was also described in the hearing record as "a way of setting up [a classroom], a way of setting up tasks and presenting materials to students" (Tr. p. 780). The goal of the methodology was stated in the hearing record to be to "strive for independence" of the students (Tr. pp. 385-86).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). While school districts are required to comply with all IDEA procedures, not all procedural errors render an IEP legally inadequate under the IDEA (Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if a procedural violation is alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an impartial hearing officer's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 130 [2d Cir. 1998]; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Mr. P. v. Newington Bd. of Educ., 2008 WL 4509089, at *7 [2d Cir. Oct. 9, 2008]; 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 (see Application of the Bd. of Educ., Appeal No. 08-016).

I will first address whether it was procedurally improper for the impartial hearing officer to base her finding that the district did not provide the student a FAPE in part on her determination that the appropriate methodology for the student was ABA discreet trial instruction, but that the program proposed by the district utilized different methodologies (IHO Decision at p. 16). The party requesting an impartial hearing determines the issues to be addressed by the impartial hearing officer (Application of the Dept of Educ., Appeal No. 08-056; Application of the Bd. of Educ., Appeal No. 07-081; Application of the Bd. of Educ., Appeal No. 07-043; Application of a Child with a Handicapping Condition, Appeal No. 91-40). It is also essential that the impartial hearing officer disclose his or her intention to reach an issue which the parties have not raised as a matter of basic fairness and due process of law (Application of the Dep't of Educ., Appeal No. 08-056; Application of the Bd. of Educ., Appeal No. 07-081; Application of the Bd. of Educ., Appeal No. 07-043; Application of a Child with a Handicapping Condition, Appeal No. 91-40; see John M. v. Bd. of Educ., 502 F.3d 708 [7th Cir. 2007]). The parents did not raise this issue in their due process complaint notice; therefore, I find that the impartial hearing officer exceeded her jurisdiction in making a determination which was not properly before her.

I now turn to the merits of this matter. The impartial hearing officer determined that the goals on the student's April 17, 2007 IEP were generic, that they were based on grade level rather than on the specific educational needs of the student, and that some of the annual goals and short-term objectives were not measurable and did not adequately reflect the student's current levels of skills as indicated in his evaluations (IHO Decision at pp. 15-16). State regulations require that an IEP include the following:

- (iii) Measurable annual goals. (a) The IEP shall list measurable annual goals, including academic and functional goals, consistent with the student's needs and abilities. The measurable annual goals must relate to:

(1) meeting the student's needs that result from the student's disability to enable the student to be involved in and progress in the general education curriculum; and

(2) meeting each of the student's other educational needs that result from the student's disability.

(b) Each annual goal shall include the evaluative criteria, evaluation procedures and schedules to be used to measure progress toward meeting the annual goal during the period beginning with placement and ending with the next scheduled review by the committee.

(c) The IEP shall identify when periodic reports on the progress the student is making toward the annual goals (such as through the use of quarterly or other periodic reports that are concurrent with the issuance of report cards) will be provided to the student's parents.

(iv) Short-term instructional objectives and benchmarks. For a student who takes a New York State alternate assessment and for each preschool student with a disability, the IEP shall include a description of the short-term instructional objectives and/or benchmarks that are the measurable intermediate steps between the student's present level of performance and the measurable annual goal

(8 NYCRR 200.4[d][2][iii], [iv]; see also 34 C.F.R. § 300.320[a][2], [3]).

With regard to the impartial hearing officer's finding that the goals in the April 2007 IEP were based on the student's grade level rather than his individual special education needs, the IEP reveals that the student's academic goals indicated that the student would "meet kindergarten performance standards" for reading comprehension, phonics and word recognition skills and math skills (Dist. Ex. 15 at p. 19). The hearing record further reveals that the academic present levels of performance on the IEP indicated that the student's score of a percentile rank of 25 on the Bracken was within the average range and indicated that the student had acquired age level pre-academic skills (id. at p. 4). Consequently, the goals as written are consistent with the indicated academic present levels of performance of the student (id. at pp. 4, 19). Therefore, I find that the hearing record supports that annual academic goals at the kindergarten level were appropriate for this student and that they provided meaningful guidance to the teacher responsible for implementing the goals.

A review of the student's non-academic goals contained in the April 2007 IEP, including the goals that addressed the student's needs in OT, PT, speech-language therapy, social interaction, play, communication and socialization, and adaptive physical education, shows that they lacked a written specified level of difficulty when isolated out of context and viewed alone (Dist. Ex. 15 at pp. 11-18, 21-22). However, the 79 short-term objectives included within the IEP comprehensively addressed the student's needs in these areas, and the majority of the student's short-term objectives were both detailed and measureable (id. at pp. 3-7, 9-22). The short-term objectives provided the requisite specificity to enable the student's teachers and parents to understand the CSE's expectations with respect to each annual goal and, in many instances,

provided appropriate evaluation procedures including imitation of a skill and teacher observation (id. at pp. 11-22). For example, one of the social interaction short-term objectives states that the student will "go along with interactions (e.g. games or outdoor activity) initiated by some peers in some situations independently 4/5 times" as measured by "teacher observation" (id. at p. 17). Additionally, with respect to the evaluative schedules used to measure the student's progress toward the annual goals, the IEP indicated that the student's progress would be reported four times during the year (id.). Accordingly, I find that the short-term objectives contained in the April 17, 2007 IEP were adequate and cured any deficiencies in the annual goals (see M.C. v. Rye Neck Union Free Sch. Dist., 2008 WL 4449338, *11 [S.D.N.Y. Sept. 29, 2008]), and that the goals and short-term objectives, when taken together, were both specific and measurable (see Application of the Dep't of Educ., Appeal No. 08-096).

