



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 09-092

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

#### **Appearances:**

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

Law Offices of Michelle Kule-Kurgood, attorneys for the respondents, Tamara J. Roff, Esq., of counsel

#### **DECISION**

Petitioner (the district) appeals from the decision of an impartial hearing officer which found that it failed to offer an appropriate educational program to respondents' (the parents') son and ordered it to reimburse the parents for their son's tuition costs at the Brooklyn Autism Center Academy (BAC) for the 2008-09 school year. The appeal must be sustained.

At the time of the impartial hearing, the student was attending BAC, a school not approved by the Commissioner of Education as a school with which school districts may contract to instruct students with disabilities (Tr. p. 82; see 8 NYCRR 200.1 [d], 200.7). The student was also receiving related services, funded by the district, through related service authorizations (RSAs), that included: (1) three 45-minute sessions of 1:1 occupational therapy (OT) per week; (2) three 30-minute sessions of speech-language therapy in a group of three and two 30-minute 1:1 speech-language therapy sessions per week at school; (3) three 50-minute home-based 1:1 sessions of speech-language therapy; and (4) five hours of home-based 1:1 special education teacher support services (SETSS) per week (Tr. p. 422; Dist. Ex. 8 at p. 16).<sup>1, 2</sup> The student exhibits self-stimulatory behaviors that include making sounds, placing his hands in his mouth, pulling on his teeth and twisting his fingers, and the hearing record reveals that he requires full-time 1:1

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<sup>1</sup> The parents do not assert that the district's recommendation for and provision of OT, and speech-language therapy at the private school and the district's recommendation for and provision of home-based 1:1 speech-language therapy and SETSS are inappropriate.

<sup>2</sup> The hearing record demonstrates that the student received four hours of home-based SETSS and one hour of in-school delivery of SETSS (Parent Ex. D at p. 1).

assistance to redirect these interfering behaviors in order to participate in both instructional and non-instructional activities (Tr. p. 24; Dist. Ex. 14 at p. 1). The student has demonstrated deficits in reading and math (Dist. Ex. 8 at p. 3) and has severe deficits in receptive, expressive and pragmatic language, as well as articulation difficulties in conjunction with a lateral lisp and oral motor weaknesses (Dist. Ex. 15 at p. 1). The student also has reportedly demonstrated fine motor deficits in graphomotor skills and dressing skills (Dist. Ex. 18 at p. 1). His eligibility to receive special education programs and services as a student with autism is not in dispute on appeal (Dist. Ex. 8 at p. 1; see 34 C.F.R. § 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

The student first received a diagnosis of a pervasive developmental disorder, not otherwise specified [PDD-NOS] when he was approximately three years old and attending a special education school called "ICCD" (Tr. pp. 397-98). The student's mother testified that the student was not making progress at ICCD, and she subsequently confirmed that her son had a diagnosis of a PDD-NOS (Tr. p. 398). The student's mother obtained "intensive" applied behavioral analysis (ABA) services for the student, and the student subsequently received 30 hours of home-based ABA instruction at district expense (Tr. pp. 398-99). When the student was four years old, per the recommendation of one of his therapists, the parents placed the student in a typical preschool twice per week accompanied by his home-based ABA provider where he continued through his kindergarten year (Tr. pp. 399-400). For his first grade year, the parents enrolled the student at a private school, where he remained for three months; however, the student's mother testified that the program offered at that school "didn't really work out for him" (Tr. p. 401). According to the student's mother, the student was imitating the other children enrolled in the private school, and the school did not have a behavior plan for the student (*id.*). Consequently, the student's mother removed him from that school (Tr. p. 402). After the student left the first private school, he was at home until April 2007, when the student's mother enrolled him in a district collaborative team teaching (CTT) program where he also received paraprofessional services (Tr. pp. 402, 404-06).<sup>3,4</sup> For the 2007-08 school year, the student remained in the district's CTT classroom; however, the student's mother indicated that she did not think the student would be able to continue in a "typical environment for third grade," and as a result, the student's mother began to research other programs (Tr. p. 407).

The hearing record indicates that on January 16, 2008, an individualized education program (IEP) was developed for the student (Dist. Ex. 13 at p. 1).<sup>5</sup> On April 17, 2008, the district developed an interim service plan (ISP) and recommended an interim program for the student that included a "CTT/special class-part time/related services" and the provision of 12-month SETSS,

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<sup>3</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>).

<sup>4</sup> The hearing record does not indicate whether the student received any services while he was at home. Additionally, although the student's paraprofessional in the CTT was the same provider who had worked with the student when he was in the private school, the hearing record does not indicate whether she was paid by the district or privately by the parents for her paraprofessional services in the CTT.

<sup>5</sup> The January 16, 2008 IEP was not made part of the hearing record; however, it is referenced in a subsequent April 17, 2008 interim service plan (ISP) that was developed by the district (Dist. Ex. 13 at p. 1).

related services, and paraprofessional services (id.).<sup>6</sup> The projected date of the initiation of the recommended services was indicated as "ASAP" (id.). The April 2008 ISP indicated that according to an IEP dated January 16, 2008, the student was classified as a student with autism (id.). The April 2008 ISP also stated that the student was recommended to receive the following testing modifications: tests to be taken in a separate location, extended time (1.5), and questions to be read/answered/recorded (id. at p. 2).

By final notice of recommendation for interim placement dated April 24, 2008, the committee on special education (CSE) recommended a specific district school for the student (Dist. Ex. 12). The April 24, 2008 letter indicated that the student would be placed in a 12:1 CTT classroom with a behavior management paraprofessional (id.). Related service recommendations included three in-school 1:1 45-minute sessions of OT per week, two in-school 1:1 30-minute sessions of speech-language therapy per week, three in-school 30-minute sessions of speech-language therapy provided in a group of three per week, three home-based 1:1 50-minute sessions of speech-language therapy per week, and five 60-minute 1:1 home-based sessions of SETSS (id.).

