



The University of the State of New York

The State Education Department

State Review Officer

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No. 09-114

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, Emily R. Goldman, Esq., of counsel

Mayerson and Associates, attorneys for respondents, Gary S. Mayerson, Esq., and Brianne N. Dotts, 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 McCarton School for the 2008-09 school year. The appeal must be sustained.

At the time of the impartial hearing, the student was attending the McCarton School, where he was receiving five individual 45-minute sessions of occupational therapy (OT) and five individual 60-minute sessions of speech-language therapy weekly, in addition to 1:1 teacher support in the classroom and applied behavioral analysis (ABA) services (Tr. pp. 9-13, 357-58; Parent Exs. H at p. 1; I at p. 1; J at 1).¹ The McCarton School constitutes the student's pendency placement during the instant proceeding pursuant to an unappealed impartial hearing officer's decision dated September 2, 2008 (Mar. 26, 2009 Tr. pp. 9, 12; Parent Ex. D).² The McCarton

¹ There are three transcript volumes from the impartial hearing. The second two transcript volumes, dated April 16, 2009, are consecutively paginated from page 1 to page 372. The first transcript volume, dated March 26, 2009, is paginated from page 1 to 15. All citations in the decision to the transcript refer to the second two consecutively paginated volumes unless otherwise noted.

² For statutory and regulatory provisions pertaining to a student's educational placement during administrative or judicial proceedings, see 20 U.S.C. § 1415(j); Educ. Law § 4404(4)(a); 34 C.F.R. § 300.518; 8 NYCRR 200.5(m).

School has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7). The student's eligibility for special education programs and services as a student with autism is not in dispute in this proceeding (see 34 C.F.R. § 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

The student has a diagnosis of an autism spectrum disorder and exhibits deficits in his social and play skills; receptive, expressive, and pragmatic language; attending skills; motor planning and coordination; fine motor skills; sensory processing and regulation skills; and academics (Parent Exs. A at p. 1; C at pp. 3-4, 6, 12, 19; J at p. 4; O at p. 5; N at p. 4). The student also exhibits anxiety, escape behaviors, and self stimulatory or interfering behaviors including scripting, closing his eyes, and gazing away from the speaker (Dist. Ex. 1 at p. 1; Parent Exs. C at p. 4, 23; J at p. 1). The student's attending deficits impede his ability to follow directions in a group setting (Parent Ex. J at p. 4).

The hearing record reveals that the student has attended the McCarton School since September 2002 (Parent Ex. P at p. 1). In a December 2007 educational progress report from the McCarton School, the student's teacher indicated that the student had been receiving approximately 30 hours of center-based ABA and that the student had demonstrated "improvement in all areas" (Dist. Ex. 1 at p. 5). According to the teacher, the student continued to exhibit a very positive response to the highly structured and individualized behavioral teaching methods employed at the McCarton School, and he demonstrated an ability to acquire new material through repetition (id.). The teacher noted that the student was learning to generalize the information that he had learned; however, she also indicated that the student continued to demonstrate delays in play, interaction, communication, and adaptive skills (id.). The teacher further reported that the student's varying attention, activity level and self-directed behaviors affected all areas, requiring adult intervention to focus his play and develop new skills (id.). The teacher's recommendations included continued "treatment using a 1:1 model" to increase the student's abilities and to help him develop attentional and behavioral controls (id.).

In a January 10, 2008 speech and language progress report from the McCarton School, the student's private speech-language pathologist reported that the student had made progress in all areas of speech and language; however, the student continued to demonstrate difficulty in his receptive, expressive and pragmatic language skills, and speech intelligibility (Dist. Ex. 2 at p. 3). The private speech-language pathologist stated that broad goals of the student's therapy included improving language comprehension and processing, increasing attention to language, expanding language use and content, promoting spontaneous use of language, facilitating interactions with peers and adults, refining motor speech skills, and expanding oral sensory skills (id. at p. 1).

With regard to the student's receptive language skills, the private speech-language pathologist reported that the student had continued to make gains in attention, following directions, and answering "when" questions (Dist. Ex. 2 at p. 1). The private speech-language pathologist also reported that the student participated in 1:1 instruction for up to ten minutes without a break (id.). She further noted that the student was frequently distracted by extraneous information, including noise and visual stimuli, and during tasks requiring sustained listening and less hands-on/visual activities (id.). The private speech-language pathologist also indicated that the student had decreased his interfering behaviors, and reported that his interfering behaviors were infrequently noticed during 1:1 therapy sessions when the student was engaged in an activity, but

were still noted when the student was transitioning or during unstructured activities (id.). Additionally, the private speech-language pathologist reported that the student was increasing his attention in group tasks to seven to nine minutes with intermittent prompts (id.). Overall, the private speech-language pathologist opined that the student benefited from the use of a behavior reinforcement system to enhance focus, increase structure, and facilitate comprehension of language (id.). The progress report reflected that the student was consistently following two-step directions related to classroom routines and that he demonstrated an emerging ability to follow two-step directions containing temporal and/or spatial concepts (id.). The report also reflected that the student's attention difficulties impeded his ability to process complex auditory information such as multi-step directions (id. at p. 2).

