



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 09-038

**Application of a STUDENT WITH A DISABILITY, by his parents, for review of a determination of a hearing officer relating to the provision of educational services by the New York City Department of Education**

**Appearances:**

Mayerson & Associates, attorneys for petitioners, Gary S. Mayerson, Esq., of counsel

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

### DECISION

Petitioners (the parents) appeal from the decision of an impartial hearing officer which denied their request to be reimbursed for their son's tuition costs at the Rebecca School for the 2008-09 school year, home-based applied behavioral analysis (ABA) services, and special education transportation. The appeal must be dismissed.

At the time of the impartial hearing, the student was attending the Rebecca School where he was receiving speech-language therapy, occupational therapy (OT), and physical therapy (PT) (Tr. pp. 277, 304, 543-44; Parent Ex. S).<sup>1</sup> In addition, a private agency was providing the student with home-based ABA services, which included eight hours per week of direct services and one hour per week of supervisory services (Tr. p. 613). The Rebecca School is a private school that has not been approved by the Commissioner of Education as a school with which districts may contract to provide special education services for students with disabilities (Tr. p. 269; see 8 NYCRR 200.1[d], 200.7). The student's eligibility for special education services as a student with

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<sup>1</sup> The hearing record contains multiple duplicative exhibits. For purposes of this decision, only District exhibits were cited in instances where both a District and a Parent exhibit were identical. It is the responsibility of the impartial hearing officer to exclude evidence that she determines to be irrelevant, immaterial, unreliable or unduly repetitious (8 NYCRR 200.5[j][3][xii][c]; see Application of a Child with a Disability, Appeal No. 07-119; Application of the Bd. of Educ., Appeal No. 06-074).

autism is not in dispute in this proceeding (Dist. Ex. 2 at p. 1; Parent Ex. D at p. 1; see 34 C.F.R. § 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

The student has received a diagnosis of a pervasive developmental disorder (PDD) (Dist. Ex. 3 at p. 3). The student has language delays, sensory motor deficits, visual perceptual difficulties, and processing difficulties (id. at pp. 1-4). The hearing record reflects that the student engaged in self-stimulating behaviors, such as hand clapping and verbal scripting behaviors when he withdraws attention from learning, and that he also showed an emerging responsiveness to peers and his environment (Tr. pp. 499, 505, 552; Dist. Ex. 3 at pp. 3-4; Parent Ex. J at p. 1). The student was also beginning to use scripted language in a more functional manner (Dist. Ex. 3 at pp. 3-4). The hearing record also reflects that the student requires frequent prompting and cueing to maintain his attention and participation in activities (Tr. pp. 394-95, 466-67, 497-99, 504-05, 551, 646; Dist. Ex. 3 at p. 3). Formal assessments conducted in 2005 reflected that the student functions in the "moderately delayed" range cognitively and exhibits "moderately low" adaptive functioning in communication and "low" adaptive functioning in his living skills and socialization (Dist. Ex. 6 at pp. 1-6).

I will first address two procedural arguments pertaining to the papers filed by the parents on appeal. The district contends that the petition for review is procedurally defective because: (1) it is not verified and (2) it does not adequately set forth citations to the hearing record as required by State regulations 8 NYCRR 279.7 and 279.8(b), respectively. As to the first argument, the parents have submitted a reply showing that a copy of a verified petition for review had been served on the district. Therefore, the district's argument is without merit and I decline to dismiss the petition for review on the basis asserted by the district. As to the second argument, after due consideration and in the exercise of discretion, I decline to dismiss the petition for review, but remind counsel to comply with the form requirements of 8 NYCRR 279.8(b) in any future appeals (see Application of a Student with a Disability, Appeal No. 08-003).

A developmental pediatrician's report dated August 31, 2007 (Parent Ex. AA) indicated that the student's "development and behavior profile suggested a diagnosis of a 'Disorder of Relating and Communicating'" (id. at p. 3). The report further indicated that while much of the student's development and behavior profile was consistent with a diagnosis of an autism spectrum disorder, many of the features in the student's profile were not specific to autism but could be associated with other disorders of development and learning (id. at p. 4).

A Rebecca School OT progress report dated November 30, 2007 indicated that the student received four 30-minute individual OT sessions per week (Dist. Ex. 10 at p. 1). The report reflected that OT focused on addressing the student's motor planning, auditory, sensory, and functional emotional developmental needs (id. at pp. 1-2). The report further noted that a "sensory diet" was implemented in the student's classroom and that the student responded well to vestibular stimulation, that he displayed tactile defensiveness, and that he occasionally displayed auditory defensiveness to sound/noise that he did not like (id. at pp. 1-3).

A Rebecca School speech-language therapy progress report dated December 2007 indicated that the student received three individual speech-language therapy sessions per week (Dist. Ex. 8 at p. 1). The progress report indicated that with adult facilitation, the student started to take more of an interest in his peers and participate more in classroom activities (id.). Speech-

language therapy focused on the student's receptive, expressive, and pragmatic language skills, as well as his oral motor and articulation needs (id. at pp. 1-3). A combination of approaches were used to address the student's oral motor/articulation needs, including PROMPT therapy, described as a system of tactile cues to the student's face and throat in order to stimulate muscle movements for specific speech sounds and movement patterns (id. at p. 2). Speech-language therapy also focused on feeding difficulties, in part through the provision of verbal and tactile prompts (id.).

A Rebecca School "initial" PT report dated January 7, 2008 indicated that the student received three 30-minute individual PT sessions per week (Dist. Ex. 9 at p. 1). The PT report described the student as "excited" and interested in the adults he worked with at school, as demonstrated by happy greetings, smiles, and laughing (id.). When provided with support and with high affect, the student displayed flexibility in trying new activities in the sensory gym, despite his initial inclination to move toward familiar play patterns (id.). The report indicated that the student tended to seek out sensory input, including vestibular and deep pressure input, which allowed for increased eye contact and verbalizations, beyond self-regulating scripting, and hand movements (id.). The PT report noted that when provided with sensory input, the student's need for "self-soothing" activities decreased or stopped completely (id.).

The district conducted a classroom observation of the student at the Rebecca School on January 18, 2008 during a free time gym class and as the class transitioned to its room (Dist. Ex. 11). The observation report indicated that the student moved about and followed other students independently, and that he responded to teacher directions (id.). During the observation, although "not much" eye contact with peers or adults was noted, and the student did not initiate much peer interaction, he responded to the interactions of others (id.). The student was not observed to communicate verbally (id.).

A January 2008 Rebecca School progress report prepared by the student's teacher indicated that at that time the student's classroom consisted of seven students (two girls, five boys), one teacher, and three teacher assistants (Dist. Ex. 7 at p. 1). The progress report indicated that developmentally, the student had made "significant progress and substantial gains" (id.). It also indicated that the student had made "incredible progress" in his ability to remain regulated throughout his day and suggested that this allowed the student to engage with and relate to adults and peers in ways that were not demonstrated when he first entered the school in September 2006 (id.). The report advised that the student's self-stimulatory behavior had "greatly decreased" (id.). At the time of the progress report, the student presented as "much easier to engage" and displayed an increase in his initiation of interaction with others (id.). Since the beginning of the 2007-08 school year, the report indicated that the student had made "remarkable gains," developmentally as well as in foundational academics (id.). At the time of the progress report, the student appeared less anxious and less avoidant throughout his entire day (id.). His ability to focus and attend "soared," as he was able to engage for 20-30 minutes without breaking the flow of communication or resorting to self-stimulatory behaviors (id.). The progress report noted that the student's expressive and receptive language abilities appeared "markedly improved" and that the student used "substantially more" spontaneous language and presented a wider vocabulary "week by week" (id.). Furthermore, the progress report indicated that the student's progress "permeat[ed]" throughout all aspects of his school day" (id.).