On May 9, 2008, a district school psychologist attempted to conduct a psychoeducational evaluation of the student (Dist. Ex. 14). According to the evaluator, the student was being reevaluated per the request of the parents and the CSE to determine whether the student's special education services were appropriate for him at that time (id. at p. 1). The evaluator reported that the student did not make eye contact, exhibited "extreme stimming" behaviors, including placing his hands in his mouth, pulling on his teeth, twisting his fingers, and exhibiting "verbal sounds" (id.). Although the evaluator initially believed that the student lacked verbal language ability, the student began to use one-word utterances and short phrases that were unrelated to test questions shortly after the evaluation was initiated (id.). The evaluator observed that the student did not appear aware of the examiner until the student was leaving the room, when the student hugged the evaluator (id.). The evaluator reported that educational and cognitive testing had been attempted; however, within minutes, the evaluator determined that the student did not understand the directions and/or could not comply with any of them, or respond to any questions and that the student was becoming angry and frustrated (id.). As a result, the evaluator terminated the evaluation (id.). Since no formal tests scores were obtained, the evaluator subsequently observed the student in his classroom during "circle time" (id.). According to the evaluator, although accompanied by his paraprofessional, the student did not seem to be attending to the story (id.). The evaluator further reported that the paraprofessional's attempts to focus the student and reduce the student's self-stimulatory behaviors were unsuccessful (id. at pp. 1-2). Further observation of the student during a speech-language therapy session revealed behavior similar to that which was previously noted during circle time, although the evaluator described the student as "somewhat more responsive" during his speech-language therapy session (id. at p. 2). The student's speech-language therapist and the student's paraprofessional reported to the evaluator that the student was usually more compliant and responsive and that the behavior that the evaluator observed was not typical for the student (id.). However, the speech-language therapist and the student's paraprofessional advised the evaluator that the student was not able to respond to abstract questions and performed better with rote material (id.). The evaluator recommended that the student would benefit from a small 6:1+1 class where he could receive more individualized, therapeutic

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<sup>6</sup> Although the April 2008 ISP indicated that the district's school psychologist, one of the parents, and the parents' attorney participated in the April 2008 ISP meeting, it is not clear from the ISP who else took part in the meeting and what role they played in developing the April 2008 ISP (Dist. Ex. 13 at p. 2). Furthermore, the document is illegible with regard to the recommendation of related services, as well as the district's rationale for the student's interim placement recommendation (id.).

instruction (id.). Lastly, she opined that the student required staff and instructors who specialized in working with autistic children in order to "develop academically and socially closer to his potential" (id.).

In a May 11, 2008 related service progress report, one of the student's speech-language pathologists indicated that the student had a severe receptive, expressive and pragmatic language disorder, which was secondary to a diagnosis of a pervasive developmental delay (Dist. Ex. 15 at p. 1).<sup>7</sup> The speech-language pathologist also noted that the student exhibited oral and verbal apraxia, severe articulation difficulties, a lateral lisp, and oral motor weakness (id.). Additionally, the speech-language pathologist reported that the student exhibited self-stimulatory behaviors which affected his attention to task and impeded the learning process (id.). According to the speech-language pathologist, the student had made "tremendous progress in all areas" (id.). The pathologist indicated that the student's speech-language therapy goals had focused on his speech and oral motor difficulties (id.). The pathologist also indicated that the student's articulatory precision was also a target and that the student's motor planning delays were becoming increasingly evident (id. at p. 2). The pathologist stated that the "PROMPT" technique was employed in speech-language therapy sessions to target motor planning difficulties by providing the student with the necessary tactile, auditory, kinesthetic, and visual cues to facilitate improved speech production (id.).<sup>8</sup> The pathologist reported that the student's ability to retell a story was a "major goal" in the student's therapy sessions and that the therapist utilized the Lindamood-Bell Visualizing and Verbalizing program with the student (id.). The pathologist further noted that the student's self-stimulatory behaviors had decreased through the use of techniques such as deep sensory work, redirection, and differential reinforcement of other behaviors (DRO) (id.). The speech-language pathologist's recommendations included continued twice weekly 60-minute sessions of home-based speech-language therapy and three 60-minute in-school sessions of speech-language therapy utilizing PROMPT and oral motor techniques (id.).

On May 16, 2008, the student's special education teacher completed a "Pupil Information Form" for the school based support team (SBST) regarding the student's ability to function in the second grade classroom (Parent Ex. H). The student's special education teacher described the student's academic achievement as "below class level," and further indicated that the student's reading skills were at an early first grade level and that his math skills were at a late kindergarten level (id.). According to the special education teacher, the student worked best in a 1:1 situation, and although she noted that the student could sit with the class, the special education teacher stated that the student typically needed redirection (id.). The special education teacher also reported that the student benefited from behavior modification to control his behaviors (id.). The special education teacher reported that the student greeted adults with a smile and a "hello," and that the student spoke with his peers (id.). She added that the student played tag with his classmates at lunch (id.). Lastly, the special education teacher indicated that although the student was encouraged to talk with classmates at snack and at recess, he sometimes preferred to be alone (id.).

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<sup>7</sup> The hearing record reveals that the author of the May 2008 related service progress report was the student's home-based speech-language provider (Dist. Ex. 15 at pp. 1-2).

<sup>8</sup> Although not indicated in the hearing record, it is presumed that "PROMPT" stands for "Prompts for Restructuring Oral Muscular Phonetic Targets." According to the related service progress report, the PROMPT technique is a tactually-based approach using tactile and kinesthetic cues to provide proprioceptive input to the oral musculature (Dist. Ex. 15 at p. 2).

In a May 19, 2008 service provider report, the student's speech-language provider noted that the student usually responded to simple questions with one-word utterances (Dist. Ex. 17).<sup>9</sup> Without verbal prompts, the therapist noted that the student rarely initiated conversations (*id.*). Although inconsistently, the therapist reported that the student would, at times, utter a rote phrase (*id.*). The therapist further noted that the student displayed many articulation errors, which made him difficult to understand (*id.*). She characterized the student's receptive language skills as "much better" than his expressive language skills, further noting that his receptive vocabulary was better than his expressive vocabulary (*id.*). The therapist also indicated that the student's behavior hindered his progress during speech-language therapy sessions and that the student "had a constant monologue going on" (*id.*). She further described him as difficult to focus and keep on task (*id.*). The therapist noted that she had difficulty assessing the student's language skills due, in part, to his behaviors (*id.*). Lastly, the speech-language therapist concluded that the student needed to continue to receive speech-language therapy to address his many deficits (*id.*). Although she noted that the student had been receiving speech-language therapy services consisting of three 30-minute sessions per week in a group of three and two 30-minute 1:1 sessions per week, the therapist recommended that the student's speech-language services be modified to three 1:1 sessions per week and two sessions in a group of two per week (*id.*).<sup>10</sup>

In a service provider report also dated May 19, 2008, the student's occupational therapist noted that the student had shown some improvement in pencil pressure and erasing (Dist. Ex. 18). However, the occupational therapist indicated that the student continued to exhibit poor letter formation, sizing, and spacing of letters and words (*id.*). Although the student continued to require verbal cues and at times, visual cues, the student had demonstrated improvement in his ability to color (*id.*). The occupational therapist also noted that the student exhibited difficulty with fine motor tasks and that the student had difficulty manipulating buttons and snaps in addition to tying his shoes (*id.*). She recommended that the student continue to receive three 1:1 45-minute sessions of OT per week (*id.*).