With regard to expressive language, the speech-language pathologist indicated that the student was spontaneously producing four to six-word utterances, and although his utterances had increased in length, the student continued to have difficulty producing articles ("a, an, the") embedded within statements and/or questions (Dist. Ex. 2 at p. 2). The private speech-language pathologist reported that the student was utilizing a communication book of written prompts to facilitate his expressive language and that the student typically was able to generalize the language from his book into spontaneous speech after multiple presentations in a variety of contexts (id.). The private speech-language pathologist also reported that the student used "wait time" and phonemic cues to expand his expressive language in a variety of settings (id.). Furthermore, the private speech-language pathologist noted that the student was consistently generating requests using accurate syntax when formulating questions to express his wants and needs and frequently attained information using "who" and "where" questions (id.). The report also reflected that the student frequently answered "who," "where," and "what" questions and "when" questions that were related to activities of daily living (ADL), such as "when do you eat dinner?" (id.). Additionally, the report noted that the student required minimal prompting to answer "why" questions (id.).

The private speech-language pathologist also noted improvements in the student's pragmatic language, and although the student continued to require minimal prompting to greet peers and teachers, the skill was quickly emerging (Dist. Ex. 2 at p. 2). The report further reflected that the student was consistently commenting about his actions spontaneously, and that the student was beginning to use attributes to comment about objects (id.). To gain another person's attention, she reported that the student typically required verbal prompting; however, he had been observed using a person's name if the individual had an item he desired (id.). The report reflected that the student was demonstrating turn-taking skills during structured board game play with the use of his communication book and minimal prompting (id.). However, the student required written prompts to engage in unstructured play (id.). The report reflected that the student was also beginning to participate in small conversations involving basic questions such as "how are you?" and "what did you do last night?" and had spontaneously generated multiple statements to staff using five to six word utterances (id. at pp. 2-3). According to the private speech-language pathologist, the student had made progress using PROMPT techniques to facilitate the speech motor planning skills required to improve the student's intelligibility (id. at p. 3).³

³ Although not indicated in the hearing record, it is presumed that "PROMPT" stands for "Prompts for Restructuring Oral Muscular Phonetic Targets."

The private speech-language pathologist recommended that the student continue to receive five individual 60-minute sessions of speech-language therapy weekly within the classroom, in addition to three afterschool sessions of speech-language therapy to facilitate carryover and generalization of skills acquired in school (Dist. Ex. 2 at p. 3). She further opined that it was important that the student be provided with opportunities to generalize language skills across a variety of contexts (id.). Lastly, the speech-language pathologist recommended that the student continue to receive PROMPT therapy to improve his speech intelligibility (id.).

In a January 23, 2008 OT progress report from the McCarton School, the student's occupational therapists described his progress as "steady" (Dist. Ex. 3 at p. 6). The therapists noted that attention and concentration continued to be areas of significant difficulty for the student and they further indicated that the student required "a great deal of external structure" to help him complete activities throughout his day (id.). The therapists also stated that the student continued to demonstrate difficulties in sensory processing and regulation, in addition to delays in gross and fine motor skills and self-care skills (id.). Although the therapists determined that the student's motor planning difficulties continued to impede development and learning, they also indicated that the student's overall muscle tone, physical strength, and coordination had improved considerably (id.). The therapists reported that the student had been participating in yoga sessions, which resulted in improvements in the student's body awareness, attention, strength, and bilateral coordination (id. at pp. 4, 6). In short, the therapists recommended five individual 45 to 60-minute sessions of OT per week for the student following sensory integration and motor learning approaches (id. at p. 6).

On January 30, 2008, a district special education teacher conducted a classroom observation of the student at the McCarton School (Tr. p. 281; Dist. Ex. 4). The special education teacher observed that the student had just successfully completed an activity and earned a "game break" (Dist. Ex. 4). She further noted that the student correctly followed the teacher's directions during one activity and was able to correctly answer the teacher's questions when refocused during another activity (id.). The special education teacher reported that the student's teacher advised her that the student had a lot of "internal language," but that the student needed to use it more (id.). According to the observation report, the student had a book filled with social phrases, such as morning greetings and beginnings of sentences, to which the student could refer to remind him of words he should know and use (id.). The student's teacher estimated the student's reading comprehension to be at a first grade level, "but only on a literal level" (id.). The student's teacher further noted that writing was very difficult for the student and that he was working on the capital form of individual letters, which the student wrote in large form (id.). The student's teacher stated that the student occasionally used a keyboard, on which the student could "hunt and peck" (id.). With regard to math, the student reportedly demonstrated 1-1 correspondence and could correctly identify the numbers one to thirty (id.). The student's teacher stated that the student had just started to do addition using manipulatives (id.). The district's special education teacher reported that behaviorally, the student often seemed "sluggish" and that he tended to slump over in his seat and close his eyes (id.). She further noted that the student cried and stomped his feet when his regular schedule was disrupted and that he became anxious over any change of routine or schedule (id.).

On May 21, 2008, the Committee on Special Education (CSE) convened to review the student's program and make program recommendations for the 2008-09 school year (Parent Ex. C). The following individuals attended the May 2008 CSE meeting: a district school psychologist

who also served as district representative, the student's father, a district special education teacher, and an additional parent member (*id.* at p. 2). Additionally, McCarton School staff participated in the May 2008 CSE meeting by telephone, including the director of the McCarton School, the student's teacher, the student's speech-language pathologist, and one of his occupational therapists (*id.*). The May 2008 CSE reviewed reports from the McCarton School including the December 2007 educational progress report, the January 2008 speech-language progress report, the January 2008 OT progress report, and the January 2008 classroom observation that was completed by the district (Tr. pp. 275-77; Dist. Exs. 1; 2; 3; 4). For the 2008-09 school year, the May 2008 CSE deemed the student eligible for special education services as a student with autism and recommended a 12-month program for the student in a 6:1+1 classroom in a special school and adapted physical education (Parent Ex. C at p. 1). The CSE recommended that related services be provided both in and out of the classroom, consisting of two 30-minute sessions of counseling per week in a group of three, five 30-minute sessions of OT per week in a group of three, and five 30-minute individual sessions of speech-language therapy per week (*id.* at pp. 1, 22). The CSE also recommended that the student receive full-time 1:1 behavioral management paraprofessional services (*id.* at p. 22). The resultant individualized education program (IEP) also reflected that the May 2008 CSE considered a 12:1+1 special class in a community school, but ultimately determined that such a program would not sufficiently support the student's cognitive, social, and "significant language/communication deficits" (*id.* at p. 21).

