



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 09-089

**Application of a STUDENT WITH A DISABILITY, by her parent, 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 and Associates, attorneys for petitioner, Gary S. Mayerson, Esq., of counsel

Michael Best, Special Assistant Corporation Counsel, attorney for respondent, Emily R. Goldman, Esq., of counsel

### DECISION

Petitioner (the parent) appeals from the decision of an impartial hearing officer which denied her request to be reimbursed for the cost of her daughter's privately obtained applied behavioral analysis (ABA) services for the 2008-09 school year. The appeal must be sustained in part.

At the time of the impartial hearing, the student was enrolled in a district collaborative team teaching (CTT)<sup>1</sup> classroom with related services consisting of a full-time 1:1 health paraprofessional, six 30-minute sessions of individual occupational therapy (OT) per week, eight 30-minute sessions of individual physical therapy (PT) per week, and seven 30-minute sessions of individual speech-language therapy per week (Tr. pp. 12-13, 53, 55, 236; Parent Exs. B at p. 1; C

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<sup>1</sup> "Collaborative team teaching," also referred to in State regulation as "integrated co-teaching services," means "the provision of specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students" (8 NYCRR 200.6[g]). School personnel assigned to an integrated co-teaching class shall minimally include a special education teacher and a regular education teacher (8 NYCRR 200.6[g][2]). The Office of Vocational and Educational Services for Individuals with Disabilities issued an April 2008 guidance document entitled "Continuum of Special Education Services for School-Age Students with Disabilities," which further describes integrated co-teaching services (see <http://www.vesid.nysed.gov/specialed/publications/policy/schoolagecontinuum.pdf>).

at pp. 1, 18).<sup>2</sup> The student's March 13, 2008 individualized education program (IEP) constitutes the student's last agreed upon IEP and therefore, is the student's pendency placement during the instant proceeding (Tr. p. 12; Pet. Ex. A).<sup>3</sup> The student's eligibility for special education programs and services as a student with autism is not in dispute in this proceeding (Parent Ex. B at p. 1; see 34 C.F.R. § 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

The hearing record reflects that when the student was three years old, she reportedly received diagnoses of cerebral palsy (CP) and a pervasive developmental disorder-not otherwise specified (PDD-NOS) (Parent Exs. P at p. 1; O at p. 1). The diagnosis of a PDD-NOS was later withdrawn, following the student's receipt of ABA services (Tr. pp. 1098-99; see Parent Ex. P at pp. 1-2). For the 2007-08 school year (kindergarten), the student was classified as a student with an orthopedic impairment (Dist. Ex. 1 at p. 1; see 34 C.F.R. § 300.8[c][8]; 8 NYCRR 200.1[zz][9]). During that time period, the student attended a 12:1 CTT classroom in a district school where she received related services of seven 30-minute sessions of individual speech-language therapy per week, six 30-minute sessions of individual OT per week, and eight 30-minute sessions of individual PT per week (Dist. Ex. 1 at pp. 1, 14; Parent Ex. P at p. 2). The student was also provided with a full-time 1:1 health paraprofessional (Dist. Ex. 1 at p. 14).

On March 13, 2008, the committee on special education (CSE) convened for an annual review of the student's special education program (Parent Ex. C at p. 1). Meeting participants included the parent, the special education teacher of the student's CTT classroom who also acted as district representative, the regular education teacher of the student's CTT classroom, and an occupational therapist (id. at p. 2). As detailed in the March 2008 IEP, the student presented with global delays across all domains, was nonverbal and used an augmentative and alternative communication (AAC) device to communicate her wants and to participate in "morning meeting" (id. at p. 3).<sup>4</sup> The academic performance and learning characteristics section of the March 2008 IEP noted that the student was able to type single words on a paper keyboard and was learning to type on an "Intellikeys keyboard connected to an iMac" computer (id.). The IEP further noted that the student was able to learn to respond independently to some questions through prompting and repetition, but did not demonstrate the ability to answer novel questions (id.). According to the March 2008 IEP, the student possessed a large vocabulary of sight words and by using her AAC device, could identify many nouns by function, feature, and class (id.). Based on teacher observation, the student's instructional level for decoding was reported to be at a kindergarten level and her instructional level for writing was reported to be at a pre-kindergarten level (id.). The March 2008 IEP indicated that it was not possible to assess the student's ability in the remaining instructional areas, including reading comprehension and mathematics, until the student became more proficient at using her AAC device and was able to attend to tasks at a more consistent rate (id. at p. 13). According to the March 2008 IEP, the student had isolated skills and required teacher prompting to participate in all aspects of classroom life including interacting with peers,

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<sup>2</sup> The student was also receiving privately provided ABA services within the student's CTT classroom and at home (Tr. pp. 816-18, 909-10).

<sup>3</sup> For statutory and regulatory provisions pertaining to a child's educational placement during administrative or judicial proceeding, see 20 U.S.C. § 1415(j); Educ. Law § 4404(4)(a); 34 C.F.R. § 300.518; 8 NYCRR 200.5(m).

<sup>4</sup> The hearing record indicates that the student used a dynamic display voice output communication aid (VOCA) (Parent Ex. C at p. 5).

appropriately using her AAC device, attending to instructional tasks, and working with manipulatives (id. at pp. 3, 5).

With regard to the student's social/emotional development, the March 2008 IEP indicated that the student was familiar with classroom routines and transitioned easily (Parent Ex. C at p. 4). According to the March 2008 IEP, the student was in the process of developing eye contact and she acknowledged her peers through laughing or occasionally swiping her hand at them (id.). The March 2008 IEP indicated that the student's behavior required highly intensive supervision, but that a behavioral intervention plan (BIP) had not been developed (id.). The March 2008 IEP detailed the student's health and physical development needs, specifically noting that the student was dependent for all activities of daily living (ADL) skills, ambulation, and transfers (id. at p. 5). According to the March 2008 IEP, the student had a tendency to grind her teeth and mouth objects and her hands (id.).