On May 20, 2008, the parents entered into an enrollment contract with BAC for the 2008-09 school year (Parent Ex. G).

In a June 1, 2008 report, the student's SETSS provider indicated that the student continued to enjoy video games and time with his family (Parent Ex. D at p. 1). According to the SETSS provider, without consistent prompts, the student was requesting and participating in more social activities (*id.*). She further reported that although the student was able to fluently greet others appropriately, and that he was aware of others and appeared interested in initiating interactions with adults as well as peers, he still required modeling and prompting to initiate and maintain social exchange, including initiating and reciprocating questions and answers (*id.* at pp. 1-2). The SETSS provider noted that the student's ability to sustain his attention and appropriate participation had increased (*id.* at p. 2). She added that the games in which he participated required a higher level of thinking and more specific directions, and that although the student continued to require modeling and prompts to guide the activity, his interest had become more apparent (*id.*).

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<sup>9</sup> The May 19, 2008 service provider's report was prepared by a different speech-language provider than the speech-language provider who completed the May 11, 2008 progress report (compare Dist. Ex. 15, with Dist. Ex. 17).

<sup>10</sup> The speech-language therapist did not indicate her recommendation for the duration of the speech-language therapy sessions (Dist. Ex. 17).

With regard to the student's language, despite some progress, the SETSS provider described the student's language as inconsistent (Parent Ex. D at p. 2). She further indicated that the student's response time was quicker and at times more detailed than a vague "yes" or "no" answer (id.). Redirection was almost always required in order for the student to fully participate; however, the SETSS provider stated that on some days and in certain environments, the student would spontaneously comment to others, initiate social exchanges, maintain conversations and/or conclude his thoughts and ideas (id.). According to the SETSS provider, the student verbally engaged with her and with his family (id.). She added that with modeling and prompting, the student was becoming better able to explain himself when trying to clarify a miscommunication (id.). The SETSS provider also characterized the student's interfering behaviors as "inconsistent," noting that the student continued to engage in self-stimulatory behavior and that he required redirection to remain on task, but to a lesser extent than before (id.). She indicated that the student's home-based SETSS sessions remained focused on providing high levels of reinforcement for appropriate behavior, structuring the student's environment with appropriate expectations, and teaching him language skills to replace inappropriate behaviors, while increasing the student's choices to enable him to lead a more independent and appropriate lifestyle (id.).

With respect to the student's academic skills, the SETSS provider reported that, as evidenced through qualitative and quantitative data collected in his home and school programs, the student had made significant strides and progress (Parent Ex. D at p. 2). According to the SETSS provider, the student's writing had become much more legible and she further reported that the student enjoyed writing and often requested tasks that included spelling (id.). Although the SETSS provider stated that the student had become more independent in answering basic mathematical questions, she further indicated that the student's math abilities remained below grade level (id.). With respect to the student's reading skills, the SETSS provider noted that they remained consistent (id.). Academically and organizationally, the student continued to require modeling, prompting, and a wide range of varied reinforcement and differentiated instruction to be successful and participate in his education (id. at p. 3). The SETSS provider indicated that the student's "educational team" would convene and modify a summer program, noting that "this [wa]s a prime opportunity for [the student] to attain skills and utilize them in varied environments" (id.). She expected that the student would make sufficient progress as he would have consistent intense 1:1 instruction (id.). In conclusion, the SETSS provider reported that the student had progressed in various developmental areas and she recommended the continuation of home-based SETSS to address the student's needs in behavior, social skills, language skills, and academics (id.).

On June 4, 2008, the student's mother signed a declination letter to the CSE chairperson, in which she declined the participation of an additional parent member during the CSE meeting (Dist. Ex. 9). Also on June 4, 2008, the CSE convened to develop the student's program for the 2008-09 school year (third grade) (Dist. Exs. 8 at p. 1; 10). The student's mother, his private behavioral consultant, a district school psychologist, the student's regular and special education teachers from his CTT class, his occupational therapist, and his speech-language therapist participated in the June 2008 CSE meeting (Dist. Ex. 8 at p. 2). The June 2008 CSE deemed the student to be eligible for special education services as a student with autism and recommended a 12-month program consisting of a 6:1+1 special class in a specialized school (id. at pp. 1-2). Related services recommendations included the provision of a full-time 1:1 behavior management paraprofessional, three 45-minute sessions of 1:1 OT per week, two 30-minute sessions of 1:1 speech-language therapy per week, and three 30-minute speech-language therapy sessions per week provided in a group of three (id. at p. 16). The June 2008 CSE also recommended home-based services comprised of three 50-minute sessions of 1:1 speech-language therapy per week and five 60-minute sessions of 1:1 SETSS per week (id.). Based on "TC" assessments, a writing

portfolio, spelling assessments and informal observations, the academic performance and learning characteristics portion of the June 2008 IEP indicated that the student was reading on a middle kindergarten/early first grade level (*id.* at p. 3).<sup>11</sup> Specifically, the June 2008 IEP reflected that the student was able to read "A/B level" books independently, but that he had difficulty with novel "C/D level" books (*id.*). According to the June 2008 IEP, the student required adult support for fluency when reading C/D level books (*id.*). The June 2008 IEP stated that the student could answer simple "what" questions based on the characters' actions and other details in a story, but that he had difficulty with "how" and "why" questions (*id.*). The student's math skills were also described in the June 2008 IEP as being at approximately the beginning first grade level, and the June 2008 IEP further reflected that the student could count using 1:1 correspondence for small groups of objects (*id.*). The June 2008 IEP also noted that the student was starting to recognize coins and name their value and that he could also distinguish between "more" and "less" if he was provided with visuals or by counting both groups to compare (*id.*). With regard to the student's present levels of speech-language performance, the June 2008 IEP reflected that the student had difficulty attending to task and needed to be constantly refocused during speech-language therapy sessions; however, behavior management techniques were employed during his sessions (*id.*). According to the June 2008 IEP, the student was responding more consistently to "wh" questions, was able to label ten school related items and had made other "major advances" (*id.*). The IEP indicated that despite these gains, the student continued to require prompting, questions repeated, and he was not yet exhibiting carryover to the classroom (*id.*). Academic management needs included individualized supervision to maintain focus and attention in class and to eliminate the student's distraction, which was exacerbated by self-stimulatory behaviors (*id.* at p. 4).