The academic performance and learning characteristics section of the May 2008 IEP revealed that the student had made progress in his learning and that he could remain on task for a period of five minutes without redirection (Parent Ex. C at p. 3). The May 2008 IEP also identified reading as an area of strength for the student and further indicated that given the student's reading skills, the student was able to follow written directions on worksheets (*id.*). Although the May 2008 IEP noted that spelling was also one of the student's strengths, the IEP also indicated that writing continued to be difficult for the student and that he utilized a keyboard to assist him in writing (*id.*). With regard to math, the May 2008 IEP indicated that the student had made progress, but that math continued to be an area of difficulty for the student due to lower frustration tolerance (*id.*). By teacher estimate, the student's reading comprehension skills were determined to be at an early first grade level and his decoding skills were deemed to be at a first grade level (*id.*). Regarding the student's computation and problem solving skills, teacher estimates placed the student's skills at a late kindergarten to first grade level (*id.*). Academic management needs included use of the following interventions: visual and/or verbal supports (i.e., schedule), redirection and prompting, clear and consistent routine, and positive reinforcement (*id.*). The May 2008 IEP also reflected that the student exhibited weaknesses in motor planning, coordination, and fine motor skills, including hand control; however, the May 2008 IEP noted that the student had made progress in those areas (*id.* at p. 6).

Present levels of social/emotional performance depicted in the May 2008 IEP indicated that the student exhibited delays in social skills and that the student displayed anxiety in new situations (Parent Ex. C at p. 4). According to the May 2008 IEP, the student tried to escape new or nonpreferred activities by crying, saying "no thanks," or requesting to use the bathroom (*id.*). The May 2008 IEP also indicated that the student required visual support to prevent self stimulatory behaviors, to keep the student's activity level at optimal levels, and to become organized (*id.*). The May 2008 CSE determined that the student's behavior seriously interfered with instruction and required additional adult support (*id.*). As a result, a behavioral intervention

plan (BIP) was developed targeting a reduction in self stimulatory scripting behavior, avoidance or escape, and anxiety-driven impulsive "darting" behaviors (*id.* at p. 23). The BIP also indicated that the student would learn to tolerate changes in his environment, exhibiting a decreasing level of anxiety (*id.*). The following strategies were recommended to address the student's interfering behaviors: use of a visual schedule, prompting, redirection, positive reinforcement, use of the token economy, a written schedule, and differential reinforcement of other behaviors (*id.*). Other supports incorporated into the BIP included the provision of a 1:1 behavioral management paraprofessional, counseling, and a small structured classroom setting (*id.*). Lastly, the May 2008 IEP also reflected that the CSE developed annual goals and short-term objectives to address the student's needs in math, reading, written expression, social interaction skills, gross motor skills, sensory processing, motor planning and coordination, fine motor and prewriting skills, speech-language skills, and behavior (*id.* at pp. 7-19).

Also on May 21, 2008, following the CSE meeting, based on observation, teacher reports and the discussion that took place during the CSE meeting, the district's school psychologist conducted a functional behavioral assessment (FBA) of the student identifying the following interfering behaviors: scripting/self-talk, eye closing, vocal protests, impulsivity/darting, anxiety, and escape behaviors (Tr. pp. 274, 286, 327, 330; Dist. Ex. 6 at p. 1).⁴ The FBA reflected that these behaviors occurred throughout the school day with varied frequency and duration and that the student became distracted and not focused on tasks that interfered with his learning as a consequence of the interfering behaviors (Dist. Ex. 6 at p. 1). Previous interventions noted on the FBA included positive reinforcement, use of a token system, use of a visual schedule, and redirection (*id.*). The FBA hypothesized that the function of the student's interfering behaviors was to deal with anxiety related to new situations and changes in the environment, self stimulation, or to communicate what he did and did not want through protest, escape, or darting behaviors (*id.* at p. 2).

In a June 2008 educational progress report from the student's teacher at the McCarton School, the teacher noted that the student continued to make progress when provided with individualized teaching using fast paced instruction, a consistent predictable routine, continuous positive reinforcement, and guidance during group activities (Parent Ex. P at p. 1). The progress report reflected that the student's token reward system targeted scripting behaviors and reinforced him for remaining quiet (*id.*). The report also indicated that although the student had exhibited difficulty navigating through the notebook of sentences that was used as a visual prompt for more complete sentences; the student was able to use the notebook to make requests, ask questions, and socialize with his peers when prompted by his teachers (*id.* at p. 2). The progress report reflected that typing had become a strength for the student, he had learned to add a period to the end of a sentence, generate a sentence and type it out with moderate prompting, and that the student was learning to spell five to six letter words (*id.* at p. 3). The student had increased his ability to label numbers to 100, rote count to 50, and had made significant progress learning to add using objects but required minimal prompting to complete equations (*id.* at pp. 3-4). The student had also

⁴ In New York, an FBA means "the process of determining why a student engages in behaviors that impede learning and how the student's behavior relates to the environment" (8 NYCRR 200.1[r]).

progressed to spontaneously greeting others and using a written activity schedule that he was able to independently follow (id. at p. 4).

