



The University of the State of New York

The State Education Department State Review Officer

No. 08-140

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, Tracy SiligmueLLer, Esq., of counsel

Mayerson and Associates, attorneys for respondents, Gary S. Mayerson, 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') daughter and ordered it to pay for their daughter's tuition costs at the Manhattan Children's Center (MCC) for the 2008-09 school year.¹ The appeal must be sustained.

At the time of the impartial hearing, the student was attending a summer program at the Interdisciplinary Center for Child Development (ICCD) for five hours per day, five days per week, in addition to receiving ten hours per week of home-based applied behavioral analysis (ABA) instruction (Tr. pp. 134, 171; Dist. Ex. 12 at p. 1). The student's eligibility for special education services as a student with autism is not in dispute in this appeal (Parent Ex. B at p. 1; see 34 C.F.R. § 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

Prior to the student's evaluation for special education services through the Committee on Preschool Special Education (CPSE), the student was evaluated through the Early Intervention Program (EIP) in October 2005 (Parent Ex. P at p. 1) and subsequently received two 30-minute sessions of home-based speech-language therapy (id.; Parent Ex. Q at p. 1).

¹ The impartial hearing officer also directed the district to reimburse the parents for the \$1000.00 deposit that they paid to MCC on May 6, 2008 (IHO Decision at p. 24; Parent Ex. W).

On May 24, 2006, a private neurodevelopmental pediatrician completed a pediatric neurodevelopmental assessment of the student following a referral by the student's EIP speech-language pathologist (Parent Ex. Q at p. 1). The speech-language pathologist advised the neurodevelopmental pediatrician that the student was not exhibiting age-appropriate language, play and pragmatic skills; had an atypical babbling pattern; preferred to be by herself; had minimal interest in toys; and had poor attending skills (id.). The student's medical history reflected that the student was "a healthy child," although she required a "non-dairy" diet, and that her developmental milestones were somewhat delayed in the areas of motor skills and language development (id.). According to the student's father, the student might have regressed in language (id.). The Autism Diagnostic Observation Schedule (ADOS) Module I was administered which revealed that the student met the criteria of an "Autistic Disorder of significant severity" (id. at p. 4). The neurodevelopmental pediatrician also concluded that the student presented with language and developmental delays (id.). Recommendations made by the neurodevelopmental pediatrician included a center-based program in a small structured class with a high teacher-to-student ratio that utilized behavior modification techniques such as ABA, home/community-based behavior modification services (with ABA) for at least ten hours per week and intensive individualized speech-language therapy to be provided at "the Center" or at home (id.).

On June 19, 2006, a school psychologist completed a psychological evaluation and a classroom observation of the student as part of the student's referral to the CPSE and to provide information that would be used to determine the student's eligibility for special education programs and services (Parent Ex. N at p. 1). Administration of the Bayley Scales of Infant Development, 2nd Edition revealed that the student obtained a mental developmental index of <50 (significantly delayed range) (id. at p. 3). The evaluator opined that the scores reflected an accurate current level of cognitive functioning, but that they may not predict the student's future cognitive development and potential (id.). With regard to language development, the evaluator noted that the student displayed significant expressive and receptive delays, and was able to use some spoken language; however, the student relied on the combination of gestures (id.). The evaluator also reported that the student was unable to label common pictures, point to pictures on request, imitate words, pose questions or follow directions (id.). Nevertheless, according to the evaluator, the student could point to desired items spontaneously and make a choice between two items (id.). The evaluator indicated that the student also exhibited significant weaknesses in social relatedness, engaged in minimal eye contact, demonstrated below age level perceptual motor planning and fine motor skills and that she was unable to imitate tasks (id. at pp. 3, 5). The parents' responses on the Vineland Adaptive Behavior Scales revealed that the student's adaptive functioning was within the low range of ability as indicated by an adaptive behavior composite standard score of 57 (id. at p. 4). The evaluator concluded that the student was eligible for classification as a preschool student with a disability (id. at p. 6). Additional recommendations included continued programming in a small language-oriented program to address cognitive, language, social and motor delays, and a review of the evaluation results with the parents, as well as completion of a speech-language evaluation (id.). With regard to the classroom observation, the evaluator noted that in the group setting the student experienced difficulty with the transition into the classroom and did not respond socially to the other children, the evaluator, or the classroom teacher; however, the student sought out the evaluator with whom she appeared more comfortable (id. at p. 7). The evaluator also noted that the student vocalized a few times and that she initially refused to transition at the end of the observation, but was able to be redirected (id.).

Also, on June 19, 2006 as part of the student's referral to the CPSE, an ICCD social worker prepared a social history of the student from responses provided by her parents (Parent Ex. O at pp. 1, 4). According to the parents, the student's major motor milestones were reached within normal limits; however, at the time of the report, she was not yet putting two words together (*id.* at p. 2). The student was further reported to label 20 to 30 items, but she had no spontaneous communicative language and she repeated two words of jargon (*id.*). The social worker also noted that the student would sometimes follow simple commands (*id.*). Additionally, the social history report reflected that the student had three major and five minor tantrums per day, and that she exhibited "sensory issues," which included mouthing of objects and taking off her clothing (*id.* at p. 3).

A speech-language pathologist at ICCD also conducted a speech-language evaluation of the student on June 19, 2006 (Parent Ex. P). Administration of the Preschool Language Scale – 4 yielded an auditory comprehension standard score of 55 (extremely low range), an expressive communication standard score of 70 (at the very bottom of the low range) and a total language standard score of 64 (extremely low range) (*id.* at p. 2). According to the evaluator, parental report was used to score several of the items to which the student did not respond (*id.*). The student was described as being minimally related, having fleeting eye contact, not imitating any actions with toys and engaging in limited play which consisted of "containerizing," object manipulation and the throwing of toys (*id.* at pp. 1-2). The evaluator also reported that during the evaluation, the student exhibited a short attention span and was easily distracted (*id.* at p. 2). The student mouthed objects, was self-directed, and refused to attend to items which were not of interest to her (*id.*). Receptively, the report reflected that the student responded inconsistently to her name and inhibitory words such as "no" and "stop," but that she did not attend or respond to "yes/no" or "wh" questions, nor did she identify any common objects or pictures (*id.*). Nevertheless, she was able to respond to some one-step contextual commands (*id.*). With regard to the student's expressive language, the evaluator found that the student communicated using vocalizations, jargon, facial expressions, gestures and a few highly limited one-word utterances (*id.* at p. 3). The evaluator also stated that the student pointed to choose between two items, and that she protested by crying, screaming or throwing items (*id.*). Lastly, the evaluator indicated that the student demonstrated joint attention by holding up items and showing them to others (*id.*). The evaluator determined that the student exhibited severely delayed receptive and expressive language development as well as severe delays in play and pragmatic skills and a highly limited phonemic repertoire (*id.*). Recommendations were made to the CPSE that the student receive three 30-minute individual speech-language therapy sessions per week (*id.*).