With regard to the student's present levels of social/emotional performance, the June 2008 IEP indicated that the student appeared to enjoy social interactions with peers and adults and that he benefited from adult support in facilitating these interactions within the classroom (Dist. Ex. 8 at p. 5). The June 2008 IEP noted that the student engaged with other children during recess (*id.*). The student's social/emotional management needs reflected that he benefited from preferential seating with appropriate peer models to help facilitate his reciprocal conversation skills (*id.*). The June 2008 CSE also concluded that the student's behavior seriously interfered with instruction and required adult support, and the June 2008 IEP indicated that a behavioral intervention plan (BIP) had been developed (*id.*). A description of the student's present health status and physical development contained in the June 2008 IEP revealed that he exhibited fine motor delays and tactile defensiveness (*id.* at p. 6). The student's attention span was also described as "decreased" (*id.*). Annual goals and short-term objectives were developed with respect to writing, reading comprehension, word recognition skills, math concept skills, problem solving skills, graphomotor skills, the student's ability to efficiently use classroom tools in order to participate in art projects, self-regulation, and his speech-language needs (*id.* at pp. 7-13).

Meeting minutes generated during the June 2008 CSE meeting revealed that that the CSE reviewed "materials," and that the results of testing and the recommended placement were explained to the student's mother (Dist. Ex. 10).<sup>12</sup> The student's mother was also advised of her right to appeal the recommended placement and her right to legal counsel (*id.*). According to the meeting minutes, the student's mother explained to the CSE that she believed that the student

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<sup>11</sup> "TC Assessments" are defined in the hearing record as "Teacher College Assessments," which are used to assess decoding abilities, spelling, reading, and listening (Tr. p. 35). The student's special education teacher from the CTT classroom stated that such assessments were conducted by her or her co-teacher several times throughout the school year (*id.*).

<sup>12</sup> The meeting minutes do not specify what materials were reviewed by the June 2008 CSE (Dist. Ex. 10).

needed additional support and individualized attention (id.). The meeting minutes indicated that the June 2008 CSE agreed with the student's mother and the CSE determined that the student also needed access to typically developing peers and a setting that would appropriately address the student's problem behaviors that interfered with his learning (id.).

By final notice of recommendation (FNR) dated July 1, 2008, the district informed the student's mother of the specific district school the student was recommended to attend for the 2008-09 school year (Parent Ex. K). The July 2008 FNR also provided the student's mother with the name, address and telephone number of a district employee who could be contacted to further discuss the CSE's final recommendation of placement (id.).<sup>13</sup> Additionally, the FNR advised the student's mother of her right to request an additional CSE meeting (id.). The student's mother testified that she visited the proposed school sometime during July 2008 (Tr. p. 414).

By letter dated August 18, 2008, the student's mother advised the CSE chairperson that she was placing the student at BAC for the 2008-09 school year and that she would be requesting an impartial hearing to pursue public funding for the unilateral placement (Parent Ex. I). She further requested transportation for the student (id.). The student's mother stated that she had visited the district's recommended placement and determined that it was not appropriate to meet her son's needs (id.). Specifically, the student's mother noted that the proposed placement lacked peer models, and that the student would not have interactions with typically developing students throughout the day (id.). In addition, the student's mother expressed concern that the recommended placement did not offer a "consistent and intense" methodology (id.). The student's mother also characterized the functional grouping of the students in the proposed class as "inappropriate" (id.). Lastly, she described the June 2008 IEP as "inappropriate and insufficient" to meet the student's needs (id.).

By due process complaint notice, dated November 24, 2008, the parents, through their attorney, requested an impartial hearing (Parent Ex. A). First, the parents alleged that the June 2008 CSE was not validly composed because a district representative and an additional parent member did not attend the meeting (id. at p. 1). Regarding the attendance of the additional parent member, the parents argued that the district failed to secure a valid waiver of the participation of the additional parent member (id.). Substantively, the parents claimed that the June 2008 IEP was insufficient and inappropriate to meet the student's needs (id.). The parents further characterized the proposed 6:1+1 placement as "entirely insufficient and inappropriate to meet [the student's] needs" (id. at p. 2). In particular, the parents contended that the proposed placement did not offer appropriate peer models for the student nor did it offer the student opportunities for interaction with typically developing peers (id.). In addition, the parents argued that the functional grouping of the students in the proposed placement was not appropriate (id.). Next, the parents alleged that the proposed placement failed to "consistently use a research based method of instruction, as required by the Individuals with Disabilities Education Act [IDEA]" (id.). Lastly, the parents indicated that the district had failed to arrange for the implementation of the recommended SETSS (id.). As relief, the parents requested a finding that the district failed to offer the student a free appropriate public education (FAPE), tuition reimbursement for the student's placement at BAC for the 2008-09 school year, and payment for the student's SETSS provider (id.).

On July 9, 2009, the impartial hearing officer rendered a decision in the matter (IHO Decision at p. 17). With regard to the parents' claim for tuition reimbursement for BAC for the

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<sup>13</sup> According to the hearing record, the proposed classroom for the student was across the street from the main building, the address of which was designated on the July 2008 FNR (Tr. p. 224).



2008-09 school year, the impartial hearing officer found in favor of the parents (id.). Specifically, the impartial hearing officer concluded that the district failed to offer the student a FAPE during the 2008-09 school year (id. at p. 16).<sup>14</sup> The impartial hearing officer indicated that he was persuaded by the testimony of the parents' witnesses that the district's program, which employed the TEACCH methodology, would have been inadequate to meet the student's needs (id.). Under the circumstances, the impartial hearing officer found that the student required a more restrictive environment predicated on ABA instruction (id.). Next, he concluded that BAC was appropriate to meet the student's needs because it was based on ABA principles (id. at p. 17). The impartial hearing officer further noted that BAC had met the student's needs and that the student had made progress there (id.). Additionally, the impartial hearing officer found that the parents had cooperated with the district, and accordingly, equitable considerations favored their claim for relief (id.).

Although the impartial hearing officer also noted that the parties had resolved the issue regarding the parents' claim for payment for the student's SETSS provider, he indicated that the district had yet to submit payment to the provider for services rendered during the 2008-09 school year (IHO Decision at p. 17). Accordingly, he ordered the district to remit payment to the student's SETSS provider (id.). Lastly, the impartial hearing officer dismissed the parents' claim to shorten the student's bus trip on the grounds that the parents failed to include the claim in their due process complaint notice and because the school year had ended (id.).