The March 2008 IEP also described the student's management needs (Parent Ex. C at pp. 3-5). Specifically, the March 2008 IEP indicated that the student responded best to individualized, 1:1 instruction using the procedures of prompting, fading, and reinforcement (id. at p. 3). It further stated that the student attended best when seated in an isolated, quiet area of the room without distractions and responded best when stimuli were varied and presented at a fast pace (id.). The March 2008 IEP noted that a full-time health paraprofessional assisted the student with redirection and prompting and also addressed the student's physical needs throughout the day (id. at p. 4). The March 2008 IEP further stated that the student required an adaptive chair, a "baby sitter" for floor activities, a sit-to-stand stander, and a gait trainer (id. at p. 5).

The March 2008 CSE recommended that the student be classified as having an orthopedic impairment and that she be placed in a CTT class in a community school with related services comprised of six individual 30-minute sessions of OT per week, eight individual 30-minute sessions of PT per week, and seven individual 30-minute sessions of speech-language therapy per week (Parent Ex. C at p. 18). The March 2008 CSE also recommended that the student be provided with a 1:1 health paraprofessional, as well as adapted physical education, assistive technology, and transportation via an air conditioned, wheelchair lift equipped bus (id. at pp. 1, 18). The March 2008 IEP included annual goals targeting the student's ability to establish and maintain eye contact, expand her academic readiness skills, increase her social interaction with peers, expand her reading readiness and good reading behavior, use "Intellikeys" to type responses, expand her mathematical skills, improve gross motor transitions, demonstrate improved gravitational security, improve fine motor skills, improve visual motor perceptual skills, improve gross motor skills, improve and expand expressive and receptive language skills, improve pragmatic language skills, and explore and enhance oral motor skills (id. at pp. 5-15).

In May 2008, the student's CTT teachers met with the parent (Tr. p. 981). The student's special education teacher reportedly indicated that the student was exhibiting "some features of autism" and recommended that the student be evaluated (Tr. p. 983). Furthermore, the parent was advised by the teachers that the student was unable to keep up with the curriculum in the CTT class (Tr. p. 981). The hearing record indicates that although the student had not met the criteria for promotion to first grade, the student was promoted because her teachers did not "see a benefit" in her repeating kindergarten and it was important to keep the student with some of her friends (Tr. pp. 462, 981, 1098).

In response to the teachers' recommendations, the parent obtained a private neurodevelopmental evaluation of the student, which was conducted over two days in June 2008 (Tr. pp. 984-86; Parent Ex. P at pp. 1-2). The evaluation included a physical/neurological examination conducted by a physician and a psychological/developmental evaluation conducted by a psychologist and reviewed on videotape by the physician (Parent Ex. P at pp. 3-4). Based on her examination, the physician reported that the student's graphomotor skills were very limited and her pencil grip was weak (id. at p. 3). Additionally, she noted that the student wore bilateral orthotics and was beginning to take steps with a walker (id.).

The psychological/developmental evaluation performed by the psychologist included formal testing completed at the developmental center and a visit to the student's home (Parent Ex. P at pp. 4-8). The psychologist observed that during the testing session, the student demonstrated very limited visual attention (id. at p. 4). In addition, the student was difficult to orient and needed support and some adaptation to process task demands (id.). The psychologist noted that the student presented with severe motor planning deficits (apraxia) and had difficulty refraining from touching and mouthing objects in a sensory way (id.). The psychologist reported that the student frequently slapped her right cheek in a stereotypical manner (id.). As part of her evaluation, the psychologist commented on the student's abilities with respect to socialization, attention/activity level, play and communication (id. at pp. 4-5). The psychologist described the student as alert and somewhat aware of her surroundings; however, she noted that the student lacked curiosity for toys and the examiner (id. at p. 4). The psychologist commented that the student interacted exclusively with her babysitter and although she was somewhat affectionate with her babysitter, the student expressed a limited range of affect (id.). The psychologist indicated that the student demonstrated joint attention during selected activities (id.). The psychologist characterized the student's play skills as "severely delayed" (id. at p. 5). She reported that the student demonstrated some functional play, but no symbolic play and noted that the student's play was often repetitive and sensory-driven (id.). According to the psychologist, the student was non-verbal and did not use sound to communicate, except for protesting (id.). The psychologist indicated that the student was unable to repeat words; however, she noted that the student did use two signs (id.). According to the psychologist, the student was able to respond to simple commands and to use her spelling board to express her wants or answer questions (id.).

With respect to standardized testing, the psychologist reported that the student's language impairment, difficulty with motor planning, and poor visual attention limited the student's ability to perform on the Stanford-Binet Intelligence Scales-Fifth Edition (SB-5) (Parent Ex. P at p. 5). According to the psychologist, the student was only able to perform selected subtests contained in a standard battery for students her age and therefore, test results should be viewed as an estimation rather than a true representation of the student's cognitive abilities (id.). The psychologist reported that the student attained a test composite score of 40 on the SB-5, indicating an overall cognitive performance in the very low range (id.). The psychologist stated that the student needed support to process demands and that many activities were adapted and presented multiple times to obtain valid scores (id.). The psychologist reported that the student's expressive language skills, as measured by the SB-5, were extremely limited and that the student's receptive language skills, as measured by the Bayley Scales of Infant and Toddler Development-Third Edition (Bayley-III) corresponded to an age equivalent of 18-22 months (id.). The psychologist indicated that, by report, the student could identify objects based on their attribute or function (id.). According to the psychologist, the student's ability to perform non-verbal tasks was in the low range (id. at p.

6). Additionally, based on responses provided by the parent, the student's overall adaptive behavior skills, as measured by the Vineland Adaptive Behavior Scales-Second Edition (VABS-II), were judged to be in the low range (id.).