In July 2006, the student was receiving ABA services (Tr. p. 129; see Parent Ex. A at p. 2). On July 18, 2006, the parents obtained a second opinion from a pediatrician regarding the student's diagnosis of autism (Parent Ex. M). As part of the assessment, the pediatrician reviewed reports from the student's neurodevelopmental pediatrician and evaluation reports from ICCD (Parent Ex. M at pp. 1-2; see Parent Exs. N; O; P; Q). The pediatrician's report also indicated that the parents completed a questionnaire on behavior and social communication which revealed that the student satisfied a total of 22 criteria for a diagnosis of autism (Parent Ex. M at p. 2).² Based

² Although the hearing record does not describe any of the criteria or identify the questionnaire that the pediatrician utilized with the parents, the hearing record shows that the presence of an autism spectrum disorder is determined when a student meets 15 of the criteria on that questionnaire (Parent Ex. M at p. 2).

on the parents' responses to the questionnaire, the pediatrician determined that the student fell "well within the diagnostic criteria for autism" (id.). On July 19, 2006, the student and her parents met again with the pediatrician (id.). During this visit, the pediatrician completed a play-based screening test for autism and based on the results of the questionnaire and the play-based screening, the pediatrician determined that the student had abnormal functioning in her social interaction, language as used in social communication and symbolic or imaginative play, and that the student met the diagnostic criteria for an "Autistic Spectrum Disorder" (id. at p. 4). The pediatrician opined that the student would respond "very well" to ABA and further recommended that the student receive "around" 30 hours per week or more of ABA instruction, to be administered partially in a daycare setting and partially at home (id.).

In September 2006, the student began attending a center-based preschool program at ICCD (Dist. Ex. 7 at p. 1).

In a letter dated December 22, 2006,³ the ABA therapy coordinator from the agency responsible for the student's home-based ABA instruction informed the CPSE that the student's home-based special education itinerant teacher (SEIT)⁴ services had been terminated per the parents' request, and that the agency did not have an available SEIT provider to re-staff the student's ten hours of "ABA SEIT" services (Dist. Ex. 13). The ABA therapy coordinator further advised the CPSE that she was assisting the parents in locating a service provider to assume the student's "ABA SEIT services" (id.). The hearing record indicates that the student did not receive home-based ABA instruction during the period of January 2007 to May 2007 (Parent Ex. A at p. 3).

In May 2007, the parents secured ten hours of home-based ABA services for the student; however, the private ABA therapist that they obtained resigned in late June 2007 because by the therapist's own admission, she was "rusty," having not provided ABA services in ten years and because she had been under the impression that she would be teaching reading to the student (Parent Ex. A at p. 3). On July 11, 2007, the parents contracted privately with another agency for their daughter's ten hours of home-based ABA services (Tr. pp. 69-70; Dist. Ex. 6 at p. 1; Parent Ex. A at p. 3).

In an undated report, the student's third private ABA therapist indicated that the student was making "rapid and consistent progress" and had greatly expanded her vocabulary and her ability to pronounce words (Dist. Ex. 6 at p. 1).⁵ The student's ABA therapist described the student's progress as "amazing" (id. at p. 4). In addition, the student's ABA therapist stated in her report that the student was able to count from approximately one to ten, knew all primary colors,

³ Although the date is stated in the letter as "December 22, 2007," within the context of the hearing record, this appears to be an error and the correct date appears to be December 22, 2006 (Dist. Ex. 13).

⁴ Section 4410(1)(k) of the Education Law defines "special education itinerant services" as "an approved program provided by a certified special education teacher on an itinerant basis in accordance with the regulations of the commissioner, at a site determined by the board, 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]).

⁵ Although undated, the report indicated the student was "three years and ten months old;" therefore, in the context of the hearing record, it is presumed that the report was written in August 2007 (Dist. Ex. 6).

and could also respond with yes/no to express her wants (id.). The student's ABA therapist described the student as "very eager to learn" (id.). Additionally, the report included a list of 14 annual goals and approximately 50 short-term objectives that addressed readiness skills, peer and adult interaction, play skills, activities of daily living (ADL) skills, expressive and receptive language, attending skills, sensory processing, bilateral integration and motor planning, fine motor skills, visual motor/perceptual skills and speech intelligibility (id. at pp. 1-2).

On January 15, 2008, a district social worker prepared a social history update of the student (Parent Ex. L). The parents reported to the district social worker that the student had made tremendous progress since July 2007 when the third ABA therapist started providing home-based services, and that the student had increased her expressive language skills including the use of two to three word utterances and making an effort to communicate her wants and needs (id. at pp. 1-2). The social worker noted that the student engaged in parallel play and demonstrated an eagerness to be around other children and adults (id. at p. 2). The social worker further indicated that the parents were very pleased with their daughter's growth in speech, behavior, relatedness, and eye contact and with her happier, overall less withdrawn demeanor (id.). The parents stated that the student had a positive relationship with her new ABA therapist (id.). Regarding the student's behavior at home and in the community, according to the parents, the student was more willing and desirous of working and cooperating, and that these changes had positively affected the student's acquisition of language and her ability to relate to others (id.). The social worker also noted that she advised the parents of their due process rights (id.).