The district appeals and requests an order annulling those parts of the impartial hearing officer's determination which ordered the district to reimburse the parents for their son's tuition at BAC for the 2008-09 school year. Alternatively, the district requests that the impartial hearing officer's order be modified to reflect a 50 percent reduction in the award in light of the parents' failure to afford proper notice to the district. As a threshold claim, the district asserts that only claims asserted in the parents' due process complaint notice were relevant to the impartial hearing officer's inquiry. With respect to the merits of the instant case, the district argues that the June 2008 IEP was procedurally and substantively appropriate, and accordingly, offered the student a FAPE. The district asserts that the June 2008 CSE was properly composed because the attendance of the additional parent member was properly waived by the parents and the special education teacher who participated was qualified to serve as the district representative. Alternatively, upon a finding that the June 2008 CSE was not properly constituted, the district argues that neither the parents nor the student suffered any prejudice or substantive harm as a result thereof. Next, the district asserts that the impartial hearing officer erred as a matter of law in finding that the district did not offer the student a FAPE because the recommended placement employed the TEACCH methodology instead of ABA instruction. The district contends that the recommended 6:1+1 placement was reasonably calculated to confer an educational benefits on the student for the following reasons: (1) the student would have received related services designed to meet his unique

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<sup>14</sup> A review of the impartial hearing officer's decision reveals that it is devoid of any specific cites to transcript pages or sufficient legal authority. State regulations provide in relevant part that "[t]he decision of the impartial hearing officer shall set forth the reasons and the factual basis for the determination. The decision shall reference the hearing record to support the findings of fact" (8 NYCRR 200.5[j][5][v]). In order to properly reference the hearing record, pages of transcript and relevant exhibit numbers should be cited with specificity. State regulations further require that an impartial hearing officer "render and write decisions in accordance with appropriate standard legal practice" (8 NYCRR 200.1[x][4][v]). Citations to applicable law are the norm in "appropriate standard legal practice," and should be included in any impartial hearing officer decision. I note also that the failure to cite with specificity facts in the hearing record and law on which the decision is based is not helpful to the parties in understanding the decision and deciding if a basis exists to appeal. The impartial hearing officer is reminded to comply with State regulations, cite to relevant facts in the hearing record with specificity and provide a reasoned analysis of those facts that reference applicable law in support of his conclusions.

needs; (2) the placement offered an appropriate peer group in which the student would have been functionally grouped; (3) the placement offered numerous mainstreaming opportunities for the student with typically developing peers; and (4) the parents would have received appropriate parent training.

The district further argues that the parents failed to establish that BAC was appropriate for the student. In particular, the district makes the following assertions regarding BAC: (1) the hearing record in the instant matter fails to offer specific information regarding how the program offered at BAC was specially designed to meet the student's unique needs; (2) the student did not receive any of his related services through BAC; and (3) the student's behavioral consultant, who testified on the parents' behalf, testified that an exclusive full-day ABA program, which is offered at BAC, would not be appropriate to meet the student's needs. Lastly, the district argues that equitable considerations should preclude the parents' requested relief for the following reasons: (1) the parents' written notice of their intention to place the student in BAC was insufficient and only expressed general concerns with the district's proposed program; and (2) the student's mother testified that she was not genuinely interested in the district's proposed program because it was not based on ABA principles.

The parents submitted an answer in which they requested that the district's appeal be dismissed and that the impartial hearing officer's order of reimbursement of the student's placement at BAC for the 2008-09 school year be upheld. On a procedural level, the parents claim that the CSE was not properly constituted due to the absence of a district representative. They further argue that the special education teacher in attendance was not qualified to serve as district representative because the special education teacher lacked sufficient knowledge of the programs offered by the district. Substantively, the parents maintain that the district's proposed 6:1+1 classroom, which was the only option available to the student, was not appropriate. In support of their claim that the proposed program was not appropriate, the parents cite the special education teacher's concerns that the student would have been the highest functioning student in the class, and that no teaching methodology, other than ABA, was discussed during the June 2008 CSE meeting. Furthermore, the parents contended that the provision of a 1:1 paraprofessional was not discussed at the June 2008 CSE meeting. Next, the parents claim that the June 2008 IEP contained general goals and short-term objectives and that the IEP was insufficient to meet the student's needs. The parents also assert that the program that was discussed at the impartial hearing was actually at a different school than the school designated on the July 2008 FNR. With respect to the methodology employed at the proposed school, the parents argue that the methodology utilized by the proposed program would not have been appropriate for the following reasons: (1) it is not a language-based model; (2) it would not provide the student with the necessary support to diminish his self-stimulatory behaviors; (3) TEACCH is not a research-based method of instruction; (4) the student requires a behaviorally based program; and (5) the student has not made progress with any program other than through ABA instruction. The parents also assert that the district failed to present sufficient evidence demonstrating the appropriateness of the functional grouping of the students in the proposed program. They further assert that the activities of daily living (ADL) curriculum and reading curriculum were not appropriate for the student. Lastly, the parents contend that the proposed program would not have provided for instructional time with typically developing peers, and accordingly, was not the least restrictive environment (LRE).

With respect to the appropriateness of BAC, the parents maintain that the evidence presented at the impartial hearing demonstrated that the unilateral placement met the student's educational needs. First, while the parents concede that BAC chooses not to provide separate related services, the parents further argue that the student's primary areas of need are being

addressed throughout the school day through 1:1 ABA instruction. The parents also contend that the student has made progress at BAC and that he is provided with appropriate social interactions with typically developing peers. They also assert that the student's self-stimulatory behaviors have decreased and he has, in turn, made progress. Lastly, the parents maintain that they cooperated with the district and therefore, the equities support their claim for reimbursement.

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 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).

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 Newington, 546 F.3d at 114; Gagliardo, 489 F.3d at 108; Walczak, 142 F.3d at 132; Patskin,

583 F. Supp. 2d at 428). 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). 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 placements 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; 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 Second Circuit employs a two-pronged test for determining whether an IEP places a student in the LRE, considering (1) whether education in the general classroom, with the use of supplemental aids and services, can be achieved satisfactorily for a given student, and, if not, (2) whether the school has mainstreamed the student to the maximum extent appropriate (Newington, 546 F.3d at 119-20; see North Colonie, 586 F. Supp. 2d at 82; Patskin, 583 F. Supp. 2d at 430; see also Oberti, 995 F.2d at 1217-18; Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1048-50 [5th Cir. 1989]). Determining whether a student with a disability can be educated satisfactorily in a regular class with supplemental aids and services mandates consideration of several additional factors, including, but not necessarily limited to "(1) whether the school district has made reasonable efforts to accommodate the child in a regular classroom; (2) the educational benefits available to the child in a regular class, with appropriate supplementary aids and services, as compared to the benefits provided in a special education class; and (3) the possible negative effects of the inclusion of the child on the education of the other students in the class" (Newington, 546 F.3d at 120; see North Colonie, 586 F. Supp. 2d at 82; Patskin, 583 F. Supp. 2d at 430; see also Oberti, 995 F.2d at 1217-18; Daniel R.R., 874 F.2d at 1048-50).

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 (Forest Grove, 129 S. Ct. at 2488; 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).