Regarding academics, the Rebecca School progress report noted that the student's academic work in all areas "places a heavy emphasis on foundational skills ... and that [his] visual attention and acuity is extremely limited" (Dist. Ex. 7 at p. 8). With respect to writing and handwriting, the teacher reported that the student was not able to form letters accurately because of his "inability to focus on the page or the pertinent material for a substantial amount of time," and that the vast majority of the student's writing skills were addressed through foundational academics, but that he also practiced writing his name with physical support and prompting from a teacher (id.). Regarding reading, the student had a limited sight word vocabulary and presented with an elementary understanding of phonics (id.). The report indicated that the Rebecca School made adaptations to the "Seeing Stars" curriculum to assist the student's understanding of phonics and phonetic rules (id. at pp. 8-9). Math concepts and skills were integrated into classroom activities and permeated throughout many informal sessions each day (id. at p. 9). The student was learning to identify coins, to count money, and was able to do single digit addition and subtraction with the visual support of manipulatives and physical and verbal prompting from an adult (id.). The student attended science one time per week (id.).

By notice dated March 20, 2008, the district's Committee on Special Education (CSE) scheduled a meeting for April 17, 2008 to discuss the student's educational needs (Dist. Ex. 13).

An occupational therapist at the Rebecca School prepared an OT report dated March 31, 2008 (Parent Ex. I). The OT report indicated that the student was most related and engaged with roughhousing activities, including rolling on the floor, being swung unpredictably on a swing, or being "upside down" while sitting on an adult's lap (id. at p. 2). The report indicated that the student required significant ongoing vestibular input in order to maintain eye contact, reduce verbal chatter, and eliminate hand wringing (id.). With respect to the student's fine and gross motor planning and sequencing capacities, the report indicated that the student was able to manage some of his own dressing needs, including putting on his coat, socks, and choosing clothing independently, although he tended to hand items to an adult for assistance (id.). Information relating to the student's visual-spatial processing needs indicated that the student had "tremendous difficulty maintaining visual focus and eye contact," but that he was "better able" to catch a ball and to slowly track a moving object (id.).

The CSE convened on April 17, 2008 for an annual review for the 2008-09 school year (Dist. Ex. 3 at pp. 1-2). According to the resulting individualized education program (IEP), the CSE's membership included the student's father; an additional parent member; a district special education teacher who also acted as the district representative; a school psychologist; a social worker; and by telephone, the student's classroom teacher from the Rebecca School (id. at p. 2; see Tr. pp. 389-90, 447). The April 2008 CSE recommended the continuation of the student's eligibility for special education services as a student with autism (Dist. Ex. 3 at p. 1; see Tr. p. 390). The April 2008 CSE recommended that the student be provided with 12-month programming in a 6:1+1 special class in a specialized school (Dist. Ex. 3 at p. 1; see Tr. pp. 390-91). The April 2008 CSE also recommended that the student receive related services of individual 30-minute sessions of OT four times per week, individual 30-minute sessions of PT three times per week, and individual 30 minute sessions of speech-language therapy five times per week (Dist. Ex. 3 at p. 1; see Tr. pp. 390, 397-400). The IEP resulting from the April 17, 2008 CSE meeting also indicated that the student would receive adaptive physical education and that he would participate in alternative assessment (Dist. Ex. 3 at pp. 1, 14). The IEP also indicated that the student wore prism

glasses and ate a yeast free and casein free diet (id. at p. 1). The April 2008 CSE, upon consideration, determined that the student's behavior did not seriously interfere with instruction and could be addressed by the special education teacher; the CSE reflected that determination on the IEP under "Social/Emotional Performance" (id. at p. 4). The IEP recommended that the student's academic management needs be addressed through redirection, verbal prompts, and the use of manipulatives in math class (id. at p. 3). The IEP recommended that the student's social/emotional management needs be addressed through positive feedback and the modeling of appropriate language for social interactions and communications and enhancing play skills (id. at p. 4). The April 2008 CSE developed annual goals and short-term objectives in the areas of reading skills; math skills; sensory processing skills; motor planning and sequencing skills; visual-spatial processing skills; functional negotiation skills; dynamic balance skills; strength and coordination skills; and receptive, expressive, and pragmatic language skills (id. at pp. 6-11; see Tr. pp. 400-09). The parents received a copy of the IEP resulting from the April 17, 2008 CSE meeting approximately two weeks later (Tr. p. 675).

On May 5, 2008, the parents signed a Rebecca School enrollment contract and tuition payment schedule for the student to attend the Rebecca School for a 10-month period for the 2008-09 school year (Parent Exs. V; W).

The hearing record contains a notice dated June 12, 2008 by which the district advised the parents that it would provide the program and services resulting from the April 17, 2008 CSE meeting at a specific district school (Parent Ex. 4). The notice also advised the parents that the recommended services would be put into effect if the parents did not respond by June 26, 2008 (id.). The student's father testified that the parents received this notice on July 18, 2008 (Tr. pp. 661-62, 666).<sup>2</sup>

Before receipt of the district's notice dated June 12, 2008, by facsimile transmission on June 23, 2008, the parents advised the district that for the 2008-09 school year, the parents intended to obtain private services for their son and seek reimbursement for services at the Rebecca School, including transportation (Dist. Ex. 12 at p. 1). The parents also indicated that they were seeking funding for afternoon and weekend ABA services, including direct therapy, consultations, and parent meetings (id.; see Tr. pp. 658-59, 706).

By due process complaint notice dated July 1, 2008, the parents, through their attorney, requested an impartial hearing (Dist. Ex. 1 at p. 1). The parents alleged that the district "failed, both procedurally and substantively" to offer the student a free appropriate public education (FAPE) in the least restrictive environment (LRE) (Dist. Ex. 1 at p. 2). The due process complaint notice alleged, among other things, that: (1) the district did not have appropriate evaluative data to determine the student's needs; (2) the district did not develop an appropriate functional behavior assessment (FBA) or a behavioral intervention plan (BIP); (3) IEP placement, as well as goals and objectives, were not developed at the April 2008 CSE meeting with the meaningful participation

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<sup>2</sup> The student's father testified that subsequent to filing the July 1, 2008 due process complaint notice, he received a letter from the district regarding a resolution meeting and that in a follow-up telephone conversation with the district, he learned about the notice dated June 12, 2008 and the proposed assignment of the student to a specific district school (Tr. pp. 684, 720). According to the student's father, he received the letter dated June 12, 2008 after the telephone conversation (Tr. p. 720).

and involvement of the parents; (4) the district failed to develop IEP goals and objectives that were "clear, unambiguous, and sufficiently challenging;" (5) the district did not provide measurable goals and objectives; (6) the offered speech-language therapy was insufficient; (7) the district failed to offer or recommend any individual parent counseling and training as required by State regulations; (8) the district impermissibly predetermined the student's program; and (9) the special education transportation offered by the district "failed to comment that it should include an air conditioned bus with limited time and a matron" (id. at pp. 2-3).

The due process complaint notice also asserted that the student's placement and program at the Rebecca School, including the related services provided at the school and the additional home-based services, including supervisory services and monthly team meetings, were appropriate for the student (Dist. Ex. 1 at pp. 2-3). The due process complaint notice further asserted that there were no equitable circumstances that would operate to preclude or otherwise diminish a reimbursement award to the parents (id.). For relief, the parents sought reimbursement for the student's tuition at the Rebecca School and for home-based services (id. at p. 3). They also requested special education transportation in an air conditioned bus with limited time and a matron (id.).

The district responded to the parents' due process complaint notice by an answer dated July 11, 2008 (Dist. Ex. 2; see 8 NYCRR 200.5[i][4]). In its answer, the district contended that the April 2008 CSE relied upon a classroom observation, related service progress reports/evaluations, and a January 2008 educational progress report from the Rebecca School, as well as teacher observations in making its recommendations (id. at p. 2). The district also stated that the CSE considered a 12:1+1 special class for the student, but determined that it was "not supportive enough" for the student (id.). The district further indicated that on June 12, 2008, it issued a "final notice of recommendation" to the parents offering the student a "district 75" placement at a specific district school, and that such placement was "reasonably calculated to enable the student to obtain meaningful educational benefits" (id. at p. 3).