On January 16, 2008, the same district social worker who had previously completed the social history update completed a "Teacher/Preschool Observation Checklist" of the student (Parent Ex. K). Her resultant report reflected, in a checklist format, specific academic skills that the student could perform and also indicated the student's functional level regarding attention span, fine/gross motor skills, self help skills, expressive language skills and social/emotional abilities (id. at pp. 1-2). The district social worker reported that the student's teacher recommended a 12:1+1 setting for the student's kindergarten placement as of January 2008, and a 12:1+1 classroom in a community setting as of August 2008 (id. at p. 2). The district social worker also noted that during the classroom observation, the student was responsive to all adults, was able to ask for crackers, followed directions and attempted to participate in a singing activity (id. at p. 3).

On January 23, 2008, the student's special education teacher at ICCD completed a progress report based on her observations of the student's classroom performance and completion of the "HELP" checklist (Dist. Ex. 7 at p. 1).⁶ The special education teacher indicated that although the student had made significant progress toward many of her individualized education program (IEP) goals and objectives, the student continued to present with significant delays in language, social skills and cognitive concepts (id. at p. 3). The student was reported to demonstrate overall skills at the "2 to 2.5-year-old level" in social, fine/gross motor and self help skills and demonstrated scattered skills between the "2.5 year-old to 3-year-old level" in receptive language skills, comprehension of basic concepts and pre-readiness skills (id.). The special education teacher also noted that the student had more significant delays in expressive language skills and a 12-month educational program to avoid regression that had been noted to occur during school holidays and

⁶ Although not indicated in the hearing record, it is assumed that "HELP" refers to the "Hawaii Early Learning Profile" (Dist. Ex. 7 at p. 1).

extended absences (id.). Lastly, the special education teacher reported that the student responded to consistent and predictable routines within the classroom, visual and verbal cues, and praise and reinforcement (id.).

In a January 24, 2008 occupational therapy (OT) progress report from ICCD, the student's occupational therapist reported that according to the "HELP Strands," the student's fine/visual motor skills were at the two year old level and that her gross motor and self help skills were scattered up to the three year old level (Dist. Ex. 8 at p. 3).⁷ The student was reported to have increased her ability to attend to tasks, make transitions and tolerate changes in routines and although she had made some progress, the student continued to have difficulty with motor planning and sequencing the steps to a task (id.) The student's fine motor skills had also improved, but the student continued to exhibit delays in visual motor skills, bilateral integration, motor planning and an inefficient grasp pattern on a marker or crayon (id.). The therapist recommended that the student continue to receive three sessions of OT per week; however, she did not specify the duration of the sessions nor did she indicate the size of the group in which the services should be administered (id.).

In a progress report also dated January 24, 2008, the student's speech-language pathologist at ICCD stated that the student continued to demonstrate steady progress toward her IEP goals (Dist. Ex. 9 at pp. 1, 3). The speech-language pathologist reported that the student had increased her social relatedness and spontaneous language; however, she continued to exhibit significant delays in her receptive and expressive language and in her speech intelligibility (id. at p. 3). The student reportedly responded well when new skills were broken down into smaller components (id.). The speech-language therapist also opined that the student benefitted from the provision of appropriate peer language models, repetition, visual cues and verbal prompts (id.). The speech-language pathologist recommended that the student's therapy continue to focus on increasing the student's language comprehension, expressive language skills, facilitation of social interaction with peers and increasing the student's phonemic repertoire through 1:1 speech-language therapy, three times per week (id.).

On January 26, 2008, the district's school psychologist completed a psychoeducational evaluation of the student (Parent Ex. I). In addition to a review of the student's records, the school psychologist attempted to conduct a student interview and administer the Wechsler Preschool and Primary Scale of Intelligence-Third Edition (WPPSI-III) and the Brigance Comprehensive Inventory of Basic Skills-Revised (Brigance); however, the student was unable to follow the requirements of the tests and no conclusive results were determined (id. at p. 3). Although the student initially cooperated with the school psychologist and related well to her parents, the school psychologist indicated that the student was not socially engaged during the evaluation (id.). According to the school psychologist, the student was able to respond to some items on the Brigance including identifying some body parts by pointing to or touching them, saying her name, pointing to primary and secondary colors and counting by rote from one to fourteen (id.). The school psychologist opined that based on the student's performance, the student would benefit from continued special education services (id.).

⁷ Although not indicated in the hearing record, it is assumed that "HELP Strands" refers to the "Hawaii Early Learning Profile: Ages Birth to 3"(Dist. Ex. 8 at p. 3).

On January 28, 2008, the CPSE convened (Dist. Ex. 12). The following individuals attended the January 28, 2008 CPSE meeting: the parents, a district representative, a district regular education teacher and the student's special education teacher from ICCD (*id.* at p. 2). A declination letter was attached to the January 28, 2008 IEP indicating that the parents waived their right to have an additional parent member participate in the meeting (*id.* at p. 19). The January 28, 2008 CPSE recommended that the student be classified as a preschool student with a disability and that she continue to attend a special 8:1+3 class at ICCD for five hours per day, five days per week and that she receive ten hours of ABA instruction per week through New York Therapy, a private agency (*id.* at pp. 1-2). Related service recommendations included three 1:1 30-minute sessions of speech-language therapy per week as well as three 1:1 30-minute sessions of OT per week (*id.* at p. 5). The academic performance and learning characteristics portion of the January 28, 2008 IEP included information taken from the January 23, 2008 educational progress report, and the January 24, 2008 speech-language and OT progress reports (*compare* Dist. Ex. 12 at pp. 6-8, *with* Dist. Exs. 7; 8; 9). Goals and objectives were developed relating to basic concepts and readiness skills, interaction skills, ADL skills, attention skills, pragmatic language skills, language comprehension, expressive language skills, speech intelligibility, oral motor skills, fine motor and visual motor skills, sensory processing and bilateral integration and motor planning skills (Dist. Ex. 12 at pp. 12-18). The parents consented to the January 28, 2008 CPSE's program recommendations on that same day (Dist. Ex. 14).