Before reaching the merits of the instant matter, initially, I note that neither party has appealed the following determinations of the impartial hearing officer: (1) that the district's written closing statement was excluded from the hearing record; (2) that the student's SETSS provider is entitled to payment from the district for services rendered during the 2008-09 school year; and 3) that the parents' request to shorten the student's bus trip was dismissed. 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][5][v], [k]). Consequently, the impartial hearing officer's aforementioned determinations are final and binding upon the parties (see Application of a Student with a Disability, Appeal No. 08-021; Application of the Bd. of Educ., Appeal No. 07-135; Application of a Child Suspected of Having a Disability, Appeal No. 06-092; 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).

Returning to the instant matter, I will first address the parties' claims regarding the composition of the June 2008 CSE. In their due process complaint notice, the parents alleged that the June 2008 CSE was improperly constituted due to the absence of an additional parent member. On appeal, the district argues that the attendance of the additional parent member was validly waived by the student's mother. As discussed herein, the hearing record substantiates the district's contention. Although not required by the IDEA (20 U.S.C. § 1414[d][1][B]; see 34 C.F.R. § 300.344), New York State law requires the presence of an additional parent member at the CSE meeting that formulates a student's IEP (Educ. Law § 4402[1][b][1][a]; 8 NYCRR 200.3[a][1][viii]; see Bd. of Educ. v. R.R., 2006 WL 1441375, at \*5 [S.D.N.Y. May 24, 2006]; Bd. of Educ. v. Mills, 2005 WL 1618765, at \*5 [S.D.N.Y. July 11, 2005]; Application of the Dep't of Educ., Appeal No. 09-024; Application of the Dep't of Educ., Appeal No. 08-105; Application of the Dep't of Educ., Appeal No. 07-120; Application of a Child with a Disability, Appeal No. 07-060; Application of the Bd. of Educ., Appeal No. 05-058). New York law provides that membership of a CSE shall include an additional parent member of a student with a disability residing in the school district or a neighboring school district, provided that such parent is not a

required member if the parents of the student request that the additional parent member not participate in the meeting (Educ. Law § 4402[1][b][1][a]; 8 NYCRR 200.3[a][1][viii]). Parents have the right to decline, in writing, the participation of the additional parent member at any meeting of the CSE (8 NYCRR 200.5[c][2][v]). New York State law further provides that when a district is permitted to convene a CSE subcommittee, the subcommittee need not include an additional parent member (Educ. Law § 4402[1][b][1][d]; 8 NYCRR 200.3[c][2]-[5]). Here, on June 4, 2008, the day of the CSE meeting, the student's mother signed a declination letter in which she waived the attendance of the additional parent member (Dist. Ex. 9; see RR v. Scarsdale Union Free Sch. Dist., 2009 WL 1360980, at \*\*8 [SDNY May 15, 2009]; Mills, 2005 WL 1618765, at \*5). Further, there is no indication that the absence of an additional parent member at the CSE meeting (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]).

Next, I will consider the parties' claims regarding the attendance of the district representative. Although the district admits that no one signed into the June 2008 CSE meeting to serve as district representative, the district alleges that the special education teacher in attendance was qualified to serve in that capacity. Alternatively, the district maintains that although no one signed the June 2008 IEP as the district representative, neither the parents or the student suffered any substantive harm which would have denied the student a FAPE as a result thereof. Conversely, the parents contend that the special education teacher lacked sufficient knowledge of the programs offered by the district, and therefore, was not qualified to serve as the district representative at the June 2008 CSE. As set forth in greater detail below, I agree with the district that although no one formally signed into the June 2008 CSE meeting to serve as district representative, there is no showing in the hearing record that the failure to do so impeded the student's right to a FAPE, caused a deprivation of educational benefits, or significantly impeded the student's mother's opportunity to participate in the decision-making process.

According to the IDEA and federal and State regulations, the CSE must include a representative of the school who is qualified to provide or supervise special education and who is knowledgeable about the general education curriculum and the availability of resources of the school district, provided that an individual who meets those qualifications may also be the same individual appointed as the special education teacher or the special education provider of the student or the school psychologist (20 U.S.C. § 1414[d][1][B][iv][I-III]; 34 C.F.R. § 300.321[a][4][i-iii]; 8 NYCRR 200.3[a][1][v]). In this case, the hearing record shows that although no one signed in as the district representative at the June 2008 CSE meeting, both the student's special education teacher and regular education teacher from the CTT classroom that he previously attended participated in the June 2008 CSE meeting (Tr. pp. 21, 33; Dist. Exs. 8 at p. 2; 10). In addition, although her name is not listed on the June 2008 IEP, the hearing record reflects that the district's school psychologist who conducted a classroom observation of the student also took part in the June 2008 CSE meeting (Tr. pp. 36-37, 409, 411; Dist. Exs. 8 at p. 2; 10; 14). The student's mother, the student's behavioral consultant, and the student's related service providers were also in attendance (Tr. pp. 293, 409; Dist. Exs. 8 at p. 2; 10). Meeting minutes reflected that the student's mother had an opportunity to voice her concerns regarding the student's program (Dist. Ex. 10; see Tr. p. 409). Additionally, the student's special education teacher from the CTT classroom that he previously attended and the student's mother both testified that they had previously discussed program possibilities for the student for the 2008-09 school year (Tr. pp. 141, 407). Under the circumstances, although no one signed the June 2008 IEP as district representative, the hearing record does not reflect that the failure to specifically designate such an

individual on the IEP (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., 2008 WL 3930028, at \*7; Matrejek, 471 F. Supp. 2d at 419).

I will now examine the appropriateness of the educational program and placement recommended by the district for the student for the 2008-09 school year. A review of the entire hearing record shows that the June 2008 CSE's recommendation for a 6:1+1 classroom, which employed the TEACCH methodology, combined with a 1:1 behavior management paraprofessional and related services consisting of speech-language therapy and OT was reasonably calculated to confer educational benefits on the student (see Tr. p. 170).

I will first consider the parties' claims regarding the educational methodology offered at the proposed placement. The district contends that the impartial hearing officer erred in finding that the district failed to offer the student a FAPE because the recommended 6:1+1 placement utilized the TEACCH methodology instead of ABA instruction. Conversely, the parents assert that TEACCH would not have been appropriate for the student's needs, particularly because the student requires a behaviorally-based program, and the student has only made progress with ABA instruction. Although an IEP must provide for specialized instruction in a 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 (Rowley, 458 U.S. at 204; M.M. v. Sch. Bd. of Miami-Dade County, 437 F.3d 1085, 1102 [11th Cir. 2006]; Lachman v. Illinois State Bd. of Educ., 852 F.2d 290, 297 [7th Cir. 1988]; Application of a Student with a Disability, Appeal No. 09-058; Application of the Dep't of Educ., Appeal No. 08-075; Application of a Child with a Disability, Appeal No. 07-065; Application of a Child with a Disability, Appeal No. 07-054; 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; Application of a Child with a Disability, Appeal No. 94-26; Application of a Child with a Disability, Appeal No. 93-46). As discussed below, the hearing record shows that the June 2008 CSE recommended a program that was based on the student's individual needs (Tr. p. 254; see Dist. Ex. 8). Moreover, the hearing record does not show that ABA instruction was the only educational methodology that would have conferred educational benefits on the student.