On July 22, 2008, the student's mother, accompanied by one of the student's home-based ABA instructors, visited the district's recommended school (Tr. pp. 216-17). The student's mother toured the proposed school and spoke with the assistant principal, two teachers, and another school staff person (Tr. pp. 217-18).

By letter to the district dated July 30, 2008, the parents stated that they had received the district's June 12, 2008 "final notice of recommendation" on July 18 and that they had visited the recommended school on July 22 (Parent Ex. Y at p. 1). The letter advised the district that the parents believed that the recommended program was inappropriate for the student "for a number of reasons," including that it was "unable to offer enough of the 1:1 instruction" the parents believed was "critical" for the student's success (id.). The letter advised the district that the student would remain at the Rebecca School for the 12-month 2008-09 school year and that the parents would be seeking reimbursement for the costs and expenses of the student's school program, his home-based program, and special education transportation (id.).

An impartial hearing began on September 19, 2008, and concluded on December 19, 2008 after three days of testimony (Tr. pp. 1, 363, 741).<sup>3</sup> By decision dated February 13, 2009, the impartial hearing officer found that the district had offered the student a FAPE for the 2008-09 school year and denied the parents' requests for reimbursement of tuition costs at the Rebecca School and for after-school ABA services (IHO Decision at p. 39). The IHO found that: (1) the record did not support the parents' assertion that the district failed to properly develop or provide critical evaluation reports that should have served as the basis for ascertaining the student's needs; (2) the goals and objectives had been properly developed and reflected the student's needs; (3) "the weight of credible evidence" failed to show that the district's offer of a "site placement" several weeks after the April 2008 CSE meeting, instead of at the CSE meeting, amounted to a denial of a FAPE, and that all material elements of the student's program were determined at the April 2008 CSE meeting with the full participation of all mandated meeting members, including the parent; (4) the issue of an alleged "late offer" of a specific placement was not raised by the parents in their due process complaint notice and was, therefore, outside of the scope of their request; (5) there was no evidence to support the parents' contention that the district engaged in predetermination and "impermissibly followed 'policy' and administrative convenience;" (6) there was no evidence to support the parents' assertion that the district denied the student appropriate special education transportation; (7) the omission of parent counseling and training in the IEP did not amount to a denial of a FAPE; (8) the IEP recommended speech-language therapy commensurate with the student's needs and the requirements of the State regulations do not apply; (9) the omission of an FBA and BIP did not amount to a denial of a FAPE; (10) the need for after-school services and 1:1 support was not raised at the April 2008 CSE meeting and the student could have received meaningful educational benefits from the TEACCH methodology used in the recommended district program; and (11) there was no evidence that the student had transitioning issues, therefore, the omission of a formal transition plan did not nullify the program (*id.* at pp. 30-39). The impartial hearing officer concluded that for the 2008-09 school year, the district had "credibly shown" that it had offered the student "a program that accurately reflects the results of evaluations and assessments to identify the student's needs, establishes annual goals and short-term objectives related to those needs," and provides for appropriate special education services in the LRE, such that educational benefit would be conferred (*id.* at p. 39).

The parents appeal the impartial hearing officer's decision that the district offered the student a FAPE for the 2008-09 school year. Specifically, the parents contend that the impartial hearing officer erred when she found the following: (1) that the district properly developed an individualized IEP tailored to meet the student's needs; (2) that the district properly developed or provided critical evaluations of the student prior to the development of the student's IEP; (3) that the parents were given timely notice of the district's "final notice of recommendation;" (4) that the

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<sup>3</sup> By decision dated September 23, 2008, the impartial hearing officer rendered an interim decision and order on pendency (*see* IHO Interim Order on Pendency). The impartial hearing officer determined that the student's pendency placement for the 2008-09 school year commencing on July 1, 2008 and extending until such time as the issues raised by the parents in the case before her was resolved, was based on a prior unappealed April 23, 2008 impartial hearing officer decision (*id.* at p. 4). That prior impartial hearing officer decision ordered that upon proof of payment, the district should reimburse the parents for tuition to the Rebecca School for the 2007-08 school year and for home-based ABA direct services composed of 8½ hours per week, a maximum of two hours of supervisory services per week, and for one monthly team meeting for 1½ hours (*see* Parent Ex. B at p. 7).

district's determination of the "physical location" for the implementation of the student's IEP by a placement officer does not "violate FAPE;" (5) that there is no evidence that the district engaged in predetermination and impermissibly followed a policy and administrative convenience in denying the student a FAPE; (6) that the district should not have to offer the student an air conditioned bus with a matron and limited time; (7) that the omission of parent counseling and training on the student's IEP did not amount to a deprivation of a FAPE; (8) that the amount of speech-language therapy hours mandated by State regulations are inapplicable to the student; (9) that the omission of an FBA and BIP did not amount to a denial of a FAPE; and (10) that the district's offered "site" is presumed to be appropriate. The parents also contend that the impartial hearing officer gave "unwarranted credit to entirely speculative testimony of various [district] witnesses...who had never met, taught, or addressed [the student]" and that the impartial hearing officer improperly ignored the testimony of the parents' witnesses. The parents assert that the district failed to offer any witnesses to dispute the student's need for the Rebecca School program, or his home-based ABA services, and failed to call any witnesses or present any evidence disputing that the equities favor the parents. The parents also assert that the student's placement and program at the Rebecca School with related services and home-based support was "reasonably calculated" and that there are no equitable circumstances that would preclude or diminish an award for reimbursement.

Turning to the district's answer, in addition to its allegations discussed above that the petition for review should be dismissed on procedural grounds, the district contends, among other things, that the parents do not have standing to seek tuition reimbursement for payments made to the Rebecca School because it is a for-profit school. The district further asserts that the impartial hearing officer correctly found that it offered the student a FAPE and that the parents have not met their burden to show that their unilateral placement of the student at the Rebecca School and his receipt of home-based ABA services was appropriate. The district also alleges that equitable considerations preclude an award of tuition reimbursement. The district further asserts that any award of tuition reimbursement to the parents should be limited to "out of pocket expenses" and should not include any prospective payments. Finally, the district contends that it should be able to recoup funds it paid pursuant to the pendency provisions of the Individuals with Disabilities Education Act (IDEA).

Two purposes of the 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 district has an affirmative obligation to offer an eligible student a FAPE (20 U.S.C. § 1400[d][1][A]; Schaffer v. Weast, 546 U.S. 49, 51 [2005]; Rowley, 458 U.S. at 180-81; Frank G. v. Bd. of Educ., 459 F.3d 356, 371 [2d Cir. 2006]; see Application of the Bd. of Educ., Appeal No. 08-026; Application of the Bd. of Educ., Appeal No. 07-137). A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA (see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F. 3d 247, 253 [2d Cir. 2009]), and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; Cerra v. Pawling Cent. Sch.



Dist., 427 F.3d 186, 192 [2d Cir. 2005]). While school districts are required to comply with all IDEA procedures, not all procedural errors render an IEP legally inadequate under the IDEA (A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; R.R. v. Scarsdale Union Free Sch. Dist., 2009 WL 1360980, at \*7 [S.D.N.Y. May 15, 2009]; 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]; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 147 [S.D.N.Y. 2006]).

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 (20 U.S.C. § 1414[d][3]; 34 C.F.R. § 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. Dep't of Educ., 2008 WL 2736027, at \*6 [S.D.N.Y. July 3, 2008]), establishes annual goals related to those needs (34 C.F.R. § 300.320[a][2]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (34 C.F.R. § 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9). Subsequent to its development, an IEP must be properly implemented (8 NYCRR 200.4[e][7]; Application of a Child with a Disability, Appeal No. 08-087).