As noted above, the psychologist's evaluation included a home visit, conducted to further assess the student's written language and academic skills (Parent Ex. P at p. 7). During the home visit, the student engaged in a series of tasks with the parent, while the psychologist observed (id.). In the first task, the student listened to the parent describe a picture in a book and then read a short sentence which corresponded with the picture (id.). The student answered questions about what she read by spelling the word on her communication board (id.). The psychologist noted that the student "passed" many pictures, but needed a lot of support to sustain her focus (id.). On the second task, the student was required to correctly spell the name of a pictured item (id.). The psychologist reported that the student correctly spelled many items and also spelled additional words to request songs (id.). The final task required the student to touch a picture that corresponded to a word spelled by the parent on the student's communication board (id.). The psychologist reported that the student was able to pass some items, but noted that this task required a longer attention span, visual scanning and motor planning and was therefore, more difficult for the student (id.). According to the psychologist, the student consistently matched letters with their appropriate sounds as produced by the evaluator (id.). To further assess the student's academic skills, the psychologist administered the Wechsler Individual Achievement Test-Second Edition (WIAT-II) (id.). The psychologist cautioned that the student's scores were based on adapted procedures and should be seen as an estimate of the student's skills (id.). She noted that the tests demonstrated how the student could perform when given a high degree of structure and appropriate individual attention (id.). According to the psychologist, the student's word reading score on the WIAT-II was "low" with an estimated age equivalent of five years, four months (standard score 77) (id. at pp. 8, 12). The student demonstrated the ability to match pictures with words (reading comprehension), but could not move on to the sentence level (id. at p. 8). The psychologist reported that the student's spelling skills were high average with an estimated age equivalent of seven years, eight months (standard score 117) (id. at pp. 8, 12).<sup>5</sup> She concluded that the student's "written language skills are significantly higher relative to her overall cognitive skills" (id. at p. 8).

Based on their evaluation, the private evaluators recommended, among other things: (1) that the student be enrolled in a special education school that utilized the principles of 1:1 ABA therapy (discrete trials); (2) that the student receive 15-20 hours of 1:1 discrete trials in school; (3) that the student receive 15 hours of 1:1 discrete trial therapy at home, supervised by a board certified behavior analyst (BCBA); (4) that the parent meet two hours per week with the ABA supervisor; (5) that the student receive speech-language therapy five times per week for 60 minutes; (6) that the student receive OT six times per week for 30 minutes; and (7) that the student receive PT eight times per week for 30 minutes (Parent Ex. P at p. 9). The evaluators offered the following diagnoses: a pervasive developmental disorder-autism spectrum, CP; verbal apraxia, and fine/gross/graphomotor deficits (id.).

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<sup>5</sup> In the body of the report, the private psychologist indicated that the student's spelling skills were average; however, a summary of the test scores contained at the end of the report indicated that the student's spelling skills were in the high average range (Parent Ex. P at pp. 8, 12).

In July 2008, the parent sent a letter to the CSE along with a copy of the private neurodevelopmental evaluation, which confirmed that the student had an autism spectrum diagnosis, in addition to CP (Parent Ex. K).<sup>6</sup> In her letter, the parent requested that an IEP meeting be scheduled as soon as possible to discuss the recommendations contained in the private evaluation report (id.). The parent advised the CSE that in the absence of an appropriate program for the 2008-09 school year, she would seek implementation of the private evaluators' recommendations, "to the extent feasible," in addition to reimbursement for those services from the district (id.).

In September 2008, In preparation for the requested CSE meeting, the district prepared teacher and OT reports and conducted an observation of the student in the CTT classroom (Dist. Exs. 2; 3; 4). The school psychologist who conducted the classroom observation, reported that despite intensive intervention the student had made minimal progress (Dist. Ex. 4 at p. 1). She indicated that the student did not appear to be either attentive or involved in a story time activity that took place in the classroom (id.). In addition, although the student was seated with other students during lunch, the school psychologist noted that there was no interaction between the student and others (id.). With respect to reading instruction, the school psychologist reported that it appeared that the student was able to identify the letters of the alphabet and that she had made some sound/symbol connection (id. at p. 2). The school psychologist observed that after "much" redirection, singing of songs to calm the student's anxiety, and encouragement, the student was able to answer a question related to a sentence that the student had read (id. at p. 1). She noted that, in one instance, it was not clear if the student was responding on her own or repeating what the teacher had said (id.). The school psychologist reported that in order for the student to demonstrate knowledge, she needed to point to pictures/words on her computer screen (id. at p. 2). The school psychologist noted that the student's ability to physically point was questionable, and at times, her answers seemed random, as the student rarely looked at what she was pointing to (id.).

The teacher report, dated September 11, 2008, was completed by the student's special and regular education teachers from the CTT classroom (Tr. p. 240; Dist. Ex. 2 at p. 2). The teachers indicated that the student was able to identify more than 100 sight words and had strong spelling skills (Dist. Ex. 2 at p. 1). However, they reported that the student's reading comprehension was impossible to assess due to fleeting motivation and prompt-dependent responses to "wh" questions (id.). The teachers indicated that the student recognized numerals from one to ten, but that the student had not demonstrated an understanding of quantities up to five (id.). In addition, they stated that the student had not demonstrated that she could connect steps in a linear way to be able to participate in math activities (id.). Throughout the report, the teachers noted the student's difficulty attending, lack of independence, and prompt dependency (id.). The teachers indicated that the student's behaviors, skills, and ability to focus had significantly declined since the previous June, as had the student's physical strength (id.). They noted that the student's behaviors were more intense and included "disturbing self-injurious behaviors" (id. at p. 1). According to the teachers, the student did not use her AAC device or keyboard for functional communication (id.

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<sup>6</sup> The hearing record shows that the parent originally sent the letter to the CSE on July 10, 2008; however, the original letter was returned to her as "not deliverable as addressed," and subsequently, the parent sent the letter a second time on July 25, 2008 (Parent Exs. K; J).

at p. 2). Additionally, they opined that the student required a small class setting in a therapeutic classroom (id.). They noted that the only way to induce the student to consistently attend was through the use of songs and singing and that the student needed a high rate of reinforcement to stay on task (id.).