The student's mother testified that the student had "[done] pretty well" in the district's CTT classroom until the end of the 2007-08 school year, when the academic demands increased (Tr. p. 406). The student's private behavior consultant also testified that the student made some progress while enrolled in the CTT classroom (Tr. pp. 300-01). The student's special education teacher who had taught him in the CTT classroom testified that the student seemed very well adjusted in the class and that he socialized with both the special education and general education students (Tr. p. 30). She added that the student enjoyed playing tag with several other students and engaged with them (id.).

Although the student's behavior consultant and the student's mother testified that the June 2008 CSE did not discuss at the meeting the different approaches or methodologies that would be used to address the student's educational needs, further review of the hearing record reflects that the student's behavior consultant had an opportunity during the June 2008 CSE meeting to request a specific educational methodology for the student, namely ABA, if she believed it was necessary to enable the student to receive educational benefits; however, the hearing record does not reflect that she or any other meeting participants made such a request at the time of the CSE meeting (Tr. pp. 293-94, 411-12). Although the student's SETSS provider also testified that she did not consider

the district's recommended program to be appropriate for the student because she opined that the student needed direct ABA instruction, she also indicated that she had no direct knowledge of any educational methodologies other than ABA (Tr. pp. 361, 370).

Furthermore, the proposed school's assistant principal opined that based on his review of the student's June 2008 IEP, he believed that the TEACCH program would be a more appropriate methodology for the student, but he also testified that the recommended district school had a 6:1+1 classroom with an ABA component (Tr. pp. 175, 177). The parents allege however, that the student worked best in a 1:1 environment, and that the TEACCH model would not have provided the student with the requisite level of supports and interventions necessary to diminish his self-stimulatory behaviors. The hearing record fails to substantiate the parents' assertions. First, the student's private behavior consultant testified that the TEACCH model was inappropriate because it required children to work predominantly in individualized work stations and she opined that without someone to support his behavior, the student engaged in self-stimulatory behavior (Tr. pp. 283-84). The student's paraprofessional from the CTT classroom also indicated that TEACCH would not be an appropriate methodology to use with the student because of the use of individual workstations, and that without 1:1 support, the student would engage in high levels of self-stimulatory behaviors (Tr. pp. 314-15). Notwithstanding the parents' concerns regarding the level of support that the student would receive in the district's recommended program, the student's special education CTT teacher who taught the student during the 2007-08 school year, indicated that she and the student's mother had previously discussed program options for the student, which included "any kind of setting where you could still have one to one support in case he needed redirection" (Tr. pp. 141-42). The June 2008 IEP indicated that the student required "individualized supervision to maintain focus and attention in class" and to "eliminate his distraction which [wa]s exacerbated by self stimulation" (Dist. Ex. 8 at p. 4). To address the student's behavioral needs, the June 2008 CSE recommended the provision of a full-time 1:1 paraprofessional (*id.* at pp. 5, 6, 14, 16). Although the student's mother contends that the provision of a 1:1 paraprofessional was not discussed at the June 2008 CSE, a review of the June 2008 IEP shows that the student would have been afforded 1:1 paraprofessional services as part of the district's recommended program (*id.*; Tr. p. 412). The hearing record reflects that the IEP was sent to the parents (Dist. Ex. 8 at p. 2). Additionally, the student's special education teacher from the CTT classroom indicated that neither she nor her co-teacher were concerned that the 6:1+1 classroom would not offer the student enough 1:1 assistance because they assumed that the student would have a "shadow" there, which the special education teacher further characterized as a definite aspect of the student's program (Tr. pp. 145-46). The special education teacher added that she did not think that the CSE discussed eliminating paraprofessional services from the student's program (Tr. p. 146). Based on the foregoing, given that the student would have been afforded 1:1 support, as prescribed by his June 2008 IEP, I find that recommended 6:1+1 program would have sufficiently provided the 1:1 support required to address the student's self-stimulatory behaviors.

In view of the foregoing, including that the student had previously made progress while enrolled in the district's CTT classroom and that he would have been afforded 1:1 support in the proposed 6:1+1 classroom, the hearing record supports a conclusion that the district's use of the TEACCH methodology, as opposed to the parents' preferred use of ABA instruction, would have offered the student educational benefits and would not have resulted in a denial of a FAPE. Testimony by the assistant principal of the recommended school indicated that "instruction in a TEACCH model is given in a whole class environment where everybody is involved in the instruction...and then it is moved to workstation activities" (Tr. pp. 247-48). He further testified that for each subject, the whole group instruction is usually 15 to 20 minutes long, but could extend



longer to ensure that the concept is grasped, that the whole group instruction is differentiated based on the student's needs, and that the paraprofessionals are there for every instructional period (Tr. pp. 253-54, 257). The assistant principal testified that students are encouraged to move from one workstation to another and the idea is that eventually, the students will move independently, on their own (Tr. p. 255).

The hearing record also demonstrates that the proposed program offered the student appropriate related services designed to meet his unique special education needs. A review of the hearing record reveals that in making its related services recommendations, the June 2008 CSE considered the reports and evaluations from the student's then current related services providers (Dist. Exs. 8; 15; 17; 18). First, regarding the provision of speech-language therapy, the June 2008 IEP recommended in-school speech-language therapy including two weekly 30-minute 1:1 sessions and three 30-minute sessions in a group of three, as well as three 50-minute home-based 1:1 speech-language therapy sessions per week (Dist. Ex. 8 at p. 16). With respect to the student's OT needs, the June 2008 IEP reflected that the student continued to exhibit deficits in writing, cutting, maintaining visual attention to task, and that he demonstrated perseveration on tasks, tactile defensiveness and inappropriately placing his hand in his mouth (*id.* at p. 6). As a result, the CSE recommended the provision of three 45-minute individual OT sessions per week to address the student's needs (*id.*).

Additionally, a June 2008 progress report prepared by the student's home-based SETSS provider reflected that the student continued to need the 1:1 home-based SETSS recommended in the student's IEP to address his needs across behavioral, social, language, and academic domains (Parent Ex. D at p. 3). The student's home-based SETSS provider indicated that she worked on a combination of skills including academic, communication, and social skills (Tr. p. 363). The June 2008 CSE addressed the student's needs in these areas by recommending five 60-minute individual sessions of SETSS per week in the home (Dist. Ex. 8 at p. 16).