A student's recommended program must 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., 546 F.3d 111, 114 [2d Cir. 2008]; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; E.G. v. City Sch. Dist. of New Rochelle, 2009 WL 773960, at \*4 [S.D.N.Y. Mar. 16, 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]). In determining an appropriate placement in the LRE, the IDEA requires that students with disabilities be educated to the maximum extent appropriate with students who are not disabled and that special classes, separate schooling or other removal of students with disabilities from the general educational environment may occur only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily (20 U.S.C. § 1412[a][5][A]; see 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.6[a][1]; Newington, 546 F.3d at 112, 120-21; Oberti v. Bd. of Educ., 995 F.2d 1204, 1215 [3d Cir. 1993]; J.S. v. North Colonie Cent. Sch. Dist., 586 F. Supp. 2d 74, 82 [N.D.N.Y. 2008]; Patskin, 583 F. Supp. 2d at 430; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 144 [N.D.N.Y. 2004]; Mavis v. Sobel, 839 F. Supp. 968, 982 [N.D.N.Y. 1993]). The placement of an individual student in the LRE shall "(1) provide the special education needed by the student; (2) provide for education of the student to the maximum extent appropriate to the needs of the student with other students who do not have disabilities; and (3) be as close as possible to the student's home" (8 NYCRR 200.1[cc]; 8 NYCRR 200.4[d][4][ii][b]; see 34 C.F.R. § 300.116; see also W.S., 454 F. Supp. 2d at 147). Consideration is also given to any potential harmful effect on students or on the quality of services that they need (34 C.F.R. § 300.116[d]; 8 NYCRR 200.4[d][4][ii][c]). Federal and State regulations also require that school districts ensure that a continuum of alternative services be available to meet the needs of students with disabilities for special education and related services (34 C.F.R. § 300.115; 8 NYCRR 200.6). The continuum of alternative placements includes instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions; and the continuum makes provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement (34 C.F.R. § 300.115[b]).

The federal and State statutes and regulations concerning the education of students with disabilities provide for a collaborative process between parents and school districts in planning and providing appropriate special education services (see Schaffer, 546 U.S. at 53; Cerra, 427 F.3d at 192-93). The "core of the statute" is the collaborative process between parents and schools, primarily through the IEP process (see Schaffer, 546 U.S. at 53).

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

The 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 (L. 2007, ch. 583, § 3); therefore, it applies to the instant case (see Application of the Bd. of Educ., Appeal No. 08-016).

I will now turn to the merits of the parents' appeal. The parents contend that the impartial hearing officer erred when she found that the district had properly developed or provided critical evaluations of the student prior to the development of his IEP. The impartial hearing officer found that the parents had not "provided any material elucidation of this issue" and, therefore, she found the argument to be without merit (IHO Decision at p. 30). The parents' petition for review does not identify any "critical evaluation report" that they claim the district did not properly develop or provide with respect to the April 17, 2008 CSE meeting. As the parents have not provided any further clarification regarding this issue, I will not disturb the impartial hearing officer's finding that this objection is not supported by the record and is without merit.

Next, the parents contend that the April 17, 2008 IEP failed to include "definitive and specialized" annual goals for the student. The impartial hearing officer concluded that the parents' assertion as raised in their due process complaint notice that goals and objectives were not developed at the CSE meeting with meaningful participation of the parents was "unsupported by any evidence or testimony of the teacher or provider who appeared at the [impartial] hearing" and found that the annual goals and short-term objectives reflected the student's needs (IHO Decision at p. 31).<sup>4</sup> The IEP included goals that addressed the student's needs in order to develop his reading and math skills; to improve his sensory processing, motor planning skills, and sequencing skills; to improve his visual-spatial processing skills; to improve his functional negotiation skills; to improve his dynamic balance skills; to improve his strength and coordination skills; and to improve his receptive, expressive, and pragmatic language skills (Dist. Ex. 3 at pp. 6-11; Dist. Exs. 7; 8; 9; 10). Although the annual goals may be vague when isolated out of context and viewed alone, I find that the 38 short-term objectives included within the IEP comprehensively addressed the student's needs and I further find that the majority of the short-term objectives were both detailed and measurable (Dist. Ex. 3 at pp. 6-11). Therefore, I find that the structure and content of the short-term objectives remedied any deficiencies in the annual goals (see Tarlowe, 2008 WL 2736027, at \*9; M.C. v. Rye Neck Union Free Sch. Dist., 2008 WL 4449338, at \*11 [S.D.N.Y. Sept. 29, 2008]; W.S., 454 F. Supp. 2d at 146, 147; Application of the Dep't of Educ., Appeal No.

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<sup>4</sup> It is unclear from the petition for review whether the parents appeal the impartial hearing officer's conclusion that the goals and short-term objectives were "properly developed" at the CSE meeting (IHO Decision at pp. 30-31). Nevertheless, after reviewing the hearing record, I find no error in the impartial hearing officer's conclusions. Specifically, the hearing record reflects that the parents participated in the creation of the annual goals and short-term objectives that were developed at the April 2008 CSE meeting (Tr. pp. 400-09, 414, 692, 676-77; see Dist. Ex. 3 at p. 2). Moreover, the student's father testified that he participated in the CSE meeting and was a member of the CSE that developed the student's IEP (Tr. pp. 692). The hearing record reflects that the parents were "significantly involved" in the development of the IEP (see T.P. 554 F. 3d at 253; Cerra, 427 F.3d at 193). Furthermore, I concur with the impartial hearing officer's determination that the omission on the April 2008 IEP of methods of measurement to determine the student's progress toward achieving the goals did not rise to the level of a denial of a FAPE (IHO Decision at p. 31).

08-096). Moreover, as indicated in the impartial hearing officer's decision, the student's related services providers from the Rebecca School provided the April 2008 CSE with a significant number of annual goals and short-term objectives for the student's IEP (Tr. pp. 404, 406, 408; Dist. Exs. 3 at pp. 6-11; 8 at p. 2; 9 at p. 2; 10 at p. 2; see IHO Decision at pp. 30-31). The hearing record also reflects that the student's classroom teacher at the Rebecca School participated in the development of the student's annual academic goals and short-term objectives as part of her telephone participation in the April 17, 2008 CSE meeting (Tr. pp. 389, 400-01, 404; see Dist. Exs. 3 at p. 6; 7 at p. 10).

Next, the parents contend that the impartial hearing officer erred when she concluded that the district's failure to offer a "site placement" at the April 2008 CSE meeting did not deny the student a FAPE (IHO Decision at pp. 31-32). The impartial hearing officer concluded that issues relating to the selection of the physical location of the student's recommended program did not rise to the level of a denial of a FAPE because "all material elements of the student's program were determined at the [CSE] meeting, with the full participation of a component of mandated individuals, including the parent" (id. at p. 32).<sup>5</sup>

Although the IDEA requires parental participation in determining the educational placement of a student (see 34 C.F.R. §§ 300.116, 300.327, 300.501[c]), the assignment of a particular school is an administrative decision provided it is made in conformance with the CSE's educational placement recommendation (White v. Ascension Parish Sch. Bd., 343 F.3d 373, 378, 379-80, 380-82 [5th Cir. 2003]; see also Veazey v. Ascension Parish Sch. Bd., 2005 WL 19496 [5th Cir. Jan. 5, 2005] [administrative decision to change a student's assigned school is not an "educational placement" such that a Board of Education is required to provide the parent with a prior written notice under the IDEA]; A.W. v. Fairfax Co. Sch. Bd., 372 F.3d 674, 682 [4th Cir. 2004] [IDEA's "stay put" provision, providing that during the pendency of proceedings, the student "shall remain in the then-current educational placement" did not limit a school district from transferring a student from one school to another]; Concerned Parents & Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751, 756 [2d Cir. 1980] [administrative decision to change a student's assigned school is not an "educational placement" such that a Board of Education is required to provide the parent with a prior written notice under the IDEA]; Tarlowe, 2008 WL 2736027, at 6; but see A.K. v. Alexandria City Sch. Bd., 484 F.3d 672 [4th Cir. 2007]; Madison v. Metropolitan Sch. Dist. v. P.R., 2009 WL 467555, at \*10 [W.D. Wisc. Feb. 25, 2009]). Moreover, the United States Department of Education (USDOE) has stated that its "long-standing position is that placement refers to the provision of special education and related services rather than a specific place, such as a specific classroom or specific school" (Educational Placements, 71 Fed. Reg. 46687 [August 14, 2006]). Similarly, the

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<sup>5</sup> The parents' petition for review contends that the district's notice of a school location was untimely. However, I agree with the impartial hearing officer that the parents' due process complaint notice did not assert this claim, therefore, the claim was not proper subject matter for the due process proceeding (see IHO Decision at p. 32; see also 20 § U.S.C. 1415[f][3][B]; 34 C.F.R. § 300.511[d]). Further, the hearing record reflects that the district objected at the impartial hearing to the raising of this issue (Tr. pp. 373-79, 664-65). I find, therefore, that the impartial hearing officer correctly held that this issue was not properly raised by the parents and thus that it was outside the scope of the impartial hearing and I will not address it on appeal (34 C.F.R. § 300.511[d]; see Application of a Student with a Disability, Appeal No. 08-130; Application of a Child with a Disability, Appeal No. 07-122; Application of the Dept of Educ., Appeal No. 07-059).