By final notice of recommendation (FNR) dated June 9, 2008, the district advised the parents of the specific district school where the student's May 2008 IEP would be implemented (Dist. Ex. 5). The FNR also stated that if the parents wished to reject the May 2008 IEP or arrange another CSE meeting, they could contact the district staff person listed on the FNR (id.).

On June 23, 2008, the student's father visited the district's placement identified in the June 9, 2008 FNR (Tr. p. 353; Parent Ex. F). By letter dated June 27, 2008, the student's father advised the district that he could not consent to the student's placement in the proposed program because he determined that the program was inappropriate for the student (Parent Ex. F). The student's father based his determination on the following reasons: (1) that his son "primarily" needed 1:1 teaching instruction; (2) that the "direct instruction" at the proposed program totaled only 45 minutes per day, whereas the student required at least 40 hours per week; and (3) that the recommended speech-language services totaled only seven 30-minute sessions per week, and that the student needed at least eight 45-minute sessions per week (id.). The student's father indicated that he was available to view other recommended programs, but if no other program was offered, then he rejected the proposed program (id.). Lastly, the student's father stated that in the absence of an appropriate placement, and as discussed during the CSE meeting, the student would continue at the McCarton School, for which the parents would seek tuition reimbursement (id.).

In a July 9, 2008 OT progress report from the McCarton School, the student's therapists described the student's progress as "steady" (Parent Ex. O at p. 6). The therapists reported that the student was able to engage in therapist directed activities for longer periods of time and appeared to have improved postural control, which helped the student sit in a chair with correct posture (id. at p. 5). Noted improvements were observed with respect to the student's strength, balance, coordination, and fine motor control; however, the therapists stated that attention and concentration continued to be areas of significant difficulty for the student and that the student required a great deal of external structure to help him complete activities throughout his day (id.). The report also reflected that the student continued to demonstrate difficulties in sensory processing and regulation, as well as delays in gross and fine motor skills and self-care skills (id.). Although the therapists indicated that motor planning difficulties still impeded the student's development and learning, they further reported that the student's overall muscle tone, physical strength, and coordination had improved considerably (id.). The therapists also reported that the student was participating in yoga sessions that resulted in improved body awareness, attention, strength, and bilateral coordination (id.). In addition, the therapists stated that the student had improved his repertoire of foods to include a variety of tastes and textures, and they noted that the student was willing to try novel items (id.). The therapists also opined in the progress report that the student benefited from sensory breaks such as the use of a swing, hammock, and trampoline, which they recommended be continued to help the student complete activities with greater independence and ease throughout the day (id. at pp. 5-6). Recommendations included continued OT sessions at the then current mandate of five individual 45-minute sessions per week utilizing sensory integration and motor learning approaches (id. at p. 6). Administration of the Bruininks-Oseretsky Test of Motor Proficiency, Second Edition (BOT-2) yielded a total composite score in the first percentile rank (id. at p. 1). However, the report indicated that the student's scores did not reflect a comparison of the student's abilities with his peers according to standardized direction

because, due to the student's diminished attention, auditory processing and body awareness, he required visual modeling for all components of the test and additional verbal instructions (id.). Although the administration of the test was adapted for the student in order to get a better picture of his skill development, the evaluators opined that the student's low scores were due to difficulties following verbal directions and/or demonstrations for each task (id. at p. 3).

A July 21, 2008 speech-language progress report from the student's speech-language pathologist at the McCarton School indicated that the student's speech-language therapy focused on improving language comprehension and processing, increasing attention to language, improving syntax, promoting spontaneous use of language, facilitating interactions with peers and adults, refining speech motor planning skills, and expanding play skills (Parent Ex. N at p. 1). The progress report reflected that the student had made progress in all areas of speech-language; however, he continued to demonstrate difficulty in the areas of receptive, expressive and pragmatic language skills, language processing, and motor speech skills (id. at p. 4). The speech-language pathologist recommended that the student's therapy sessions continue at the then current mandate of five individual 60-minute sessions of speech-language therapy per week, and she further suggested that the student be afforded an additional three individual 60-minute afterschool sessions per week to facilitate maintenance, carryover, and generalization of skills acquired in school (id.). The speech-language pathologist also recommended that the student receive PROMPT therapy and engage in oral-motor exercises to improve his speech sound productions (id.).

In September 2008, the McCarton School developed an "Individual Education Plan" for the student for the 2008-09 school year (Parent Ex. G). The plan included goals and short-term objectives in the areas of expressive and receptive language, community skills, pre-academic skills, academic skills, social and leisure skills, ADL skills, and behavior skills which were to be addressed using ABA instruction (see id. at pp. 1-16).

On October 10, 2008, the student's mother entered into an enrollment contract with the McCarton School for the 2008-09 school year (Parent Ex. L at p. 3).⁵

A January 2009 speech-language progress report from the McCarton School reflected that the student had made progress in all areas of speech-language; however, he continued to demonstrate difficulty in the areas of receptive, expressive and pragmatic language skills, language processing, and motor speech skills (Parent Ex. J at p. 4). The speech-language pathologist recommended that the student's therapy sessions continue at the then current mandate of five individual 60-minute sessions of speech-language therapy per week, and she further suggested that the student be afforded three additional individual 60-minute afterschool sessions per week to facilitate maintenance, carryover, and generalization of skills acquired in school (id.).