In a related service student progress report dated September 24, 2008, the student's occupational therapists reported that the student was dependent for all transitional movements as she presented with gross motor delays, gravitational insecurity, and cognitive delays (Dist. Ex. 3 at p. 1). According to the therapists, the student had difficulty initiating and participating in most purposeful activities, as well as difficulty with regulation of sensory input (id.). The therapists indicated that the student responded to music and songs which calmed her when she was over-stimulated (id.). According to the therapists, the student had demonstrated some regression in gross motor skills, appeared to be more fearful of transitions and movements requiring moderate to maximum assistance, and appeared to seek more sensory input to calm herself (id.).

On September 24, 2008, the CSE reconvened for the parent's requested review of the student's program (Parent Ex. B at p. 2). Meeting participants included the parent, a district representative, the student's regular and special education teachers from her CTT classroom, the school psychologist who had conducted the September 2008 observation of the student, an additional parent member, a physical therapist, and an occupational therapist (Tr. p. 91; Parent Ex. B at p. 2). According to the CSE members, the meeting focused on determining an appropriate classification for the student (Tr. pp. 92, 94, 442, 461, 517, 992-94, 1107-08). The parent's private neurodevelopmental evaluation was referenced during the course of the discussion (Tr. pp. 997, 1100-01). The September 2008 IEP stated that despite a variety of interventions and adult attention, the student had not demonstrated significant academic or social progress in her CTT classroom to warrant continuation of her current program (Parent Ex. B at p. 4). The September 2008 IEP indicated that the student required a small, highly structured classroom setting with a very high teacher to student ratio in order to provide constant supervision and individualized attention (id.). In addition, the September 2008 IEP indicated that the student required assistance from a health paraprofessional at all times (id. at p. 5). The September 2008 CSE recommended that the student's classification be changed from orthopedic impairment to autism (compare Parent Ex. C at p. 1, with Parent Ex. B at p. 1). The September 2008 CSE further recommended a change in the student's program from a CTT class in a community school with related services to a specialized class in a specialized school with related services (compare Parent Ex. C at p. 1, with Parent Ex. B at p. 1). In addition, the September 2008 CSE recommended the provision of a 1:1 health paraprofessional, six 30-minute sessions of individual OT per week, eight individual 30-minute sessions of PT per week, and seven 30-minute individual speech-language therapy sessions per week (Parent Ex. B at p. 19). The parent indicated that at the CSE meeting she requested that ABA services be added to the student's IEP, but was reportedly told that the district did not put ABA services on IEPs (Tr. pp. 997-98).

Subsequent to the September 2008 CSE meeting, the parent contracted with a private ABA provider to provide home-based ABA services to the student, beginning that month (Tr. pp. 818, 910, 998, 1106). In addition, in October 2008, the parent contracted with a BCBA to set up a home-based ABA program for the student (Tr. pp. 639-40; Parent Ex. O at p. 3).

By final notice of recommendation (FNR) dated October 8, 2008, the district advised the parent of the CSE's September 24, 2008 recommendations and identified a specific district school where the proposed program would be implemented (Parent Ex. I). The October 2008 FNR also advised the parent of her right to discuss the placement recommendation and her right to request another CSE meeting and provided the name, address, and phone number of a contact person at the district (id.).

By due process complaint notice dated October 14, 2008, through her attorney, the parent requested an impartial hearing (Parent Ex. A at p. 1). The parent asserted that both procedurally and substantively, the district failed to offer the student a free appropriate public education (FAPE)<sup>7</sup> for the 2008-09 school year (id.). The parent alleged, among other things: (1) that the district failed to recommend a specific placement for the student at the CSE meeting; (2) that the district failed to properly and timely evaluate the student's present levels of performance; (3) that the district failed to give meaningful consideration to the private evaluation secured by the parent; (4) that the district failed to indicate a staffing ratio for the proposed class; (5) that the district failed to "promote" the student's least restrictive environment (LRE); (6) that the district failed to propose a transition plan to address the district's recommendation that the student enter a program that differed from her then current placement; and (7) that the district failed to recommend extended day services for the student (id. at pp. 1-3). As a remedy, the parent requested reimbursement for placement at the Manhattan School for Children (MSC); special transportation to and from school; 15-20 hours per week of individual ABA services in school; 15 hours per week of home and community-based individual ABA services; five hours per week of individual speech-language therapy utilizing PROMPT, picture exchange communication system (PECS), and oral-motor methodologies; six sessions per week of individual OT; eight sessions per week of individual PT; weekly program development and supervision by a BCBA; weekly team meetings between the student's school and home-based ABA providers; two hours per month of interdisciplinary meetings between all of the student's service providers and two hours per week of individual parent training and counseling for the parent (id. at p. 5).

In a response dated October 15, 2008, the district asserted that the September 24, 2008 CSE's recommended placement was reasonably calculated to enable the student to obtain meaningful educational benefits (Parent Ex. D).

On October 20, 2008, the parent, accompanied by her private BCBA, visited the district's recommended placement listed on the October 2008 FNR (Parent Ex. O at pp. 6-9). By letter dated October 21, 2008 to the district, the parent stated that she was planning on attending the scheduled resolution meeting pertaining to the student and advised that at that time "absent any resolution agreement we might enter into, I am rejecting the proposed District 75 placement as inappropriate

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<sup>7</sup> The term "free appropriate public education" means special education and related services that--  
(A) have been provided at public expense, under public supervision and direction, and without charge;  
(B) meet the standards of the State educational agency;  
(C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and  
(D) are provided in conformity with the individualized education program required under section 1414(d) of this title.  
(20 U.S.C. § 1401[9]; see also 34 C.F.R. § 300.17).

to meet [the student's] needs" (Parent Ex H). In addition, she noted that she continued to invoke the student's rights pursuant to pendency, including placement in the CTT classroom (id.).