Department has also stated that it "referred to 'placement' as points along the continuum of placement options available for a student with a disability, and 'location' as the physical surrounding, such as the classroom, in which a student with a disability receives special education and related services" (Placements, 71 Fed. Reg. 46588 [August 14, 2006]).<sup>6,7</sup> This view is consistent with the opinion of the USDOE's Office of Special Education Programs (OSEP), which indicates that the assignment of a particular school may be an administrative decision provided it is made in conformance with the CSE's educational placement recommendation (Letter to Veasey, 37 IDELR 10 [OSEP 2001]).

In this case, there is no evidence in the hearing record that the student's special education and related service needs could only be met in a specific classroom or school building. To the contrary, as discussed below, the hearing record shows that the student's special education and related service needs would have been met in the LRE in the district's recommended classroom. Further, the district offered the student a service along the continuum, a 6:1+1 special class in a specialized school (see 8 NYCRR 200.6[h][4][ii][a]) at the April 17, 2008 CSE meeting. There is no evidence that the student's father was denied participation in that decision, as evidenced by the fact that he raised concerns at the CSE meeting about the student-to-staff ratio of the recommended program (Tr. p. 512; see K.Y. v. New York City Dep't of Educ., 2008 U.S. Dist. LEXIS 89827, 108 LRP 63889 [E.D.N.Y. July 2, 2008]). The impartial hearing officer further noted that the parents' involvement in the selection process for the school at which the student's IEP would be implemented was not precluded as the parents were able to and did send a letter objecting to the specific site selection (Parent Ex. Y at p. 1). Additionally, the district also advised the parents in the placement letter that the parents retained the right to discuss the recommendation of a specific school, and could arrange a meeting with respect to the recommendation (id.). Under the facts of this case, I agree with the impartial hearing officer that the district did not deny this student a FAPE by not determining at the April 2008 CSE meeting the specific district school that the student was recommended to attend and at which his IEP would be implemented.

Next, the parents contend that the impartial hearing officer erred when she found that there was no evidence that the district engaged in predetermination and impermissibly followed policy and administrative convenience in denying the student a FAPE. The parents' petition for review further asserts that the 6:1+1 program is the district's functional default placement for students with autism. The impartial hearing officer found that there was insufficient evidence supporting the parents' objection on this ground (IHO Decision at p. 32). For the reasons discussed below, I find that the hearing record reflects that the recommendation for the student to attend a 6:1+1 class was not predetermined and thus did not significantly impede the parents' opportunity to participate

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<sup>6</sup> The federal and State continuums of alternative placement options are identified in 34 C.F.R. § 300.115 and 8 NYCRR 200.6.

<sup>7</sup> The USDOE previously discussed "location" regarding the 1997 amendments to the IDEA, which for the first time required an IEP to identify the "location" of services. In discussing this provision of the 1997 amendments, the USDOE noted that "[t]he 'location' of services in the context of an IEP generally refers to the type of environments that is the appropriate place for provision of the service. For example, is the related service to be provided in the child's regular classroom or in a resource room?" (Content of IEP, 64 Fed. Reg. 12594 [March 12, 1999]; see also S. Rep. No. 105-17, at 21-22 (1997). Current provisions requiring that the location of services be identified on an IEP are found at 20 U.S.C. § 1414(d)(1)(A)(i)(VII), 34 C.F.R. § 300.320(a)(7), and 8 NYCRR 200.4(d)(2)(v)(b)(7).

in the decision-making process regarding the provision of a FAPE to the student (see T.P., 554 F.3d at 253; Nack v. Orange City Sch. Dist., 454 F.3d 604, 610-11 [6th Cir. 2006]; R.R., 2009 WL 1360980, at \*8-\*9; A.G. v. Frieden, 2009 WL 806832, at \*7 [S.D.N.Y. Mar. 26, 2009]; E.G., 2009 WL 773960, at \*3; K.Y., 2008 U.S. Dist. LEXIS 89827; P.K. v. Bedford Central Sch. Dist., 569 F. Supp. 2d 371, 382-83 [S.D.N.Y. Aug. 1, 2008]; Danielle G. v. New York City Dep't of Educ., 2008 WL 3286579, at \*6-\*7 [E.D.N.Y. Aug. 7, 2008]; M.M. v. New York City Dep't of Educ., 583 F. Supp. 2d 498, 507 [S.D.N.Y. Oct. 21, 2008]; W.S., 454 F. Supp. 2d at 147-48; 20 U.S.C. § 1415[f][3][E][ii][II]; 34 C.F.R. § 300.513[a][2][ii]; 8 NYCRR 200.5[j][4][ii]; but see Application of a Student with a Disability, Appeal No. 08-035 [finding that the hearing record supports a conclusion that a predetermination of program services rose to the level of a denial of a FAPE]).

The April 2008 IEP reported that the CSE considered a 12:1+1 program in a community school for the student as an alternative to the program ultimately recommended, but "deemed" such a program inappropriate for the student because he required a 12-month program to address his needs and achieve his IEP goals (Dist. Ex. 3 at p. 13; see Tr. pp. 409-10). Testimony by the district representative indicated that classes with a 6:1+1 ratio were highly structured programs to address the particular needs of students with autism, but that other student-to-teacher ratio options might be considered based on a student's functioning level and other "symptoms" exhibited (Tr. pp. 422-23, 435, 451, 453, 454). Further, the district representative testified that an 8:1+2 class was not appropriate for the student because that program targeted the goals and needs of students with multiple disabilities, such as students in wheelchairs, and the focus of the 8:1+2 class was different than what the student needed (Tr. pp. 450-51). The district's special education teacher who attended the April 2008 CSE meeting testified that the student needed a highly structured program in a classroom with a small student-to-staff ratio and with a teacher trained to work with students on the autism spectrum (Tr. pp. 391, 420, 454). The hearing record reflects that the recommended 6:1+1 program would have met the student's needs as described at the April 2008 CSE meeting and on the resultant IEP. I also note that there is no evidence in the hearing record that the student's father asked the April 2008 CSE to consider other types of programs or classrooms for the student and that the CSE refused to do so solely on the basis of the student's classification as a student with autism (Tr. pp. 390, 400-409, 414, 692, 676-77, 689, 692). Moreover, the parents' argument that the CSE's recommendation of a 6:1+1 class without home-based ABA reflected predetermination, is not supported by the hearing record. The student's father testified that he did not seek to have personnel who provided the student's ABA programming attend the April 2008 CSE meeting (Tr. pp. 680, 689-90). Nor does the hearing record show that the student's father informed the other CSE members that the student was participating in a home-based ABA program, or that he requested such services at the April 2008 CSE meeting (Tr. pp. 437, 453). In light of the above, I find that I need not modify the impartial hearing officer's determination that the recommendation of a 6:1+1 class for the student considered the student's individual needs and was not predetermined.