By educational progress report dated January 7, 2009, the student's teacher from the McCarton School reported that the student had demonstrated improvement in all areas (Parent Ex. I at pp. 1, 4). According to the student's teacher, the student continued to exhibit a very positive response to the highly structured and individualized behavioral teaching methods employed at the McCarton School and had demonstrated an ability to acquire new material through repetition (id.

⁵ Although the student's mother did not sign the enrollment contract until October 10, 2008, the contract is dated July 14, 2008 (Parent Ex. L at p. 1).

at p. 4). The teacher further noted that the student was learning to generalize learned information; however, he continued to demonstrate delays in his play, interaction, communication, and adaptive skills (*id.*). The student's teacher also reported that the student's varying attention, activity level, and self-directed behaviors affected all areas, requiring adult intervention in order to focus the student's play and develop new skills (*id.*). Recommendations included continued individualized education with 1:1 staff support to increase the student's abilities and help the student develop attention skills and behavioral controls (*id.*).

In a January 29, 2009 OT progress report from the McCarton School, the student's occupational therapists noted that the student enjoyed sensory input via various types of equipment in the gym (Parent Ex. H at p. 3). They further reported that the student had been making steady progress in all areas addressed during his OT sessions including sensory regulation, gross and fine motor development, and ADLs (*id.*). The therapists advised that the student continued to need significant support for consistent demonstration of those improvements in sensory and attention regulation, as well as trunk strengthening, motor planning and refinement of graphomotor and daily living tasks overall, and that such support needed to come through the student's sensory diet, classroom routine, and OT sessions (*id.* at pp. 3-4). The therapists highly recommended the continuation of OT services at the mandate of five individual 45-minute sessions per week and they added that it was vital that the student consistently receive proprioceptive and vestibular input to facilitate self-regulatory strategies, an optimal level of arousal, and the ability to organize himself to promote learning and acquisition of age appropriate fine and gross motor skills for greater success at home and in school (*id.* at p. 4).

By due process complaint notice dated February 11, 2009, the parents, through their attorney, commenced an impartial hearing (Parent Ex. A). As relief, they requested tuition reimbursement for the 2008-09 school year at the McCarton School (*id.* at pp. 1, 4). The parents maintained that on a procedural and a substantive level, the district failed to offer the student a free appropriate public education (FAPE)⁶ during the 2008-09 school year (*id.* at p. 1). Among other things, the parents alleged that: (1) the CSE convened an IEP meeting without first timely and properly evaluating the student's present levels of performance; (2) the CSE "failed to develop critical assessment reports" that should have been used as the basis for developing the IEP; (3) the CSE failed to recommend a "specific placement location" at the CSE meeting; (4) to the extent that a placement location was recommended outside of the CSE meeting, the placement recommendation was not reasonably calculated to meet the student's individual needs, particularly his need for intensive 1:1 teaching; (5) the proposed placement was inappropriate and did not offer "the intensity and consistency" that the student needed; (6) the CSE failed to recommend any extended day services for the student; (7) the CSE failed to develop a transition plan for the student; (8) no school social worker or "education evaluator" attended the CSE meeting; (9) the proposed FBA/BIP was inadequate and inappropriate; (10) the annual goals and short-term objectives

⁶ 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* 34 C.F.R. § 300.17).

contained in the May 2008 IEP were unclear, ambiguous, inadequate, and not measurable; (11) the CSE failed to offer the parents any individual parent training and counseling in violation of State regulations; and (12) the CSE engaged in impermissible predetermination (id. at pp. 2-4).

On February 17, 2009, the district submitted a response to the parents' due process complaint notice in which it argued that the proposed program was reasonably calculated to enable the student to obtain meaningful educational benefits (Parent Ex. B).

On March 26, 2009, an impartial hearing convened and after three days of testimony, concluded on June 16, 2009 (IHO Decision at pp. 1-2). On August 28, 2009, the impartial hearing officer rendered a decision in the matter awarding tuition reimbursement to the parents for the McCarton School for the 2008-09 school year (id. at p. 13). First, the impartial hearing officer determined that there was no evidence to support the district's contention that the parents were not entitled to reimbursement relief due to a lack of standing (id. at p. 3). The impartial hearing officer went on to find that nothing in the hearing record showed that another person accepted the responsibility to pay the student's tuition and that there was no evidence in the hearing record showing that the parents failed to pay the tuition (id.). The impartial hearing officer further determined that there was no evidence or testimony during the impartial hearing about the checks paid to McCarton (id.). Accordingly, he conditioned his award of reimbursement upon proof that the parents "directly or indirectly" paid the student's tuition (id.).