On February 4, 2008 and February 21, 2008, the parents obtained a private evaluation from the McCarton Center for Developmental Pediatrics (McCarton), to determine the student's current developmental status and help define her educational and therapeutic needs (Parent Ex. H). Administration of the Stanford-Binet Intelligence Scale-5th Edition (SB5) yielded a full scale IQ score of 65 (very low range), a verbal IQ score of 69 (very low range) and a nonverbal IQ score of 64 (very low range) (*id.* at p. 9). The evaluator stated that the student's individual skills were unevenly developed and ranged from average to very low (*id.* at p. 4). The student's receptive and expressive vocabulary skills were assessed using the Receptive One-Word Picture Vocabulary Test and the Expressive One-Word Picture Vocabulary Test and yielded scores in the very low range (*id.*). Administration of the Beery-Buktenica Developmental Test of Visual-Motor Integration-5th Edition (VMI) reflected that the student's performance yielded a standard score of 61 (very low range) (*id.* at p. 5). With regard to the student's adaptive behavior skills, the parents' responses on the Vineland Adaptive Behavior Scales-2nd Edition (VABS-II) reflected that the student's overall adaptive behavior skills were in the low range for her age in communication, daily living, socialization and motor skills (*id.* at p. 6). The evaluator utilized the Childhood Autism Rating Scale (CARS) to rate the student's behavior during the evaluation, which yielded a score of 32 based on the evaluator's observation and parental report (*id.* at p. 7).⁸ The student was reported to demonstrate several characteristics of an autism spectrum disorder including variable eye contact, limited reciprocal social interaction skills, sensory regulation problems, repetitive motor movements, delayed play skills and delayed language skills (*id.*). Behavioral observations made during the evaluation described the student as a "gentle child" who showed a desire to please, was willing to attempt an array of tasks, and who responded well to structure, clear limits and verbal encouragement (*id.*). Nevertheless, when faced with a challenging task, the student "zoned out" and became absorbed in repetitive motor behaviors (*id.*). The evaluator recommended a 12-month

⁸ The hearing record explains that scores on the CARS range from 15-60 and scores of 30 or more are characterized to be in the autistic range (Parent Ex. H at p. 7).

intervention program, that included 1:1 ABA instruction, ten hours of home-based ABA therapy with her then-current provider, two additional hours per week of parent training with an ABA supervisor, five 60-minute 1:1 speech-language therapy sessions per week including oral-motor therapy, the use of "PECS"⁹ with a focus on all aspects of expressive and receptive language skills, five 30-minute 1:1 OT sessions per week to address sensory integration, fine motor and graphomotor skills in addition to one two-hour monthly interdisciplinary meeting with the student's therapist, teachers and parents to review her progress and make modifications to the student's program (id. at pp. 7-8).

By letter dated March 27, 2008, the parents advised the Committee on Special Education (CSE) that they had yet to receive a copy of their daughter's January 26, 2008 psychological evaluation report and requested that the CSE forward a copy of the report to them prior to the student's upcoming IEP meeting, which was scheduled to take place on March 31, 2008 (Parent Ex. G at p. 1).

On March 31, 2008, the district's CSE convened for a review of the student's program and to develop an IEP for the 2008-09 school year, when the student would be entering kindergarten (Parent Ex. B at p. 1).¹⁰ Participants at the March 31, 2008 CSE meeting included the parents, a district representative, the district's regular education teacher, a school psychologist, the district's supervisor of psychologists, a district special education teacher and an additional parent member (id. at p. 2).¹¹ The March 31, 2008 CSE determined that the student was eligible for special education services as a student with autism (id. at p. 1). For the 2008-09 school year, the March 31, 2008 CSE recommended that that the student be placed in a 12-month, 6:1+1 special class in a specialized school with related services consisting of three 1:1 30-minute OT sessions per week and three 30-minute speech-language therapy sessions per week in a group of three, both to be delivered in a separate location (id. at pp. 1, 10). The student's academic present levels of performance reflected information from the January 23, 2008 educational progress report by the student's ICCD classroom teacher and further noted that the student had made considerable progress in all areas, but that she continued to present with delays in language, social skills, comprehension of cognitive concepts and motor skills (id. at p.3; see Dist. Ex. 7 at pp. 2-3). The March 31, 2008 IEP further reflected that the student exhibited characteristics of autism including variable eye contact, limited reciprocal social interaction skills, sensory regulation problems, delayed play and language skills and that her adaptive behavior skills were in the low range for her age (id. at p. 3). According to the March 31, 2008 IEP, the student's academic readiness skills and language skills were emerging and as her language increased, she had become increasingly more related, engaging and involved in her surroundings (id.). The student's social/emotional present levels of performance revealed that the student knew the names of her peers and engaged in parallel play (id. at p. 4). In addition, the March 31, 2008 IEP indicated that the student could

⁹ The hearing record defines "PECS" as a "picture exchange communication system" or "an augmentative communication system wherein [individuals] with autism quickly acquire [an] effectual means of communication" (Tr. p. 192).

¹⁰ The hearing record reveals that the March 31, 2008 CSE considered the February 2008 McCarton report (Tr. pp. 354-55).

¹¹ A review of the student's March 31, 2008 IEP reveals that there is an additional signature which is illegible and does not indicate the person's title (Parent Ex. B at p. 2).

exchange toys and take turns with peers given prompting and modeling (*id.*). The student's social/emotional management needs included consistent and routinized structure, modeling, prompts, visual and verbal cues, picture charts, positive reinforcement and praise (*id.*). The resultant IEP further stated that the student's behavior did not seriously interfere with instruction and could be addressed by the special education classroom teacher and accordingly, a behavior intervention plan (BIP) was not developed for the student (*id.*). The March 31, 2008 IEP also contained six annual goals and 20 short-term objectives relating to the student's identified needs in sensory processing skills, fine motor/graphomotor skills, basic concepts and academic readiness skills, expressive and receptive language and speech intelligibility (*id.* at pp. 6-7).

On or about April 10, 2008, the student's mother visited the district school which was ultimately recommended by the district as the proposed placement (Tr. p. 147).¹² During her visit, the student's mother met with the district school's special education coordinator (Tr. p. 148).

By letter dated April 29, 2008, a representative from MCC advised the parents that the student had been accepted for admission for the 2008-09 school year (Parent Ex. E). On May 1, 2008, the student's mother entered into an enrollment contract with the private placement for the 2008-09 school year (Parent Ex. D at pp. 1-2). The hearing record indicates that the parents submitted their registration fee to MCC on or about May 6, 2008 (Parent Ex. W at p. 2).