Next, the parents contend that the impartial hearing officer erred when she found that the special education transportation offered to the student on his IEP was appropriate to meet his needs (see IHO Decision at p. 32). The impartial hearing officer noted that the assistant principal of the recommended school testified regarding special education transportation that "all the parent had to do was make the request, supported by documentation, which would [then be] processed in the matter of a week or two" (*id.* at pp. 32-33). The impartial hearing officer further found that there

was no evidence in the hearing record to show that the parents had made such a request at the April 2008 CSE meeting or otherwise (*id.*). The student's April 2008 IEP indicated that he is eligible for special education transportation (Dist. Ex. 3 at p. 1). While the IEP does not specify the type of special education transportation to be provided to the student (*see id.*), the hearing record contains no evidence that the student required an air conditioned bus with limited time and a matron. Therefore, I agree with the impartial hearing officer that there is no evidence contained in the hearing record that the student was denied a FAPE on this ground.

Next, the parents contend that the impartial hearing officer erred when she found that the omission of parent counseling and training from the April 17, 2008 IEP was not a deprivation of a FAPE. State regulations require that an IEP indicate the extent to which parent training will be provided to parents, when appropriate (8 NYCRR 200.4[d][2][v][b][5]). Pertaining to educational programs for students with autism, State regulations require that provision shall be made for parent counseling and training for the purpose of enabling parents to perform appropriate follow-up intervention activities at home (8 NYCRR 200.13[d]). In this case, the parents are correct that the April 2008 IEP did not indicate that parent counseling and training would be provided; however, as more fully discussed below, the hearing record shows that the parent training that would have been available at the district's recommended school was appropriate and I agree with the impartial hearing officer that under the circumstances of this case, the omission of these services from the student's IEP did not deprive the student of a FAPE (IHO Decision at p. 33).

As noted by the impartial hearing officer, the hearing record shows that the student's program at the proposed district school would have involved significant parent counseling and training activities and opportunities (Tr. pp. 214, 215, 246, 247, 673, 674; *see* IHO Decision at p. 33). In particular, the assistant principal testified that the district's "Office of Parent Involvement" provided monthly workshops based on various topics such as autism, behavior, feeding, and bussing concerns (Tr. p. 214). She further testified that the school had a parent coordinator, who was described as "available to all parents as needed" (*id.*). The parent coordinator provided parents and families with different events and workshops throughout the school year, including events relating to students' reading, the IEP, and arts and crafts in the home workshops (*id.*). The assistant principal also testified that the school's related service providers were always available to parents (*id.*). As an example, the school's speech-language therapy department provided feeding programs over the course of the school year for students with severe disabilities and offered parents training on appropriate feeding techniques for those students (Tr. p. 215). The assistant principal testified that during the 2007-08 school year, the related service providers at the school conducted an open house where each discipline presented its own workshop, and at which parents were able to tour, visit, and gain helpful information for use at home (*id.*). She further testified that teachers also communicate with parents regularly through a communication book that goes back and forth between home and school (*id.*). Further, the assistant principal testified that she operated with an "open-door policy" and that parents are welcome to come to the school at any time to observe in the classroom or to visit a therapy session (Tr. p. 247). The hearing record also reflects that the school communicated with parents, and that if they needed more support or individual support, appropriate individuals or the team of "school professionals" was available to them upon request (*id.*). I also note that the district's parent counseling and training events and workshops included the same type of content that the parents received from the Rebecca School and from the supervisor of the student's home-based ABA services (Tr. p. 673). Therefore, I affirm the impartial hearing

officer's finding that the omission of parent counseling and training from the student's IEP did not deprive the student of a FAPE.

Next, the parents contend that the impartial hearing officer erred when she found that the amount of speech-language therapy hours mandated by the State regulations are inapplicable to the student's case. The parents' due process complaint notice alleged that "the related speech and language therapy offered to [the student] [was] not sufficient and in line with the Commissioner's Regulations concerning educational programming for student's with autism" (Dist. Ex. 1 at p. 3). The impartial hearing officer found that "the student's IEP recommended individual speech and language therapy commensurate with [the student's] needs and that the requirements of the [State] Regulations, which essentially applied to group session, are inapplicable" (IHO Decision at p. 34). I first note that the parents do not appear to challenge on appeal the impartial hearing officer's finding that the speech-language therapy recommended by the April 17, 2008 CSE was commensurate with the student's needs or otherwise reassert on appeal that the amount of speech-language therapy recommended in the student's April 2008 IEP was not adequate or appropriate for the student. Instead, the parents appear to appeal only the impartial hearing officer's finding that the State regulations for language instruction for students with autism did not apply in the instant case (*id.*). However, since the appropriateness of the amount of speech-language services was raised in the parents' due process complaint notice and was decided upon by the impartial hearing officer, I will address this issue.

I concur with the impartial hearing officer that the April 2008 IEP recommended speech-language services appropriate to meet the student's needs. There is no dispute that the student is classified as a student with autism (*see* Dist. Exs. 1; 3 at p. 1). 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 April 2008 CSE recommended the student receive individual 30-minute sessions of speech-language therapy five times per week (Dist. Ex. 3 at pp. 1-2, 14). I find that the hearing record supports the impartial hearing officer's determination that the district's programming in the 6:1+1 class, as discussed below, would have met the student's speech-language needs.

The April 2008 IEP included annual goals and short-term objectives specific to the student's deficits in his receptive, expressive, and pragmatic language skills, consistent with the goals and objectives developed for the student by his speech-language therapist at the Rebecca School (*compare* Dist. Ex. 3 at pp. 10-11, *with* Dist. Ex. 8 at p. 3). The hearing record reflects that the recommended class employed TEACCH, described as a methodology that works on improving receptive language and uses the visual modality for learning and communication (Tr. pp. 89, 210-11). I also note that the class profile specifies that "visuals" are utilized throughout the day to facilitate communication of wants and needs as well as to facilitate generalization and independence of acquired skills (Dist. Ex. 5 at pp. 2-3).<sup>8</sup> The special education teacher of the recommended class testified that language instruction appropriate to the student's individual language and social interaction needs would take place during "circle time" and the class' lunch

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<sup>8</sup> The hearing record included a class profile (Dist. Ex. 5). The class profile contained academic, social, and management information about the students in the class; a description of the classroom environment; and information about the students' needs, strategies, and accommodations that were used in the classroom (*id.*).



hour, the latter which included time for playing games and other social skills including turn-taking and sharing (Tr. pp. 86, 88-89, 111). During circle time, which all students participated in, the special education teacher testified that she would use that time as an opportunity for the student to work on learning how to answer questions and communicate with peers (Tr. p. 107). I also note that the student's goals and objectives included receptive, expressive, and pragmatic language skills, in which the special education teacher testified she would be involved (Tr. pp. 106-07; see Tr. p. 199). As indicated above, the student's IEP also provided that his academic management needs, which would include his language needs, would be addressed by redirection and verbal prompting and this was also specified in the class profile (Dist. Ex. 5 at p. 2; see Tr. pp. 90-93, 109-11). The special education teacher specifically testified to her use of these individualized techniques (Tr. pp. 90-93, 109-11). The special education teacher testified that modeling of the student's appropriate language as required by the student's IEP would also take place during class trips in the community, such as visiting a restaurant to work on ordering skills or going bowling, where social skills would be addressed (Tr. p. 179; Dist. Ex. 3 at p. 4). Under the circumstances, although not specifically delineated on the student's IEP, the hearing record reflects that the student's program as a whole, including specific speech-language therapy and in-class language instruction, were appropriate to meet the student's individual speech-language and communication needs (see Application of the Dep't of Educ., Appeal No. 08-140; Application of the Bd. of Educ., Appeal No. 08-091; Application of the Bd. of Educ., Appeal No. 07-028).