On October 23, 2008, a resolution meeting convened (Tr. p. 874). A resolution agreement was drafted indicating that the parties had reached a partial agreement relating to the issues raised in the parent's October 14, 2008 due process complaint notice (Parent Exs. F at p. 2; S at p. 1; see 20 U.S.C. § 1415[f][1][B]; 34 C.F.R. § 300.510; 8 NYCRR 200.5[j][2]). The parties stipulated as follows: (1) that a functional behavioral assessment (FBA) and behavioral intervention plan (BIP) would be conducted within 30 days of the date of the agreement; (2) that a transition meeting would be scheduled once a new placement, agreed upon by the parent, was determined; (3) that the student's IEP would be changed to reflect that the September 2008 CSE recommended a classroom with a 6:1+1 staffing ratio; (4) that a schedule would be developed to allow collaboration at the school between the student's home-based ABA therapist and the classroom teachers; and (5) that the home-based ABA therapist would be allowed to support the student in the classroom with supervision from her supervisor (Parent Ex. F at pp. 2-3). On October 31, 2008, the parent signed the resolution agreement noting that she accepted it "without prejudice to [the student's] rights including pendency and the upcoming [impartial] hearing" (id. at p. 4).

In accordance with the resolution agreement, the parties and the student's ABA therapist and BCBA met on October 31, 2008 to discuss conducting an FBA and developing a BIP for the student (Dist. Ex. 5; Parent Ex O at p. 9).<sup>8, 9</sup> A BIP was later developed (Dist. Ex. 5 at p. 5).<sup>10</sup> Also in accordance with the resolution agreement, at the end of October 2008, the student's home-based ABA therapist began providing ABA services to the student in the student's CTT classroom and the student's IEP was amended to reflect and clarify that the student was recommended by the September 2008 CSE for a special class in a special school with a 6:1+1 staffing ratio (Tr. p. 910; Parent Ex. S at pp. 2, 6).

By notice dated October 28, 2008, the district recommended a second district school for the student to attend (Parent Ex. G). The notice also advised the parent of her right to discuss the placement recommendation and her right to request another CSE meeting and provided the name, address, and phone number of a contact person at the district (id.). By letter dated November 12, 2008, the parent rejected the second school location recommended by the district, noting that it was inappropriate to meet her daughter's needs (Parent Ex. E at p. 1). The parent also "insisted" that the district honor the student's pendency rights (id.).

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<sup>8</sup> The resultant FBA/BIP worksheet from the October 31, 2008 meeting also indicated that a meeting convened on October 23, 2008 (Dist. Ex. 5; see Tr. pp. 869-70).

<sup>9</sup> According to the student's ABA therapist, at the October 31, 2008 meeting, the school psychologist requested that the special education teacher collect data on the student's "outbursts" (Tr. p. 879). The ABA therapist testified at the impartial hearing that she had not seen nor had she been provided with any data collected by the special education teacher or anyone else from the classroom (Tr. pp. 879-80).

<sup>10</sup> The BIP completed on the district's IEP form was dated November 18, 2008 (Dist. Ex. 5 at p. 5). At the impartial hearing, the student's ABA therapist testified that she had not seen the document prior to her testimony on that date (March 23, 2009) (Tr. pp. 869, 877-78). At the impartial hearing, the student's BCBA acknowledged attending a meeting on October 31, 2008 at which time the student's interfering behaviors were discussed, but denied that an FBA was conducted at that meeting (Tr. pp. 657-58, 684-85).

A November 23, 2008 progress report detailed the student's progress in her discrete trial programs (Parent Ex. M).<sup>11</sup> The report indicated that the student demonstrated improvement in responding to her name, receptively identifying body parts, non-verbal imitation, and following one-step commands (*id.* at pp. 1-2). In addition, the student demonstrated improvement in her use of "mands" and her ability to label objects and actions (*id.* at pp. 3-4).

By letter to the district's "Office of Student Enrollment Planning and Operations" dated November 25, 2008, the parent indicated that although she had visited the district's second recommended placement and rejected it, she was interested in visiting the placement again (Parent Ex. U).

On December 3, 2008, an impartial hearing convened, and after six days of testimony, concluded on May 4, 2009 (IHO Decision at pp. 1-2).

On December 11, 2008, the parent again visited the second recommended placement with her BCBA and subsequently rejected it in a letter to the district dated December 16, 2008 (Parent Exs. R; V). The parent once again invoked the student's pendency rights in the December 16, 2008 letter (Parent Ex. R at p. 1).

In January 2009, the student's private ABA provider prepared reports detailing the student's progress in both her school-based and home-based ABA programs (Parent Exs. Y; Z). The reports reflected that the student demonstrated progress on many of her school-based ABA programs between October 2008 and January 2009 (Parent Ex. Y). Additionally, the reports reflected that between November 2008 and January 2009, the student mastered or demonstrated improvement on numerous home-based ABA programs (Parent Exs. X; W; BB).

By order on pendency dated January 12, 2009, the impartial hearing officer noted that the parties agreed that the March 2008 IEP constituted the student's pendency placement and ordered the provision of services consistent with that IEP (Tr. pp. 12, 24-27; Pet. Ex. A). With respect to the merits, by decision dated July 6, 2009, the impartial hearing officer determined that the district's failure to conduct an FBA and to provide parent training and counseling on the student's IEP constituted a failure to offer the student a FAPE (*id.* at pp. 13-14). The impartial hearing officer further determined that although the parent argued that the CTT classroom was appropriate for the student if additional related services in school and at home were provided, she agreed with the district that the CTT classroom was not an appropriate setting for the student and further noted that the student needed a special education setting specifically designed to address the special needs of a student with autism that can also "accommodate her wheelchair needs" (*id.* at p. 14). Without further articulating a basis for her decision, the impartial hearing officer concluded that the services secured by the parent for the student were not appropriate to meet the student's unique special education needs (*id.*). Accordingly, the impartial hearing officer denied the parent's request for reimbursement for the student's ABA services for the 2008-09 school year (*id.*).