By letter dated May 8, 2008 to the CSE's placement officer, and per their conversation following the March 31, 2008 CSE meeting, the student's father requested notice of the student's placement for the 2008-09 school year (Parent Ex. S). According to the student's father, the parents wanted to "inspect the placement recommendation's facilities and services" (*id.*).

By due process complaint notice dated May 12, 2008, the parents requested an impartial hearing in which they sought "compensatory" relief with respect to the 2006-07 school year and payment of tuition for the 2008-09 school year (Parent Ex. A).¹³ The parents also invoked the student's pendency entitlements based on the January 28, 2008 IEP, alleging that until the issuance of a final order, the student was entitled to receive ten hours of home-based ABA instruction, in addition to three 30-minute sessions of 1:1 speech-language therapy as well as three 30-minute sessions of 1:1 OT per week (*id.* at p. 2). Regarding their claims that pertained to the 2008-09 school year, the parents contended that the district failed both procedurally and substantively to offer the student a free appropriate public education (FAPE) in the least restrictive environment (LRE) (*id.* at p. 3). The parents asserted, among other things, that: 1) the district failed to recommend a specific placement at the March 31, 2008 CSE meeting; 2) despite the student's interfering behaviors, the district failed to develop an appropriate BIP or functional behavioral

¹² The student's mother could not recall the exact date of her visit to the district's recommended school (Tr. p. 147).

¹³ With respect to the 2006-07 school year, the impartial hearing officer granted the parents' request to withdraw their compensatory education claims with leave to re-file at a later date (Tr. pp. 49-51, 129).

assessment (FBA);¹⁴ 3) the goals and objectives contained in the March 31, 2008 IEP were not developed with meaningful parent participation; 4) the district failed to indicate the number of progress reports per year, or the method of measurement that would be utilized in determining whether the student had achieved her goals and objectives; 5) the district failed to offer the student sufficient speech-language services in accordance with 8 NYCRR 200.13[a][4]; and 6) the district failed to offer any individual parent counseling and training in accordance with 8 NYCRR 200.13[d] (*id.* at pp. 3-4). As relief, the parents requested funding for their daughter's tuition and costs for the 2008-09 school year for MCC and transportation, in addition to ten hours of home and community-based 1:1 ABA instruction per week (*id.* at p. 5).

By Final Notice of Recommendation (FNR) dated June 11, 2008, the district advised the parents of the student's recommended district placement for the 2008-09 school year (Dist. Ex. 2). According to the June 2008 FNR, the district recommended that the student be placed in a 6:1+1 classroom in a special class at a specific district specialized school (*id.*). The June 11, 2008 FNR also advised the parents to contact the district if they wished to discuss the CSE recommendation or if they wanted to arrange another meeting (*id.*).¹⁵ The parents responded by letter dated June 20, 2008, in which they advised the district's CSE chairperson that they were rejecting the proposed district placement (Parent Ex. R). The parents stated that the student's mother had previously visited the proposed placement, and that she found it to be "inappropriate and inconsistent" with McCarton's evaluations and recommendations (*id.* at pp. 1, 3).¹⁶ The parents further maintained that any services falling short of McCarton's recommendations were inappropriate (*id.*). On or about June 23, 2008, the parents returned the June 2008 FNR to the district, indicating their rejection of the proposed placement (*id.* at p. 2).

On July 8, 2008, an impartial hearing began and concluded on September 10, 2008, after three days of testimony (IHO Decision at p. 1). On July 25, 2008, the impartial hearing officer issued an interim order on pendency, wherein he directed the district to continue to fund all costs for ten hours per week of "at-home/community based 1:1 services" through "New York Therapy" and provide related services authorizations (RSA) for three 1:1 30-minute sessions per week each of speech-language therapy and OT (IHO Order on Pendency at p. 2). On October 20, 2008, the impartial hearing officer rendered his decision on the merits of the parents' claims (IHO Decision at p. 24). With regard to the parents' contention that the district did not offer the student a FAPE during the 2008-09 school year, the impartial hearing officer made the following findings: 1) that

¹⁴ 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 evaluation or reevaluation, 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]).

¹⁵ The FNR also gave the name and contact information of an individual at the district that the parents could contact and informed them that they could bring to a CSE meeting individuals that have "knowledge or special expertise regarding [their] child" (Dist. Ex. 2).

¹⁶ The third page of Parent Ex. R appears to be a facsimile copy of the parents' June 20, 2008 letter (Parent Ex. R).

despite the student's interfering behaviors, the district failed to develop an appropriate FBA and BIP; 2) that the student was not offered appropriate speech-language therapy in accordance with State regulations pertaining to the education of children with autism; 3) that the district failed to offer individual parent counseling and training in accordance with State regulations; and 4) that the district failed to establish that the methodology that it would have utilized accurately measured whether or not the student had achieved progress in reaching her goals (*id.* at p. 22). The impartial hearing officer also determined that the representative of MCC provided testimony that established that MCC could provide an educational program to meet the student's special educational needs (*id.* at pp. 22-23). Lastly, the impartial hearing officer determined that equitable considerations supported the parents' request for relief (*id.* at p. 23). In light of the foregoing, the impartial hearing officer ordered the district to pay the tuition at MCC and reimburse the parents for the deposit that they paid to MCC (*id.* at p. 24). He further directed the district to continue to pay for the student's ten hours per week of home-based ABA services for the 2008-09 school year (*id.*).

The district appeals and requests that the impartial hearing officer's decision be vacated in its entirety. Preliminarily, the district argues that the parents should be denied tuition reimbursement because they have not incurred any out-of-pocket expenses for the student's tuition at MCC, with the exception of the deposit monies. Alternatively, the district alleges that the parents are not entitled to an award of tuition reimbursement because the district offered the student a FAPE during the 2008-09 school year. In particular, the district contends that: 1) the student did not require an FBA or BIP because to the extent that the student had interfering behaviors, her behaviors could have been managed by her classroom teacher and providers; 2) the recommended district program contained sufficient speech-language instruction in compliance with State regulations; and 3) the recommended district program afforded sufficient parent counseling and training in accordance with State regulations. The district also asserts that the impartial hearing officer erred by making a *sua sponte* finding that the district failed to establish that the methodology that it would have used accurately measured whether or not the student had progressed in reaching goals. With respect to the parents' unilateral placement, the district contends that the parents failed to establish that it was appropriate or tailored to meet the student's individual educational needs. Moreover, the district alleges that the parents failed to demonstrate that the ten hours of home-based ABA instruction were necessary for the student to derive an educational benefit. Finally, the district maintains that the equities do not favor the parents' claims for an award of tuition reimbursement because the parents had not intention of placing the student "anywhere other than MCC."