Turning next to the merits of the case, although he found that the May 2008 CSE was duly constituted, the impartial hearing officer concluded, in pertinent part, that the May 2008 IEP was inappropriate and that the student was denied a FAPE for the following reasons: (1) the student could not function adequately in a group setting without 1:1 instruction; (2) the frequency and duration of the OT recommended in the May 2008 IEP failed to comport with what the student's therapists recommended in his OT report; (3) the hearing record did not demonstrate that the student would benefit from a 6:1+1 program without intense teacher support on a 1:1 basis; (4) a 6:1+1 program recommendation was not in an educational setting that would be calculated to provide the student with "meaningful educational progress;" (5) the FBA did not comply with State regulation to the extent that it lacked specific data regarding the frequency, duration, and intensity of the student's behavior; and (6) the FBA was not useful as a basis for developing a BIP (id. at pp. 6-8). Next, although the impartial hearing officer described the student's program at the McCarton School as "rather restrictive," he noted that the hearing record provided a clear description of the student's program and how it was adapted to meet the student's individual needs (id. at p. 11). He concluded that the McCarton School was reasonably calculated for the student to make educational progress, and that the parents met their burden of establishing that it was appropriate to meet the student's special education needs (id. at p. 12). Lastly, with respect to equitable considerations, the impartial hearing officer determined that there was no evidence that the parents failed in any way to cooperate with the district in developing their son's program (id.). More specifically, given that the district did not mail the FNR until June 9, 2008, the impartial hearing officer found "no reason to penalize the parents for a late notice" of their decision to reenroll their son at the McCarton School (id. at p. 13). Furthermore, the impartial hearing officer found no reason to reduce the award of tuition reimbursement because of the parents failure to

comply with the Individuals with Disabilities Education Act's (IDEA's) 10-day notice requirement⁷ because the student had not been attending public school, but had been enrolled at the McCarton School (*id.*). In light of the foregoing, the impartial hearing officer ordered the district to reimburse the parents for the student's tuition at the McCarton School, upon submission of proof that the tuition was paid "from an account owned by the parents or an account which the parents were required to fund from their assets" (*id.*). The impartial hearing officer also ordered the district to provide direct funding if there was any balance due for the 2008-09 school year (*id.*).

The district appeals, and requests that the impartial hearing officer's decision be vacated to the extent that he found that the district failed to offer the student a FAPE and that equitable considerations favored an award of relief. However, the district does not appeal the impartial hearing officer's finding with regard to the appropriateness of the McCarton School. First, the district argues that the impartial hearing officer erred in finding that the student was denied a FAPE and that its program recommendation of a 6:1+1 classroom was not reasonably calculated to confer educational benefits to the student, alleging the following reasons: (1) the May 2008 CSE reviewed and discussed various reports from the McCarton School; (2) the May 2008 IEP goals were appropriate to meet the student's needs; (3) the parents did not object to or raise any concerns regarding the IEP goals during the CSE meeting; (4) the student would have been appropriately supported by a 1:1 paraprofessional in the recommended district placement; (5) the recommendation that the student receive five 30-minute sessions of OT was appropriate to meet the student's needs; (6) although the FBA/BIP were inadequate, the May 2008 IEP directly addressed the student's behaviors through the use of a visual schedule, verbal support, redirection, prompting, positive reinforcement, and the provision of 1:1 paraprofessional; (7) the recommended 6:1+1 classroom would have been able to implement the student's IEP and address the student's educational and behavioral needs; and (8) the recommended placement would have offered the parents parent training and counseling. In the alternative, the district argues that to the extent that a State Review Officer upholds the impartial hearing officer's finding that the district failed to offer the student a FAPE, the award of reimbursement should be limited to the period of September 1, 2008 through June 30, 2009 and should not include summer 2009. Lastly, the district argues that the impartial hearing officer's decision should be annulled because he failed to develop the hearing record with regard to whether the parents had suffered any out-of-pocket loss and ultimately abdicated his fact finding responsibility by failing to determine if the parents had a legal obligation to pay the McCarton School.

The parents submitted an answer requesting that the petition be dismissed and the impartial hearing officer's decision be affirmed. First, the parents challenge the district's argument that they lack standing to seek relief as untimely and erroneous. The parents contend that as a result of previous impartial hearings, the district knew about the identity of the individual who had financed the student's tuition. In addition, the parents assert that the district failed to raise in their answer to the parents' due process complaint notice or during the impartial hearing, any objection to the evidence proffered as proof of payment, and in essence waived any challenge with respect to the parents' standing to seek relief. Next, although the parents maintain that the impartial hearing officer properly found that the district failed to offer the student a FAPE during the 2008-09 school year, they further submit that the district failed to comply with the stipulation in Jose P. v. Ambach,

⁷ See 20 U.S.C. § 1412(a)(10)(C)(iii)(I); 34 C.F.R. § 300.148(d)(1).

No. 79 Civ. 270 (E.D.N.Y. Jan. 5, 1982), with respect to the placement determination.⁸ With respect to the appropriateness of the McCarton School, the parents allege that the impartial hearing officer correctly found that the placement was appropriate because the evidence showed that it was reasonably calculated to provide the student with meaningful educational benefits. Lastly, the parents argue that equitable considerations support their claim for relief, and to the extent that relief is awarded, the award of tuition should cover the period of July 1, 2008 through June 30, 2009.

Additionally, the parents have submitted the following documents as additional evidence which they request for consideration on appeal: (1) an affidavit from the individual whose name is listed on the checks used to pay the student's tuition at the McCarton School (see Parent Ex. L at pp. 5-6); and (2) a copy of the stipulation entered in Jose P. (No. 79 Civ. 270 [E.D.N.Y. Jan. 5, 1982], 553 IDELR 298).