The parent appeals and challenges the portion of the impartial hearing officer's decision that denied her request for relief. The parent requests, in part, a finding that the student's placement

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<sup>11</sup> The November 2008 progress report did not indicate whether reported data was collected for home or school-based programs or both (Parent Ex. M).

in the CTT classroom, combined with her related services and 1:1 ABA support, was reasonably calculated to provide the student with meaningful educational benefits. Regarding the student's 1:1 home-based and in-school ABA services, the parent asserts that the student requires ABA services in addition to her placement in the CTT classroom in order to generalize skills learned in school, make meaningful progress, and avoid regression. The parent maintains that the student's CTT classroom combined with her home-based and in-school ABA services, is the only program designed to address the student's autism and CP. The parent further argues that the CTT classroom constitutes the LRE for the student, where the student may interact with typically developing peers as well as with other students with special needs. Next, the parent argues that ABA services meet the student's unique needs. Moreover, the parent contends that the student's home-based ABA services were necessary, in part, to enable the student to develop the skills required to use her augmentative communication device and spelling board, both of which allowed the student to derive meaningful educational benefits from her program. In addition, the parent argues that as a result of her 1:1 ABA services, the student has made good and meaningful progress in her CTT classroom. Lastly, although the parent argues that equitable considerations support her claim for relief, she further alleges that the impartial hearing officer implicitly found her blameworthy for not asking the district to provide additional placement recommendations.

The district submitted an answer, admitting and denying the parent's allegations and requesting that the petition be dismissed in its entirety. First, the district claims that the petition should be dismissed for want of sufficient pleading pursuant to State regulations. Turning to the merits of the instant case, the district does not appeal the impartial hearing officer's determination that the student was denied a FAPE during the 2008-09 school year; however, it argues that the impartial hearing officer correctly determined that the overall program, comprised of the 1:1 ABA services and placement in the CTT classroom, was not appropriate for the student. The district first notes that all of the student's providers and teachers agreed that the CTT classroom was not appropriate for the student. Specifically, the district asserts that the CTT classroom was not appropriate for the following reasons: (1) the student was highly distractible and the classroom was too large and distracting for the student to be able to participate; (2) the student was unable to participate in the general education curriculum and received her own curriculum implemented by her 1:1 ABA provider; (3) the student did not reap any social or academic benefits from the CTT; and (4) the student's interfering behaviors also inhibited her participation in the general education environment. Next, the district maintains that the CTT classroom was not made appropriate for the student's needs by supplementing it with 1:1 ABA services. The district further contends that the 1:1 ABA services delivered to the student in school did not address any portion of the academic curriculum, nor did the ABA services target the student's IEP goals or socialization. With respect to the 1:1 home-based component of the student's private ABA services, the district contends that the parent failed to establish how it was necessary to permit the student to benefit from instruction. Although the district recognizes that there was coordination between the student's in-school and home-based ABA services, the district maintains that there is no evidence indicating that the home-based services were necessary to generalize the student's skills or that they specifically furthered the student's school-based program. The district further contends that contrary to the parent's allegations that the student had difficulty with generalization, those allegations are unsupported by the hearing record. Moreover, the district alleges that the parent has not demonstrated that the student's progress is attributable to the home-based component of the student's program. Lastly, the district argues that the parent's claims with respect to equitable considerations should be rejected.

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 Forest Grove v. T.A., 129 S. Ct. 2484, 2491 [2009]; 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., 553 F.3d 165, 172 [2d Cir. 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 P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at \*15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the 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 Newington, 546 F.3d at 114; 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, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

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]; 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).

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 law 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).

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).

Turning to the instant matter, I initially note that neither party appeals that part of the impartial hearing officer's decision wherein she determined that during the 2008-09 school year, the district failed to offer a FAPE to the student. An impartial hearing officer's decision is final and binding upon the parties unless appealed to a State Review Officer (34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[j][v][5]). Consequently, the impartial hearing officer's determination that the district failed to offer the student a FAPE is final and binding upon the parties (see Application of a Student with a Disability, Appeal No. 08-046; Application of the Dep't of Educ., Appeal No. 08-025; Application of a Child with a Disability, Appeal No. 07-050; Application of a Child with a Disability, Appeal No. 07-026; Application of a Child Suspected of Having a Disability, Appeal No. 06-092; Application of a Child with a Disability, Appeal No. 06-085; Application of a Child with a Disability, Appeal No. 04-024; Application of a Child with a Disability, Appeal No. 03-108; Application of a Child with a Disability, Appeal No. 02-100). Notwithstanding the above-determination, under the circumstances presented in the instant case, pursuant to the student's

March 2008 IEP, the CTT classroom combined with related services<sup>12</sup> constitutes the student's placement for the purposes of pendency (Tr. p. 12). The hearing record suggests that the district has met its pendency obligation toward the student.

The parent asserts that the student's placement and program in a CTT classroom with related services and in-school and home-based ABA support services were reasonably calculated to provide the student with meaningful educational benefits and did, in fact, provide the student with meaningful benefits for the 2008-09 school year. In response, the district argues that its staff, as well as the student's private providers, agreed that the CTT classroom was inappropriate for the student. The impartial hearing officer concurred with the district that the CTT classroom was not an appropriate setting for the student based upon the student's level of cognitive functioning and the recommendations made by the parent's private evaluators (IHO Decision at p. 14). For the following reasons, I concur with the impartial hearing officer's conclusion that the CTT class was not an appropriate placement for the student for the 2008-09 school year.

The hearing record indicates that the student attended a CTT class for kindergarten (2007-08 school year) and that she had the same regular and special education teachers for first grade (2008-09 school year) (Tr. p. 238). The CTT class was described by district staff as a class for "cognitively typical" students with motor impairments (Tr. pp. 95, 115, 349, 481, 540). According to district staff, students enrolled in the CTT class were expected to participate in the grade-level curriculum (Tr. pp. 117, 349, 367-68, 380, 540, 542). At the impartial hearing, each of the district's witnesses provided detailed testimony regarding why they believed the CTT class was an inappropriate placement for the student. The student's regular education teacher testified that toward the end of the student's kindergarten year, the teachers were concerned with the student's lack of progress, and as a result, they recommended further evaluation of the student (Tr. pp. 243-44, 451). The regular education teacher testified that the student did not communicate independently with her peers and was easily distracted (Tr. pp. 251-52). She further testified that the student exhibited interfering behaviors, which included loud screaming, extending her limbs and spontaneous laughing (Tr. p. 251). According to the teacher, the student had difficulty with following the morning meeting routines, and required the support of her paraprofessional and the teacher, including physical prompting to look at and greet classmates (Tr. p. 252). With respect to academics, the teacher described the student's reading skills as "pre-emergent" and reported that the student's math skills were at a "pre-K" level; however, she noted that the teachers could not fully assess the student, because the student could not fully attend (Tr. p. 262). As a result, the regular education teacher opined that the CTT classroom was not appropriate for the student, because she could not participate in any of the curriculum or perform in any of the assessments that were given to her (Tr. p. 278). According to the regular education teacher, in the inclusive CTT setting teachers ask that students be able to do academics on their own and follow along cognitively, which was difficult for the student to do (id.).