In their answer, the parents request that the petition be dismissed and that the impartial hearing officer's award be affirmed. The parents maintain that the March 31, 2008 IEP denied the student a FAPE on a procedural and substantive level. In particular, the parents argue that the March 31, 2008 CSE engaged in impermissible predetermination in developing the student's IEP. Additionally, the parents argue that a formal placement recommendation was not given to them at the March 31, 2008 CSE meeting. The parents further argue that the district's placement recommendation would not have allowed the student to make meaningful progress. The parents further contend that the student presented with interfering behaviors, thereby necessitating an FBA and BIP. The parents also dispute the district's claim that the district provided the student with adequate speech-language therapy and add that the district failed to furnish them with individualized parent counseling and training in accordance with the State regulations. Next, the parents contend that the unilateral placement combined with the student's additional ten hours of

home-based ABA instruction was reasonably calculated to confer an educational benefit on the student. Lastly, the parents argue that equitable considerations favor their request for relief.

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). While school districts are required to comply with all IDEA procedures, not all procedural errors render an IEP legally inadequate under the IDEA (A.C. v. Bd. of Educ., 2008 WL 5505470, at *4 [2d Cir. Jan. 16, 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if a procedural violation is alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; 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).

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).¹⁷ The student's recommended 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 200.1[cc], 200.6[a][1]; see P. v. Newington Bd. of Educ., 2008 WL 4509089, at *7 [2d Cir. Oct. 9, 2008]; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

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).

In the case of a student whose behavior impedes his or her learning or that of others, the IDEA requires a CSE, in considering "special factors," to consider positive behavioral interventions and supports, and other strategies, to address that behavior (20 U.S.C. § 1414[d][3][B][i]; 34 C.F.R. § 300.324[a][2][i]; see 8 NYCRR 200.4[d][3][i]; see A.C., 2008 WL 5505470, at *4; 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).¹⁸ In addition to the federal requirement, State regulations require that an initial evaluation include a functional behavioral assessment for a student whose behavior impedes his or her learning or that of others, as necessary to ascertain the physical, mental, behavioral and emotional factors which contribute to the suspected disabilities (8 NYCRR 200.4[b][1][v]). Additionally, under State regulations when considering more restrictive programs or placements

¹⁷ The New York State Education Department's Office of State Review maintains a website at www.sro.nysed.gov. The website explains in detail the appeals process and includes State Review Officer decisions since 1990.

¹⁸ 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, 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.

as a result of the student's behavior, a CSE "shall consider the development of a behavioral intervention plan" (8 NYCRR 200.22[b]).

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 determined that the March 31, 2008 IEP did not offer a FAPE to the student (IHO Decision at p. 22). However, a thorough review of the hearing record demonstrates that the district adequately complied with the necessary procedural requirements in developing the March 31, 2008 IEP and that the special education program and related services recommended by the district in the March 31, 2008 IEP were reasonably calculated to confer educational benefits to the student and were offered in the LRE. Accordingly, at the time it was formulated, the March 31, 2008 IEP offered the student a FAPE for the 2008-09 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 consider the parents' assertion that the March 31, 2008 CSE failed to develop an appropriate FBA or BIP, which ultimately resulted in a denial of a FAPE to the student. Contrary to the impartial hearing officer's finding that the district failed to develop an appropriate FBA and BIP (IHO Decision at p. 22), there is no persuasive evidence in the hearing record that the student demonstrated a need for either an FBA or a BIP at the time of the March 31, 2008 CSE meeting. The student's mother indicated in the social history update dated January 15, 2008 that "previously [the student] would yell, cry, and occasionally hit the adults in her life when she could not be understood. This behavior has diminished and is now all but nonexistent" (Parent Ex. L at p. 2). Furthermore, the student's special education teacher at ICCD stated that the student's behavior "[was] decreasing and she [was] more readily redirected and respond[ed] to encouragement to continue working as well as to models to appropriately gain attention of others" (Dist. Ex. 7 at p. 3). The special education teacher further indicated that the student "respond[ed] to consistent and predictable routines within the classroom," "visual and verbal cues to help her learn, play and interact appropriately and successfully" and "praise and reinforcement" (id.). Similarly, the student's speech-language therapist at ICCD noted that the student responded well to social praise as reinforcement and that when her attention waned, the student responded to prompting and redirection to remain engaged and to complete tasks (Dist. Ex. 9 at p. 1). The district's supervisor of psychologists proffered the following testimony regarding the student's teacher's and related services providers' observations with respect to the student's behaviors:

... with a behavioral intervention, you're talking about behaviors that impeded academic progress, and that was not presented with [the student] in that a lot of the strategies that were utilized by her current providers seemed to be moving her towards the right direction. It wasn't as though we really had to look at antecedents

that were creating certain behaviors and try to figure out how to ameliorate them or increase it because it seemed from the report that [the student] was already starting to be motivated with her tasks. The whole idea of a functional behavioral assessment is to unearth what is motivating behavior, how to change behavior, so you can understand how to redirect and re-program. That just didn't seem to be an issue in the case of [the student].

(Tr. pp. 345-46).