Next, the parents contend that the impartial hearing officer erred when she found that the district's omission of an FBA and BIP for the student did not amount to a denial of a FAPE. The April 2008 CSE, upon consultation with the student's current teacher, determined that the student's behavior did not seriously interfere with instruction and could be addressed by the special education teacher; the CSE reflected that determination on the IEP under "Social/Emotional Performance" (Dist. Ex. 3 at p. 4). The impartial hearing officer concluded that the student's interfering behaviors were periodically distracting to other students and to himself, but that the behaviors could be "addressed in the classroom through redirection, verbal prompts, positive feedback, and other sensory strategies employed by the special education teacher" in the district's recommended classroom (IHO Decision at p. 34). I agree with the impartial hearing officer that under the circumstances here, the April 2008 CSE was not required to conduct an FBA or develop a BIP for the student. In the case of a student whose behavior impedes his or her learning or that of others, the CSE shall consider strategies, including 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., 553 F.3d 165; J.A. v. East Ramapo Cent. Sch. Dist., 2009 WL 773937, at \*4 [S.D.N.Y. Mar. 24, 2009]; M.M., 583 F. Supp. 2d at 510; W.S., 454 F. Supp. 2d at 149-50; Tarlowe, 2008 WL 2736027, at \*8; Application of a Student with a Disability, Appeal No. 08-028; Application of the Dep't of Educ., Appeal No. 07-120).<sup>9</sup> Additionally, under State regulations when considering more restrictive programs or placements

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<sup>9</sup> In developing an IEP and considering "special factors" when a student's behavior impedes learning, federal regulations (34 C.F.R. § 300.324[a][2][i]) and State regulations (8 NYCRR 200.4[d][3]) require consideration of strategies to address that behavior as part of the development of the IEP. Federal regulations (34 C.F.R. §§ 300.530[d][1][ii], 300.530[f][1][i]) and State regulations (8 NYCRR 201.3) also address preparation of, or review of, an FBA and BIP in disciplinary situations. In addition, as presented in the instant case, State regulations (8 NYCRR 200.4[d][3][i], 200.22[a], [b]), but not federal regulations, require consideration of an FBA and BIP in certain non-disciplinary situations.

as a result of the student's behavior, a CSE "shall consider the development of a behavioral intervention plan" (8 NYCRR 200.22[b]).<sup>10</sup>

In the instant case, the hearing record reflects that the student displayed hand clapping and verbal scripting (Tr. p. 499). These behaviors were "occasionally" distracting to the other students in the class, as well as to the student (Tr. pp. 499, 541-42). The April 17, 2008 IEP reported that the student's behaviors did not seriously interfere with instruction and that they could be addressed by the special education teacher in the classroom (Dist. Ex. 3 at p. 4). The district's special education teacher who attended the April 2008 CSE meeting testified that during the CSE meeting, the district psychologist consulted with the student's Rebecca School special education teacher and it was decided that the student's behaviors did not seriously interfere with classroom instruction and that it was not necessary to develop a BIP because the student's behavior could be addressed by the classroom teacher (Tr. pp. 396-97, 435). The hearing record also reflects that the student was responsive in the classroom to redirection, verbal prompts, positive feedback, and sensory strategies and that the April 17, 2008 IEP specifically provided that the student's program would include redirection and verbal prompts (Tr. pp. 498-500; Dist. Ex. 3 at p. 3). The special education teacher who would have been the student's classroom teacher at the recommended district school testified that her class used visual cues, prompting, and reinforcement, and the class profile also specifically referenced the use of visuals and prompting (Tr. pp. 90-93, 109-11; Dist. Ex. 5 at pp. 2, 3). Moreover, the director of the Rebecca School testified that the student did not need a BIP because that school views students' behaviors as a reflection of their attempted communication and that the Rebecca School addressed the student's academic management needs through staff attention (Tr. pp. 307, 344-45). I find that the special education classroom at the recommended district school; the use of redirection, and prompting in that class as provided for by the student's April 17, 2008 IEP; as well as the structured arrangement of the physical space in that class, would have appropriately addressed the student's behavior needs such that the student did not require an FBA or a BIP (K.Y., 2008 U.S. Dist. LEXIS 89827).

The parents next allege that the program and placement recommended by the April 2008 CSE was not designed to confer educational benefits on the student because the student requires additional 1:1 support and home-based ABA services. The impartial hearing officer found that at the time of the April 2008 CSE meeting, based on the information that the CSE had before it, the CSE appropriately determined that the student did not require 1:1 support or after-school ABA services in order for the student to receive educational benefits (IHO Decision at pp. 37-38, citing Roland M. v. Concord Sch. Comm., 910 F. 2d. 983, 922 [1st Cir. 1990]). I agree with the impartial hearing officer's determination. The program director of the Rebecca School testified that the student required a 1:1 aide or 1:1 teaching support all day long to obtain meaningful educational benefits (Tr. pp. 283, 289, 294, 314, 336, 338), as well as an after-school ABA program in order to receive an appropriate education at the Rebecca School (Tr. p. 310). However, the student's Rebecca School teacher testified that "without one-on-one support [the student] was not able to

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<sup>10</sup> In New York, a BIP is defined as "a plan that is based on the results of a functional behavioral assessment and, at a minimum, includes a description of the problem behavior, global and specific hypotheses as to why the problem behavior occurs and intervention strategies that include positive behavioral supports and services to address the behavior" (8 NYCRR 200.1[mmm]; 8 NYCRR 201.2[a]). An FBA is defined as "the process of determining why a student engages in behaviors that impede learning and how the student's behavior relates to the environment" (8 NYCRR 200.1[r]).

have as much success as he possibly could have otherwise" and that this would "optimize" the student's success, especially in academic areas (Tr. pp. 504, 520). She also testified that the student's ABA program was important so that the student could "maximize" the progress that he could make in a given time and to enable him to be successful both at home and at school (Tr. p. 534). 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). Based on the above, I find that the hearing record reflects that the student was offered a FAPE.

I now turn to the issue of whether the district's recommended class would have offered the student a FAPE. The assistant principal of the recommended district school was qualified to work with students with autism and had experience as a special educator and as a school administrator (Tr. pp. 203-05). The assistant principal testified that prior to her current position, she was a teacher for students with autism for four years within the district (id.). The assistant principal testified that she holds a Bachelor's degree in education of the deaf and a Master's degree in special education (Tr. p. 205). She also testified that she is State certified in administration, supervision, and special education (Tr. pp. 205-06). Furthermore, and contrary to the parents' assertions, she testified that she is trained and has certification in the TEAACH methodology and is also trained in ABA (Tr. pp. 205-06, 207). Furthermore, the special education teacher of the recommended class testified that she had been teaching for six years, had worked with autistic students for three years, held both a Bachelor's and Master's degree in education, was a certified special education teacher, and had taken workshops in TEACCH (Tr. pp. 75-76).

Regarding the recommended classroom, the assistant principal testified that the TEACCH methodology was used, as well as "a plethora" of programs available relating to content areas, including literacy (Tr. p. 209). She testified that the school's resources were "very extensive" (id.).<sup>11</sup> The assistant principal further testified that the classroom methodology used is "structured teaching" that includes various levels, such as physical structure, individualized schedules, 1:1 work stations, visual structure through daily routines, as well as strategies to build skills (Tr. pp. 209-10). TEACCH attempts to incorporate students' interests and passions into building their skills and attempts to provide motivation for students, in order to make life experiences meaningful for them and exposes students to different types of activities and practice for the generalization of skills, which the hearing record indicated was a need of the student (id.). The assistant principal further testified that the classroom structure aims to build independence and generalization so that students do not become prompt dependent and reliant on another person for their wants and needs (Tr. pp. 210-11). According to the assistant principal, the classroom program also addresses behavior through the use of the daily schedule so the students "are clear" about knowing what to expect throughout the day, subsequently resulting in the students' abilities to "calm themselves"

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<sup>11</sup> The assistant principal further testified that "District 75" has an "Office of Autism" that has "multiple coaches available" to support teachers in the classroom, to provide training, and to suggest strategies (Tr. p. 211). In addition to the recommended school's participation in a literacy pilot program, literacy coaches spend time in the classrooms and provide teachers with information and materials (Tr. pp. 209, 212). The recommended school also uses a consultant from a private school that offers training and consultation to many of the schools in District 75 (Tr. p. 207). The assistant principal testified that after the school's paraprofessionals and teachers receive training from a private consultant, they receive continuing support throughout the school year through verbal and written feedback (Tr. p. 212). The recommended school also uses the consultant services of an occupational therapist/yoga instructor, who works with the district in incorporating sensory processing activities into the classroom (id.).

(id.). The special education classroom teacher who would have taught the student at the recommended school also testified and provided information consistent with that of the assistant principal (see Tr. pp. 76-77, 81, 89-90, 137-39, 157-58, 168, 196-99, 204-06, 208, 264-65).