The district submitted a reply in which it argues that the documents offered by the parents on appeal as additional evidence should be rejected. With respect to the stipulation, the district submits that it should be rejected for the following reasons: (1) it was available at the time of the impartial hearing; (2) it is not necessary in order to render a decision in this matter; (3) although the parents argue that the district violated the stipulation, such claims have not been properly raised on appeal; and (4) to the extent that the district violated the stipulation, the remedy of a Nickerson letter is not available to the parents in this case because they are not seeking reimbursement for a State-approved private school. Next, the district objects to the affidavit on the following grounds: (1) the document was available during the impartial hearing, yet, the parents did not offer it as evidence; and (2) the parents have not demonstrated how the affidavit relates to their claims. Pursuant to State regulations, a reply is limited to any procedural defense interposed by a respondent or to any additional documentary evidence served with the answer (8 NYCRR 279.6). In this case, the district's reply contains allegations that do not respond to procedural defenses interposed by the parents. Therefore, the reply will be considered only to the extent that district raises objections to the additional evidence submitted with the answer (Application of a Student with a Disability, Appeal No. 09-058; Application of a Student with a Disability, Appeal No. 09-056; Application of a Student with a Disability, Appeal No. 09-034; Application of a Student with a Disability, Appeal No. 08-151; Application of a Student with a Disability, Appeal No. 08-102; Application of a Student Suspected of Having a Disability, Appeal No. 08-002; Application of a Child with a Disability, Appeal No. 04-064; Application of a Child with a Disability, Appeal No. 02-009; Application of a Child with a Disability, Appeal No. 98-37).

Regarding the additional evidence, generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an impartial hearing officer's

⁸ Pursuant to Jose P., *supra*, a parent may be entitled to the remedy of a Nickerson Letter, which is a letter from the Department of Education to a parent authorizing the parent to immediately place the student in an appropriate special education program in any State-approved private school, at no cost to the parent (see Jose P. v. Ambach, No. 79 Civ. 270 [E.D.N.Y. Jan. 5, 1982], 553 IDELR 298). The remedy of a "Nickerson letter" is intended to address the situation in which a student has not been evaluated or placed in a timely manner. (see Application of a Student with a Disability, Appeal No. 08-020; Application of the Bd. of Educ., Appeal No. 03-110; Application of a Child with a Disability, Appeal No. 02-075; Application of a Child with a Disability, Appeal No. 00-092).

decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 09-091; Application of a Student with a Disability, Appeal No. 08-030; Application of the Dep't of Educ., Appeal No. 08-024; Application of a Student with a Disability, Appeal No. 08-003; Application of the Bd. of Educ., Appeal No. 06-044; Application of the Bd. of Educ., Appeal No. 06-040; Application of a Child with a Disability, Appeal No. 05-080; Application of a Child with a Disability, Appeal No. 05-068; Application of the Bd. of Educ., Appeal No. 04-068). Here, I decline to accept the proffered affidavit in this case because it could have been offered at the time of the impartial hearing. Moreover, the Jose P. document offered by the parents is not necessary to render a decision, however, I will take judicial notice of it.

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 (see 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]; see also O'Toole v. Olathe Dist. Sch. Unified Sch. Dist. No. 233, 144 F.3d 692, 701 [10th Cir. 1998]). Under the IDEA, if a procedural violation is alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an impartial hearing officer's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 130 [2d Cir. 1998]; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally,

school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs (34 C.F.R. § 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals related to those needs (34 C.F.R. § 300.320[a][2]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (34 C.F.R. § 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

The New York State Legislature amended the Education Law to place the burden of production and persuasion upon the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of production and persuasion regarding the appropriateness of such placement (Educ. Law § 4404[1][c], as amended by Ch. 583 of the Laws of 2007). The amended statute took effect for impartial hearings commenced on or after October 14, 2007; therefore, it applies to the instant case (see Application of the Bd. of Educ., Appeal No. 08-016).

Before reaching the merits of the instant appeal, initially, I note that neither party has appealed the following determinations of the impartial hearing officer: (1) that the student's placement at the McCarton School was appropriate; and (2) that the parents failed to comply with the IDEA's 10-day notice requirement. 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 the Dep't. of Educ., Appeal No. 09-092; 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).

Turning to the merits of the instant case, after a careful and independent review of the hearing record, I find that the impartial hearing officer erred in finding that the district denied the student a FAPE for the 2008-09 school year. For the reasons set forth below, the hearing record reflects that the May 2008 CSE developed an appropriate program with parental participation and that the district's recommended 6:1+1 classroom combined with related services consisting of

counseling, OT, speech-language therapy and the support of a 1:1 behavior management paraprofessional that was reasonably calculated to confer educational benefits to the student.

The hearing record reveals that the information contained in the May 2008 IEP was based upon information provided by staff from the McCarton School who attended the CSE meeting (see Tr. pp. 289, 298). The school psychologist who participated in the May 2008 CSE meeting testified that the CSE reviewed reports prepared by the student's then current teacher and related service providers from the McCarton School (Tr. pp. 275-76; see Dist. Exs. 1; 2; 3; 4). She also testified that the student's father was afforded opportunities to participate in the development of the student's IEP and to ask questions with regard to each "discipline" (Tr. p. 294). The school psychologist testified that the academic instructional levels and the description of the student's present levels of academic performance reflected in the student's May 2008 IEP were provided by the student's teacher from the McCarton School (Tr. pp. 279-82, 298). The May 2008 IEP also included academic and social/emotional management needs that were linked to the student's present levels of academic and social/emotional performance and learning characteristics, including visual and/or verbal supports (visual schedule), redirection and prompting, clear and consistent routine, positive reinforcement, token economy, and counseling (Parent Ex. C at pp. 3-4).

I now turn to the district's assertion that the annual goals contained in the May 2008 IEP were appropriate to meet the student's needs. As detailed below, the hearing record supports the district's claim.