The hearing record also reflects that the district's recommended school would have adequately addressed the student's behavioral needs. Where a student came to her classroom without a BIP,¹⁹ and a BIP was not noted as required, the district's teacher stated that she would "definitely" do an assessment and for certain behaviors that required an immediate response, she would make a behavior plan "immediately" (Tr. pp. 246-47). The unit coordinator from the proposed placement also testified that as part of the assessment process for students who needed behavior plans, an FBA would be done, as well as a Motivational Assessment Scale (MAS) and an antecedent, behavior, consequence (ABC) chart, depending on the student's needs (Tr. pp. 307-08). In addition, the school had a behavior team, comprised of the unit coordinator, an occupational therapist, another classroom teacher and a paraprofessional to assist a teacher, where a student exhibits difficult behaviors (Tr. pp. 304-05). According to the unit coordinator, everyone at the school who is in contact with such students would receive a copy of the behavior plan (Tr. p. 305). The hearing record illustrates that the student was successfully responding to interventions in the classroom, and to the extent that she had been exhibiting interfering behaviors, by parent report, such behaviors had decreased (see Application of a Child with a Disability, Appeal No. 07-012).²⁰ Additionally, the hearing record reveals that the student's teacher at the proposed placement would have adequately addressed any behavioral difficulties exhibited by the student if they occurred. In this case, the hearing record does not show that the lack of an FBA or BIP impeded the student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE, caused a deprivation of educational benefits, or rendered the IEP substantively inadequate. Under the circumstances presented above, at the time of the development of the March 31, 2008 IEP, the development of an FBA or BIP was not necessary in order to offer this student a FAPE. Even if an FBA or BIP was required by State regulation in this instance, the district's failure to do so here did not,

¹⁹ I note that the transcript states "if a child doesn't have an "IEP" and one is not noted as required" although in the previous sentence, the transcript indicates the witness is referring to a BIP and not an IEP (Tr. p. 246).

²⁰ In the instant case, the March 31, 2008 CSE relied upon the following reports in making its recommendations for the student: a district psychoeducational report, and progress reports from the student's preschool teacher, speech-language therapist and occupational therapist at ICCD (Dist. Exs. 7; 9; 8; Parent Exs. H; I). I note that the aforementioned reports did not recommend that an FBA and BIP be completed for the student. The hearing record also reveals that the student's special education teacher from ICCD did not recommend an FBA or a BIP (Dist. Ex. 7 at p. 3).

procedurally or substantively, rise to the level of a denial of a FAPE to the student (see A.C., 2008 WL 5505470, at *4).²¹

Next, I will turn to the district's argument that the March 31, 2008 IEP afforded the student sufficient speech-language instruction. As indicated below, the hearing record substantiates the district's argument. State regulations 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 the March 31, 2008 CSE recommended that the student receive three 30-minute group speech-language therapy sessions per week and placement in a 6:1+1 special class which provided for speech-language instruction throughout the day (Parent Ex. B at pp. 1, 10). The teacher at the recommended district school testified that she provides specialized language instruction in her classroom using gestures, picture symbols, visuals, audios, sign language, and an electronic communication device (Tr. pp. 215-16). According to the district's teacher, specialized language instruction could also include the use of PECS, which was also recommended by the student's private evaluators (Tr. p. 216; Parent Ex. H at p. 8). The teacher further testified that specialized language instruction takes place "all throughout the day because communication is all throughout the day" (Tr. p. 216). Additionally, the hearing record reflects that the March 31, 2008 CSE considered but did not offer speech-language therapy five times per week as recommended by McCarton because the CSE "felt five times would be too much out of the classroom so [they] offered three times, which [they] felt could address her needs given the fact that she would be in the classroom also increasing her communication skills" (Tr. pp. 354-55; Parent Ex. H at p. 8). The district's supervisor of psychologists testified that "pull-out is not always the answer ... we like to see what can be accomplished in the classroom" and stressed that the CSE tried to maintain as much time in the classroom as possible (Tr. pp. 355, 376). She also opined that students on the autism spectrum need to be involved communicatively with other students (Tr. p. 376). According to the supervisor of psychologists, social interaction was important to increase expressive language, and the more time the students spends in the classroom with peers, the more likely speech skills will increase (*id.*). Furthermore, the supervisor of psychologists testified that the PECS was "utilized highly," in the recommended program (Tr. p. 354). In addition, the supervisor of psychologists testified that the March 31, 2008 CSE discussed with the parents that "once they start the program ... they could always get more services if necessary" (Tr. p. 374). Although the supervisor of psychologists emphasized the CSE's goal to reduce the amount of the student's pull-out time from the classroom, she also noted the flexibility of the program recommendations, because "the speech and language and other remaining service providers spend a great deal informally [of] their time in the classroom working with the teachers. It's not just the specific mandate" that the student would receive (Tr. pp. 374-75). Under the circumstances, 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

²¹ Notwithstanding the impartial hearing officer's finding that the district failed to conduct an FBA or BIP and thus "failed to satisfy 'Prong I' of the Burlington/Carter test" (IHO Decision at p. 22), the impartial hearing officer did not determine whether the district's failure to do so impeded the student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE, or caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; 8 NYCRR 200.5[j][4][iii]; 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]).

instruction, were appropriate to meet the student's individual speech-language and communication needs (see Application of the Bd. of Educ., Appeal No. 08-091; Application of the Bd. of Educ., Appeal No. 07-028).

The district also correctly asserts that the program recommended by the March 31, 2008 CSE provided for adequate parent counseling and training. State regulations provide for parent counseling and training for the purpose of enabling parents of students with autism to perform appropriate follow-up intervention activities at home (8 NYCRR 200.13[d]). Parent counseling and training is defined as: "assisting parents in understanding the special needs of their child; providing parents with information about child development; and helping parents to acquire the necessary skills that will allow them to support the implementation of their child's individualized education program" (8 NYCRR 200.1[kk]). Here, the hearing record demonstrates that the recommended program offered extensive parent counseling and training that was consistent with 8 NYCRR 200.13(d). In the instant matter, the hearing record reflects that during the March 31, 2008 CSE meeting, parent counseling and training was discussed with the parents, in which the supervisor of psychologists indicated that the recommended program "did a great deal to support parents and that the [proposed placement] had resources for parents that would be available," even though she testified that the CSE did not make a specific provision for these services on the student's IEP (Tr. pp. 371-72). Additional testimony by the district's unit coordinator revealed that the district's recommended school had a six-week parent training program that addressed behavior (Tr. p. 300). She further testified that the school conducted Parent Teacher Association (PTA) meetings every other month and that a variety of people, including attorneys, attended the PTA meetings to assist parents or to help train parents (Tr. pp. 300-01). The school also offered a parent support group and a sibling support group (Tr. p. 301). The hearing record also shows that respite care services were available if the family had no one to watch the student during the meetings (*id.*). Parents were also encouraged to seek case management services and the school helped facilitate this by having parents talk to either the school's parent coordinator or one of the guidance counselors (*id.*). According to the unit coordinator, one of the parents at the site worked for an agency that also helped parents "facilitate and navigate through the system" and the unit coordinator "links our parents with this parent" (Tr. p. 302). Additionally, the teacher from the proposed placement testified that bulletins and information on parent trainings were sent out to the parents and the guidance counselor also coordinated with the parents (Tr. p. 271). Accordingly, although parent counseling and training was not specifically set forth in the March 31, 2008 IEP, in light of the evidence presented herein regarding the available services for parent counseling and training at the proposed placement, the district's failure to include these services on the IEP did not procedurally²² or substantively, result in the denial of a FAPE to the student (Application of a Child with a Disability, Appeal No. 07-030; Application of a Child with a Disability, Appeal No. 07-010).