The special education teacher also testified that the student was unable to keep up with a first grade curriculum (Tr. pp. 452-53). She reported that based on what the student had

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<sup>12</sup> The related services consisted of seven 30-minute sessions of individual speech-language therapy per week, six 30-minute sessions of individual OT per week, and eight 30-minute sessions of individual PT per week (Dist. Ex. 1 at pp. 1, 14; Parent Ex. P at p. 2). The student was also provided with a full-time 1:1 health paraprofessional (Dist. Ex. 1 at p. 14).

demonstrated to the teachers, she was "far below" the other students and her academic skills were at a pre-emergent level, except for spelling (Tr. p. 621). The special education teacher noted that although the student sometimes engaged in activities that paralleled those of her classmates, the student had a "separate" curriculum from the other students enrolled in the CTT class (Tr. pp. 453, 455-56, 485; see Tr. pp. 574, 578, 583, 593-94). According to the special education teacher, the student did not interact with her peers and only interacted with adults when they were making an effort to engage her or elicit a response (Tr. p. 550). The special education teacher testified that the noise level and movement in the CTT classroom were very distracting to the student (Tr. p. 578). She further reported that despite the teachers' efforts, the student was not picking up things incidentally, was not picking up daily routines and there was no "eye gaze" between the student and adults or peers (Tr. p. 530). The special education teacher opined that the student could not be compared to her classmates in the CTT classroom because she had such a different mode of learning and a different repertoire of skills (Tr. pp. 529, 531, 621).

The special education teacher further testified that she did not think the curriculum in the CTT classroom could be adapted for the student (Tr. p. 534). She opined that to do so would involve "pushing her [the student] through a curriculum that probably [would have had] very little meaning for her" (id.). The special education teacher further testified that the student needed to work on "very small stepping stones," such as attention to task, joint attention, and shortening her response time (id.).

The assistant principal of the student's school testified that there were concerns that the district's CTT program was not meeting the student's needs, and that it was not the best setting for the student (Tr. p. 351). Moreover, given that the parent's private evaluation revealed that the student was performing at such low cognitive levels, the assistant principal testified that the September 2008 CSE deemed the student not appropriate for the CTT program because it determined that the student needed much more support than the CTT program could provide (Tr. pp. 377, 387, 428). According to the assistant principal, extensive modifications had been made to the student's program which the assistant principal described as "a lot of one-on-one work" (Tr. p. 384). The assistant principal also noted that regardless of the modifications made to the student's program, and despite the number of individual therapies provided to her, the student had made little, if any, progress and there were concerns that the student might be regressing (Tr. pp. 379, 400, 409-10).

The district's school psychologist testified that according to the parent's private neurodevelopmental report, the student was functioning in the moderate range of mental retardation and she further noted that the student could not keep pace with the general education population (Tr. p. 96). The psychologist further reflected that she had not seen a significant improvement in the student from the previous year (Tr. p. 96). Regarding the student's progress, the psychologist reported that it had taken two years to get the student to establish minimal eye contact and to increase the student's awareness of another student near her (Tr. p. 191). Additionally, the psychologist testified that the student was not connecting socially with the other students in the class (Tr. p. 97). The psychologist further opined that the student's "autistic overlay," prevented the student from "benefiting from the relatedness of working with other students" (id.). According to the psychologist, the demands in the classroom were great and the student's social/emotional and academic needs were not being met (Tr. pp. 158-59). The psychologist stated that the CTT program was not designed to meet the student's needs, and

although the district had tried to "patchwork" the program to provide as much service as necessary help the student, the psychologist indicated that it "really w[as] not appropriate" (Tr. p. 204; see Tr. pp. 212, 222). The psychologist opined that while the addition of a behavioral consultant might improve the student's eye contact or further promote her peer relationships, such a modification would not enable the student to function in a CTT class "close to criteria" and would not meet the student's needs (Tr. p. 192).

Consistent with the testimony of district witnesses, the parent's BCBA testified that the CTT class was not an appropriate placement for the student (Tr. pp. 713, 719). The BCBA stated the district "felt that [the student] was incorrectly placed in a CTT class and I believe we're all in agreement" (Tr. p. 653). The BCBA agreed with the recommendations made by the parent's private evaluators, specifically that the student should be enrolled in a special education school that utilized the principles of 1:1 ABA therapy (discrete trials) (Tr. pp. 725-30).

As detailed above, despite the modifications made to the student's CTT program, the hearing record demonstrates that the student was not able to adequately participate in the curriculum, that the CTT class was not reasonably calculated to confer educational benefits on the student, and that it did not confer sufficient educational benefits. Under the circumstances, I am constrained to agree with the impartial hearing officer's conclusion that the CTT classroom was not appropriate to meet the student's academic or social/emotional needs.