The assistant principal further testified that the recommended school has speech-language therapists, occupational therapists, and physical therapists who would have been able to provide the student with the related services recommended in his April 2008 IEP (Tr. pp. 212-14). The school also offers its students a full summer program, which includes the continuation of related services during the summer (Tr. pp. 250-51).

The hearing record shows that the recommended class contained six students and a paraprofessional in addition to the special education teacher (Tr. p. 79). However, I note that the sixth student entered the proposed class in September 2008, and the class was not full when it was recommended for the student by the CSE (Tr. p. 82). All of the students in the 6:1+1 class were eligible for special education services as students with autism (id.). At the time of the impartial hearing, the students were between eight and nine years old, so the student would have been appropriately grouped chronologically with the students in the class (id.). The teacher described the students' intellectual functioning as "below average" (id.). In both reading and math, one student was at the "R.R." instructional level, two students were at the "P.P." instructional level, one student was at the 0.5-1.5 instructional level, and two students were at the 1.6-2.5 instructional level (Dist. Ex. 5 at p. 1).<sup>12</sup> Socially, all of the students in the recommended class worked on interacting with each other with assistance from the adults in the classroom and through the use of visual cues (Tr. p. 83). The special education teacher used functional grouping of students during reading and math class.<sup>13</sup> The teacher noted that the overall goal of her class was to "help students function with independence, and to help them generalize the skills that they are taught throughout all environments" (Tr. p. 84). I note that such goals are appropriate for the student.

In addition, the hearing record reflects that all of the students in the recommended class received speech-language therapy and OT, one student received PT, and one student was assigned a 1:1 crisis intervention paraprofessional (Dist. Ex. 5 at pp. 2-3). All of the students received adaptive physical education three times per week (id. at p. 2).

The special education teacher further testified that her class was highly structured and included individual schedules and workstations to help students build their routines (Tr. p. 84). The teacher testified that students with autism need consistency and that they work best with visuals in an organized environment, enabling them to move throughout the room independently (Tr. p. 85). The teacher described her classroom as "labeled," so that students know where the boundaries are for specific centers (id.). Teaching areas are visible, with physical boundaries in the classroom assisting in defining "centers" in the room, including one for math and another for reading (id.). She testified that "special centers," (where students could go between their times in the academic centers to keep their frustration levels low), addressed computer, listening, sensory,

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<sup>12</sup> Presumably, "R.R." refers to a "readiness" level of instruction and "P.P." refers to a "pre-primary" level of instruction.

<sup>13</sup> The hearing record describes "functional grouping" as smaller groups of students who have been placed together according to their academic profile (Tr. p. 83).

and play skills (*id.*). Some centers were for the special education teacher's 1:1 interaction with students, whereby she worked on skills taken directly from each student's IEP (*id.*). The special education teacher indicated that she takes data specific to behavior and 1:1 math and reading, and then discusses the data with the assistant principal (Tr. pp. 168-69, 193). Social interaction skills were described as specifically addressed during lunch hour and at circle time (Tr. pp. 88-89). The hearing record reflects that students respond verbally if they are able, and they had "visuals" to assist them in choosing an answer if they are not verbal (*id.*). The hearing record further reflects that such a classroom structure is appropriate to meet this student's needs (Tr. pp. 96, 391, 420, 422-23, 451, 454).

The special education teacher testified that she provided daily 1:1 instruction to her students, the duration of which was determined by the students' individual needs, the number of students in the classroom during that time, what the teacher was teaching, and what therapies the student had on a particular day (Tr. pp. 175-78). The special education teacher also provided visual cues, prompting, and reinforcement to students, and she explained at the impartial hearing how she would implement this student's academic management and social management needs as set forth in his IEP (Tr. pp. 90-93, 109-11; *see* Dist. Ex. 3 at pp. 3-4). The special education teacher also testified that she would be able to collaborate with the student's related service providers in implementing many of the goals included in the IEP and after reviewing the goals, she believed that these goals and objectives addressed the student needs as set forth in the IEP (Tr. pp. 12-17, 152-54, 184-90, 199-200; *see* Dist. Ex. 3 at pp. 6-8, 10).

The special education teacher further testified that the paraprofessional assigned to her class was trained in TEACCH and that her responsibilities included taking daily data from workstations, implementing behavior plans, running small groups, helping students follow their daily routines, assisting at mealtimes and during therapy sessions, organizing the classroom, and developing a trusting relationship with the students (Tr. pp. 79-81).

The special education teacher noted that students' need for the generalization of skills was addressed by students working with different people and in different environments in the community (Tr. pp. 178-79). Furthermore, the special education teacher testified that based on the student's IEP, he appeared to have deficits similar to the students in her class, and he would likely fit in academically and socially with the other students and would receive meaningful educational benefits (Tr. pp. 96, 107-08, 118-19, 123, 199; *see* Dist. Ex. 5).

Based on the above, I find that the district's recommended 6:1+1 class would have conferred educational benefits on the student and would have offered the student a FAPE in the LRE.<sup>14</sup> I further note that although an IEP must provide for specialized instruction in the student's areas of need, a CSE is not required to specify methodology on an IEP and the precise teaching methodology to be used by a student's teacher is generally a matter to be left to the teacher (Application of a Child with a Disability, Appeal No. 07-052; Application of a Child with a Disability, Appeal No. 06-022; Application of a Child with a Disability, Appeal No. 05-053;

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<sup>14</sup> The parents assert in their petition that the impartial hearing officer improperly placed the burden on the parents to show that the district's recommended program did not offer the student a FAPE. I am not persuaded that the impartial hearing officer erroneously applied the burden to the parents; however, the evidence contained in the hearing record amply shows that the district offered the student a FAPE.

Application of the Bd. of Educ., Appeal No. 02-047; Application of a Child with a Disability, Appeal No. 02-022; Application of a Child with a Disability, Appeal No. 94-26; Application of a Child with a Disability, Appeal No. 93-46; Matter of a Handicapped Child, 23 Ed. Dep't Rep. 269). The hearing record shows that the student could have received educational benefits from a program that utilized the TEACCH methodology. The assistant principal testified that she found "great success" in using TEACCH as a classroom teacher and seeing it used as an administrator (Tr. p. 210). The special education teacher testified that she has seen the TEACCH methodology help students develop skills such as those skills that the hearing record shows this student needs to develop and as was targeted in his IEP (Tr. pp. 96, 101-02; Dist. Ex. 3 at p. 3; Parent Ex. C at p. 3; IHO Decision at p. 5). I have considered the testimony of the student's Rebecca School teacher who expressed her opinion at the CSE meeting that a 6:1+1 student-to-staff ratio was not appropriate for the student (see Tr. pp. 512, 543). The teacher also testified that she had never visited a 6:1+1 class for students with autism at the district and she did not testify that she was familiar with such a district classroom (Tr. p. 543).<sup>15</sup>

In conclusion, I find that the impartial hearing officer's determination that the district offered the student a FAPE in the LRE for the 2008-09 school year is well supported by the hearing record. The decision is thorough and well reasoned. Having determined that the district offered the student a FAPE in the LRE, I need not reach the issue of whether the Rebecca School was appropriate for the student 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 Student with Disability, Appeal No. 08-158; Application of a Child with a Disability, Appeal No. 05-038).

I have considered the parties' remaining contentions and find that I need not address them in light of my determinations.

**THE APPEAL IS DISMISSED.**

**Dated: Albany, New York  
May 21, 2009**

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**PAUL F. KELLY  
STATE REVIEW OFFICER**

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<sup>15</sup> I also concur with the impartial hearing officer that in this case the absence of a transition plan does not warrant a finding that the recommended 6:1+1 class would not have offered the student a FAPE (IHO Decision at p. 38). In this case, the hearing record shows that the student has been able to adjust to changes in his educational routine including the beginning of instruction at the Rebecca School, the beginning of an after-school ABA program and changes in the providers of that service, and changes in related services personnel (see IHO Decision at p. 38).