Lastly, the district asserts that the impartial hearing officer erred by finding that the district failed to establish that the methodology that it would have utilized accurately measured whether or not the student had progressed in reaching her goals and asserts that this issue was not raised in the parents' due process complaint notice. The district is correct that the impartial hearing officer must confine his determination to issues raised in the parents' due process complaint notice, and

²² See 20 U.S.C. § 1415(f)(3)(E)(ii); 34 C.F.R. § 300.513(a)(2); 8 NYCRR 200.5(j)(4)(ii).

that the issue, as the impartial hearing officer framed it, was not enumerated in the parents' due process complaint notice. However, the parents raised a similar allegation in their due process complaint notice that the district did not indicate on the IEP the number of progress reports per year, or the method of measurement that would be utilized in determining whether the student has achieved her goals and objectives (Parent Ex. A at p. 4; 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). Accordingly, I will address this issue as it was stated in the due process complaint notice. After reviewing the March 31, 2008 IEP, I note that the CSE did fail to include a number indicating how many progress reports would be issued per year with regard to the student's goals and objectives (Parent Ex. B at pp. 6-7). An IEP is required to provide a description of how a student's progress toward meeting the annual goals will be measured and when periodic reports on the progress the student is making will be provided (34 C.F.R. § 300.320[a][3][i-ii]; 8 NYCRR 200.4[d][2][iii][b][c]). Nevertheless, the district's teacher stated that "during the one to one sessions we do have our data feed where we record the data according to the different goals and at the same time we do have our data sheets wherein if we need to collect data wherein they are doing snack time, lunch time or when they are outside" (Tr. p. 266). She further indicated that data was collected throughout the day (id.). Thus, although no specific time lines to report the student's progress were included in the IEP, as detailed above, the hearing record reflects that information regarding the student's progress would have been readily available to the parents. Additionally, the supervisor of psychologists testified that the goals were reviewed at the March 31, 2008 CSE meeting, and there is no indication in the hearing record that the parents questioned how often the student's progress on those goals would be reported (Tr. p. 350).

Regarding the method of measurement used to assess the student's progress toward goals and objectives, the March 31, 2008 IEP does not contain a specific method of measurement of the student's progress toward her IEP goals (Parent Ex. B at pp. 6-7). However, the teacher from the proposed placement stated that she "always does a lot of informal assessments" and that "observation is one of the most effective" forms of measurement (Tr. p. 204). The teacher also reported that she uses "individual notebooks" to document when a student is observed doing a new task (id.). During the first month of school, she performs assessments on new students using the Assessment of Basic Language and Learning Skills (ABBLs), interviews people who have worked with the student and develops her own checklist (Tr. pp. 203-05). In the instant case, the hearing record does not demonstrate that the district's failure to indicate the number of progress reports or the specific method of measurement that would have been used to show the student's progress toward her IEP goals impeded the student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE, or caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; 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]).²³ However, the district is

²³ I note that although the impartial hearing officer found that the district failed to establish that the methodology that it would have utilized accurately measured whether the student was progressing toward her IEP goals, he did not determine whether these procedural inadequacies impeded the student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE, or caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; E.H., 2008 WL 3930028, at *7; Matrejek, 471 F. Supp. 2d 415, 419).

cautioned to ensure its compliance with 34 C.F.R. § 300.320(a)(3)(i-ii) and 8 NYCRR 200.4(d)(2)(iii)(b)(c).

The parents' also argue that the CSE engaged in impermissible predetermination by not identifying a specific school location at the March 31, 2008 CSE meeting. I note that a district must ensure that a student's IEP is in effect at the beginning of each school year for each student in its jurisdiction with a disability (34 C.F.R. § 300.323[a]; 8 NYCRR 200.4[e][1][ii]; Cerra, 427 F.3d at 194; Tarlowe v. New York City Dep't of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008] [stating "[a]n education department's delay does not violate the IDEA so long as the department 'still ha[s] time to find an appropriate placement ... for the beginning of the school year in September'"). In this case, the March 31, 2008 IEP was formulated in a timely fashion and the student's special education program and services were developed at that CSE meeting with the participation of the parents and indicated on the resultant IEP (8 NYCRR 200.4[d][2][v]), as was the type of placement setting where the student would receive the special education services (see 8 NYCRR 200.4[d][2][xii]; see also 8 NYCRR 200.6). Moreover, the district provided the parents with a specific school and class site for implementation of the IEP in June 2008 (Dist. Ex. 2). Given that the statutory and regulatory requirements were met by the district, the fact that a specific placement was not determined at the time of the March 31, 2008 CSE meeting did not amount to the denial of a FAPE.

Having determined that the district offered the student a FAPE for the 2008-09 school year, I need not reach the issue of whether the parents' private placement 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, including the parents' challenges to the appropriateness of the district's proposed placement, and find that I need not reach them in light of my determinations.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the impartial hearing officer's decision dated October 20, 2008 is hereby annulled.

Dated: Albany, New York
January 21, 2009

PAUL F. KELLY
STATE REVIEW OFFICER