Notwithstanding the conclusion that the student's placement in the CTT classroom was not an appropriate placement for the 2008-09 school year, the hearing record herein supports reimbursement for the privately obtained ABA services, particularly where the private services were necessary, designed to, and did confer, educational benefits.<sup>13</sup>

The hearing record shows that the parent hired a "certified" ABA provider and a BCBA to develop and implement an ABA program for the student during the 2008-09 school year (Tr. pp. 638-40, 675-76, 816-18, 909-10). Per the parties' October 2008 resolution agreement, the district agreed that the student's private ABA provider could deliver the ABA services within the district's CTT classroom (Parent Ex. S at p. 2). The BCBA identified through testimony and progress reports contained in the hearing record the various programs that she had written for the student that included number discrimination, spelling, identifying actions, discriminating objects and pictures, improving eye contact, learning to self regulate, and learning to request things appropriately (Tr. pp. 662-63; see Parent Exs. M; Y; Z). I note that the skills targeted by the private ABA providers were in many instances consistent with the goals and objectives contained in the student's September 2008 IEP (compare Parent Ex. B at pp. 7-11, 13, with Parent Exs. M; Y; Z). The BCBA also testified that the private ABA providers were trying to teach the student the prerequisite skills, such as sorting by category, which were essential for the successful use of a verbal output device (Tr. p. 666). According to the BCBA, data taken by the ABA provider indicated that the student was making extremely good progress (Tr. p. 664; see Parent Exs. M; Y; Z). The BCBA testified that since September 2008, the student's counting skills had improved, as had her ability to visually attend to stimuli (Tr. pp. 704-05). In addition, the student's nonverbal imitation skills and ability to identify

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<sup>13</sup> I also note that the district had consented to the delivery of such services within its classroom.

body parts had improved (Tr. p. 704). The student's ABA provider testified that initially she needed to address the student's interfering behaviors and noncompliance (Tr. pp. 819-22). She detailed how the student's inability to touch something because of her CP differed from the student making an incorrect choice or being noncompliant (Tr. pp. 821-22). The ABA provider identified the skills she was working on with the student and how she used discrete trials to teach the student (Tr. pp. 823-25, 855-61). According to the student's ABA provider, the student had made significant progress throughout the time the provider had worked with her (Tr. p. 904). Progress notes entered into evidence by the parent confirmed that the student was making progress in her ABA programs (Parent Exs. M; Y; Z).

In addition to the student's private ABA providers, the student's special education teacher in the CTT classroom who had prior experience providing ABA services, agreed that ABA support was necessary and appropriate for the student (Tr. pp. 462, 486, 488, 582; see Tr. p. 1105). The special education teacher confirmed that at school the student's ABA provider was working 1:1 with her, providing her with ABA support, and that this support was helpful for the student in the classroom (Tr. pp. 488-89). The special education teacher noted that the student had "developed" eye contact (Tr. p. 489). The student's regular education teacher also noted that as a result of the 1:1 ABA support, the student was calmer and that the student's eye gaze had improved (Tr. p. 305).

The final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; M.C. v. Voluntown, 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]; see also Application of a Child with A Disability, Appeal No. 06-042). With respect to equitable considerations, the IDEA also provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; see A.H. v. New York City Dep't of Educ., 2009 WL 2602256, at \*12-\*13 [E.D.N.Y., Aug. 21, 2009]; S.W. v. New York City Dep't of Educ., 2009 WL 857549, at \*13-14 [S.D.N.Y. March 30, 2009]; Thies v. New York City Bd. of Educ., 2008 WL 344728 [S.D.N.Y. Feb. 4, 2008]; M.V. v. Shenendehowa Cent. Sch. Dist., 2008 WL 53181, at \*5 [N.D.N.Y. Jan. 2, 2008]; Bettinger v. New York City Bd. of Educ., 2007 WL 4208560, at \*4 [S.D.N.Y. Nov. 20, 2007]; Carmel Cent. Sch. Dist. v. V.P., 373 F. Supp. 2d 402, 417-18 [S.D.N.Y. 2005], aff'd, 2006 WL 2335140 [2d Cir. Aug. 9, 2006]; Werner v. Clarkstown Cent. Sch. Dist., 363 F. Supp. 2d 656, 660-61 [S.D.N.Y. 2005]; see also Voluntown, 226 F.3d at n.9; Wolfe v. Taconic Hills Cent. Sch. Dist., 167 F. Supp. 2d 530, 533 [N.D.N.Y. 2001]; Application of the Dep't of Educ., Appeal No. 07-079; Application of the Dep't of Educ., Appeal No. 07-032).

The IDEA allows that reimbursement may be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent CSE meeting prior to removing the student from public school, or by written notice ten business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 C.F.R. § 300.148[d][1]). This statutory

provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). Although a reduction in reimbursement is discretionary, courts have upheld the denial of reimbursement in cases where it was shown that parents failed to comply with this statutory provision (Greenland, 358 F.3d at 160; Ms. M. v. Portland Sch. Comm., 360 F.3d 267 [1st Cir. 2004]; Berger v. Medina City Sch. Dist., 348 F.3d 513, 523-24 [6th Cir. 2003]; Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 27 [1st Cir. 2002]); see Frank G. v. Bd. of Educ., 459 F.3d 356, 376 [2d Cir. 2006]; Voluntown, 226 F.3d at 68; Lauren V. v. Colonial Sch. Dist.; 2007 WL 3085854, at \* 13 [E.D. Pa. Oct. 22, 2007]).

In the instant case, with respect to the equities, the district does not argue on appeal that equitable considerations preclude an award of reimbursement for the student's privately obtained 1:1 ABA services for the student for the 2008-09 school year, therefore, this argument is waived.

I have considered the parties' remaining contentions and find that they are without merit or that it is not necessary to consider them in light of my determinations herein.

Lastly, I remind the district of its affirmative obligation to offer the student a FAPE. I concur with the impartial hearing officer that this student needs a special education setting that is designed specifically to address her special education needs and that can accommodate her physical limitations.

**THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.**

**IT IS ORDERED** that the impartial hearing officer's determination is annulled to the extent that she denied the parent's request for reimbursement for the private ABA services; and

**IT IS FURTHER ORDERED** that upon submission of proof of payment, the district shall reimburse the parent for the costs of the private 1:1 ABA services for the 2008-09 school year; and

**IT IS FURTHER ORDERED**, unless the parties otherwise agree, that the district shall convene a CSE meeting within 30 days from the date of this decision and offer the student an appropriate and physically accessible program in the LRE.

**Dated:** Albany, New York  
October 19, 2009

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