The IEP also contained sufficient goals and short-term objectives relating to the student's social/emotional needs (Dist Ex. 15 at pp. 16-18).¹⁰ The IEP included short-term objectives that delineated a gradual increase in the expectation of the student to interact with "greater self-reliance" with adults and then with peers, both initially with full prompts and later with minimal and/or no prompts (id. at p. 14). For example, to address the student's stated annual goal to "approach and attempt to physically engage others in interactions," the short-term objectives therein included that "the student [would] make appropriate eye contact with others as a listener and a speaker with adults 4/5 times, [per] teacher observation" and that the student would "make appropriate eye contact with others as a listener and speaker with peers 4/5 times, [per] teacher observation" (id. at p. 16). These short-term objectives described behavior which could be observed and measured and they indicated that the student's level of self-reliance would be addressed (id.). Of the 24 short-term objectives in the IEP that addressed tasks requiring social interaction, all of the short-term objectives described behavior that could be observed and measured (id. at pp. 15-18). Therefore, I find that the goals and short-term objectives included in the student's IEP were sufficient to address the student's social/emotional needs as any vagueness in the annual goals was cured by the level of specificity in the short-term objectives.

Moreover, although not dispositive, I note that the parents, staff from the student's then current placement, and an additional parent member participated in the April 17, 2007 CSE meeting, and that there is no indication in the hearing record that any of the members of the CSE were denied the opportunity to meaningfully participate in the review of the student. Furthermore, the hearing record does not indicate that the parents notified the CSE of any concerns about the goals for the student at the CSE meeting, and the hearing record does not indicate that the parents notified the district of any concern about the goals until the time at which they filed their due process complaint notice dated October 30, 2007, despite the fact that they received the IEP no later than when they received the FNR dated July 11, 2007 (see Dist. Ex. 16; Parent Ex. A).

Turning to a review of the program recommended in the IEP, I find that the offered 12-month programming in a 6:1+1 special class in a special school with related services of 30-minute individual PT sessions twice per week, 30-minute individual OT sessions three times per week and 30-minute individual speech-language therapy sessions three times per week was appropriate to meet the needs of the student. Although the parents previously indicated that they believed that the student was doing "very well" in his mainstream preschool setting with SEIT support and they

¹⁰ I note that the IEP states that a counselor would address the student's social/emotional concerns through counseling sessions (Dist. Ex. 15 at p. 7). However, counseling was not a related service included on the student's IEP, nor was it raised as an issue in the parents' due process complaint notice or at the impartial hearing.

wanted him to be placed in a similar setting for kindergarten (Dist. Ex. 14 at pp. 2-3), the hearing record does not support that a general education setting would be appropriate to meet the student's needs (see e.g., Dist. Exs. 1; 4; 7; 15). In regard to the specific class that was recommended, testimony by the district representative reflected that the classroom was "a very intensive, structured program that [wa]s designed to meet the deficits of autistic children...with highly trained professionals" (Tr. p. 207). She further testified that the classroom employed the use of various methodologies including TEACCH, ABA, Floor Time and Direct Relationship Interaction (DIR) (Tr. pp. 199, 200). She also stated that the class was "a very intensive language based program [in which the student would] be receiving language throughout the entire day in all of his instruction" and that therapists can also push into a classroom to provide services (Tr. pp. 202, 212). Additional testimony by the assistant principal of the recommended school illustrated that the classroom was a 12-month program that offered OT, speech-language therapy, PT, counseling services and a sensory room, and that the recommended school was housed in a general education school which provided opportunities for mainstreaming and inclusion classrooms (Tr. pp. 245, 247, 249, 251). The assistant principal further testified that she had access to an "Autism Coach," that there were "team meetings" to provide for collaboration, that parent training was available, and that a notebook communication system between school and home was used to keep the parents apprised of what the student did each day (Tr. pp. 261, 271, 272, 278, 285). Given the student's special education needs, I find that the recommended placement was reasonably calculated to enable the student to obtain educational benefit.

In consideration of the foregoing, I find that the impartial hearing officer erred in his determination that the district did not offer the student a FAPE for the 2007-08 school year. Consistent with LRE considerations, I find that the offered 12-month 6:1+1 program with related services was appropriate for the student and was reasonably calculated to enable the student to receive educational benefits. I note that the hearing record reveals that the CSE considered and rejected a less restrictive general education program without services and determined that it was not appropriate to meet the student's needs because he exhibited global delays in socialization, following directions and routines, and concept acquisition which required intervention (Dist. Ex. 15 at p. 25). The CSE also considered and rejected the less restrictive 12:1 and 12:1+1 programs as they believed these programs would not meet the student's needs because of his global delays (*id.*). Having determined that the district offered the student a FAPE for the 2007-08 school year, I need not reach the issue of whether the parents' unilateral placement of the student at BAC was appropriate, and the necessary inquiry is at an end (*Mrs. C. v. Voluntown*, 226 F.3d 60, 66 [2d Cir. 2000]; *Walczak*, 142 F.3d at 134; *Application of a Child with a Disability*, Appeal No. 05-038; *Application of a Child with a Disability*, Appeal No. 03-058).

I have considered the parties' remaining contentions and find them to be unnecessary to address 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
December 10, 2008

PAUL F. KELLY
STATE REVIEW OFFICER