According to the assistant principal of the district's recommended school, when determining the needs of a student, he consulted the IEP, which he characterized as the primary tool used to identify a student's needs (Tr. p. 174). He further testified that if a service was prescribed by an IEP, the school would provide it (Tr. pp. 205-06). The assistant principal also testified that the recommended school would have been able to provide the student with the related services delineated on the June 2008 IEP, and if the school did not have the staffing available, the related services were contracted out through RSAs (Tr. p. 209).

The hearing record also supports the district's contention that the student would have been appropriately grouped in the recommended 6:1+1 placement. According to the district's assistant principal, based on the student's abilities as reflected by the teacher assessment conducted by the student's CTT teacher from the prior year and the description of the student's academic present levels of performance on the June 2008 IEP, the student's academic ability levels fit the class profile (Tr. pp. 170-71). The assistant principal testified that the student fit in "age-wise, grade-wise and academically" (Tr. p. 187). He further stated that three students in the class had verbal ability, while two students lacked verbal skills (Tr. p. 194). The assistant principal further characterized the students who had verbal ability as "functioning slightly below grade level," but also noted that one of those students was close to grade level in both English language arts and math (*id.*). With regard to the remainder of the students in the class, the assistant principal indicated that they functioned at a kindergarten to early first grade level, similar to the student (*id.*). In comparison to the functioning levels of the other students in the proposed class, the assistant principal opined that the student would be "right in the middle" (Tr. p. 195).

Next, the hearing record reveals that the proposed program would have afforded the student sufficient opportunities to interact with nondisabled peers. The hearing record shows that the proposed classroom was located in a general education building; therefore, the student would have been able to socialize with typically developing peers during breakfast, lunch, dismissal, and certain recreational times (Tr. pp. 192, 258). The assistant principal of the recommended school testified that in addition, on a weekly basis within the classroom, students had an opportunity to interact with nondisabled peers through different types of activities that promoted appropriate social behavior and had the opportunity to converse, play, and engage in group activities to promote social behaviors (Tr. pp. 192-93).

Additionally, the recommended program also would have afforded the parents sufficient parent training and counseling. The hearing record demonstrates that the school offered parent meetings on autism and behavioral concerns, and that a variety of workshops were offered to parents during the course of the year (Tr. p. 211).

Lastly, I have considered the parents' additional challenges to the June 2008 IEP, and I note that they were not raised in their due process complaint notice, and as such, are not properly before me and are dismissed on that basis (see Application of a Student with a Disability, Appeal No. 08-158). However, as set forth below, I have reviewed these challenges and find that they are not persuasive. Regarding the goals enumerated in the challenged IEP, the June 2008 IEP included 12 goals with 30 corresponding short-term objectives that addressed the student's academic needs including reading, writing and math; his OT needs including graphomotor, fine motor and self regulation skills; and his speech-language needs including receptive and expressive vocabulary, length of utterance in response to questions, and articulation (Dist. Ex. 8 at pp. 7-10). Although the annual goals appear to be somewhat generally stated, the short-term objectives contain sufficient specificity to provide direction to the student's teachers concerning the expectation of the CSE and were also measurable (see id.; Tarlowe, 2008 WL 2736027). Although the hearing record reflects that the annual goals and short-term objectives were discussed at the June 2008 CSE meeting, the hearing record does not show that either the student's mother or the student's private behavior therapist objected to them at the CSE meeting (see Tr. pp. 38-39).

Next, the parents claim in their memorandum of law attached to their answer that the student was not appropriately evaluated. Although the school psychologist had attempted to conduct a psychoeducational evaluation of the student in May 2008, no formal test scores were obtained; however, the hearing record shows that the school psychologist subsequently observed the student in both a classroom and a speech-language therapy setting and reflected these observations in a written report (Dist. Ex. 14 at pp. 1-2). Based on the student's functioning in these settings and with input from the student's 1:1 paraprofessional and speech-language provider, the school psychologist recommended a "small 6:1+1 class where [the student] is able to receive more individualized, therapeutic instruction with extensive speech and language services" to address his needs (id. at p. 2). The hearing record reflects that the June 2008 IEP indicated that the student was successfully assessed using TC Assessments that provided the student's instructional levels in reading fluency, comprehension, and decoding (Tr. p. 35; Dist. Ex. 8 at p. 3). Moreover, the student's private behavior therapist, prior CTT teachers, related services providers, and mother participated in the development of the June 2008 IEP (Dist. Ex. 8 at p. 2). Therefore, the hearing record indicates that the student was appropriately evaluated to allow for the development of a program that was based on the student's needs (Dist. Exs. 8 at p. 3; 14 at pp. 1-2).

The parents also allege in their answer that the reading curriculum that would have been used at the proposed placement would not have met the student's needs. However, the hearing

record demonstrates that the reading program utilized in the recommended class is designed for students of low cognitive abilities and for students who are alternatively assessed (Tr. p. 188). The assistant principal of the recommended district school testified that the reading program can be used with students who are eligible for special education programs and services as students with autism or mental retardation and who have different functional levels, from a very low skill level to a moderate skill level (*id.*). The June 2008 IEP indicated that the student was classified as a student with autism, was functioning approximately 2 1/2 grade levels below in reading and that he was recommended for alternate assessment (Dist. Ex. 8 at pp. 3, 16). Therefore, the hearing record reflects that based on his IEP, the reading program utilized in the recommended class would have appropriately met the student's needs.

Lastly, the parents challenge the appropriateness of the ADL curriculum offered by the proposed placement for their son's needs. Although the parents claim the ADL curriculum would not have been appropriate for the student because it is a general program and because the student already possesses some of the skills addressed in the curriculum, the hearing record also indicates that the curriculum was a generalized program that was "differentiated based on the classroom needs" (Tr. p. 235). As such, the hearing record reveals that the proposed district program's ADL curriculum would have addressed the student's specific ADL needs.

Based on the above, I find that the district offered the student a FAPE in the LRE for the 2008-09 school year.

Having determined that the district offered the student a FAPE, I need not reach the issue of whether BAC 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 a 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 it is unnecessary to address them in light of my determinations herein.

**THE APPEAL IS SUSTAINED.**

**IT IS ORDERED** that the portions of the impartial hearing officer's decision dated July 9, 2009 which determined that the student was denied a FAPE and awarded tuition reimbursement to the parents for the student's unilateral placement at BAC for the 2008-09 school year are hereby annulled.

**Dated:** Albany, New York  
October 5, 2009

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