An IEP must include a statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum; and meet each of the student's other educational needs that result from the student's disability (see 20 U.S.C. § 1414[d][1][A][i][II]; 34 C.F.R. § 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). Each annual goal shall include the evaluative criteria, evaluation procedures and schedules to be used to measure progress toward meeting the annual goal during the period beginning with placement and ending with the next scheduled review by the committee (8 NYCRR 200.4[d][2][iii][b]; see 20 U.S.C. § 1414[d][1][A][i][III]; 34 C.F.R. § 300.320[a][3]).

The hearing record reflects that the May 2008 IEP included annual goals and short-term objectives to address the student's needs in math, reading, written expression, social skills, gross motor skills, sensory processing, motor planning, and coordination and fine motor skills, speech-language (auditory processing, pragmatic, receptive, and expressive language skills), and behavior (Tr. p. 289; Parent Ex. C at pp. 7-19). Although the parents argued in their due process complaint notice that the district failed to develop IEP annual goals and short-term objectives that were clear, unambiguous, adequate, sufficiently challenging and individualized; the hearing record indicates otherwise. The hearing record reflects that the academic annual goals and short-term objectives were appropriately linked to the student's needs as indicated by the present levels of academic performance on the May 2008 IEP and that they reflected that the student would continue to work on a particular skill at a somewhat higher level than what was described in the present levels of performance (Parent Ex. C at pp. 3, 7-9). For example, the student's present level of academic performance on the May 2008 IEP indicated that the student was able to recognize numbers up to 60 and that he could count to 30, and the correlating math short-term objectives reflected that the

student would increase his number recognition to 80 and rote count to 50 (*id.* at pp. 3, 7). With respect to reading comprehension, the May 2008 IEP indicated that the student could answer "who," "what," "where" and "when" questions and the correlating short-term objective reflected that the student would answer "how" and "why" questions (*id.* at pp. 3, 8). The hearing record suggests that this was a reasonable expectation of the student in light of testimony by the student's teacher from the McCarton School who described the student's progress as slow and gradual (Tr. p. 43). A review of the student's counseling and behavioral annual goals also reveals that they were appropriately linked to the description of the student's present level of social/emotional performance and needs set forth in the May 2008 IEP (Parent Ex. C at pp. 4, 10). The hearing record indicates that the OT annual goals and short-term objectives on the student's May 2008 IEP were similarly based on the student's functional levels as reported in the present level of health and physical development in the May 2008 IEP and in the January 2008 OT progress report (*see* Dist. Ex. 3 at pp. 1-2, 4-5; Parent Ex. C at pp. 6, 12-14). Although the occupational therapist recommended in her report that two short-term objectives that addressed "jumping jacks" and "sit-ups" be increased from five to ten repetitions, the May 2008 IEP did not reflect the increase (*compare* Parent Ex. C at p. 13, *with* Dist. Ex. 3 at p. 4). However, the hearing record does not suggest that the failure to include the therapist's recommendation: (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]), or substantively denied the student a FAPE.

Additionally, with regard to the student's May 2008 speech-language goals, although the May 2008 IEP did not include the student's present level of speech-language performance, the annual goals and short-term objectives included in the IEP were consistent with the student's needs and abilities described in the January 2008 speech-language progress report from the McCarton School (*compare* Dist. Ex. 2 at pp. 1-3, *with* Parent Ex. C at pp. 16-18; *see also*, *O'Toole*, 144 F.3d at 701). According to the school psychologist, the student's goals were created during the May 2008 CSE meeting with the participation of the McCarton School staff, which included the student's then current speech-language pathologist (Tr. p. 289; Parent Ex. C at p. 2). Moreover, the hearing record does not reflect that the student's father or any of the student's related service providers from the McCarton School raised any objections to the annual goals and short-term objectives that were developed at the May 2008 CSE meeting. Based on the above, the hearing record demonstrates that the May 2008 IEP annual goals and short-term objectives were appropriate to meet the student's needs and that they provided sufficient specificity to enable the student's teacher and related service providers to understand the CSE's expectations with respect to each goal and what the student would be working on over the course of the school year (*see Tarlowe v. Dep't of Educ.*, 2008 WL 2736027, at *9 [S.D.N.Y. July 3, 2008]); *Application of a Student with a Disability*, Appeal No. 09-082; *Application of a Student with a Disability*, Appeal No. 09-038; *Application of the Dep't of Educ.*, Appeal No. 08-096; *Application of a Student with a Disability*, Appeal No. 08-086; *Application of a Child with a Disability*, Appeal No. 07-117; *see also M.C. v. Rye Neck Union Free Sch. Dist.*, 2008 WL 4449338, at *11 [S.D.N.Y. Sept. 29, 2008]).

Next, a review of the hearing record supports the district's contention that the impartial hearing officer erred in finding that the recommended program did not offer the student a FAPE because the recommendation did not include teacher support on a 1:1 basis. Testimony by the

teacher of the district's recommended class indicated that as of September 2008, there were five students and four paraprofessionals in the classroom, in addition to the teacher (Tr. pp. 157, 159). One paraprofessional was assigned to the classroom and the other three were assigned to specific students (Tr. p. 159). The hearing record reflects that the classroom staff had experience and training in the area of autism; specifically, the classroom paraprofessional had been working with children with autism for approximately ten years and had worked with students with other disabilities for twenty years (*id.*). The teacher testified that he had received training in topics specific to working with children with autism including ABA, verbal behavior, "TEACCH,"⁹ and augmentative alternative communication devices; that he had recently completed an Advanced Certificate in Autism regarding teaching and research in autism; and that he had exposure to the "Stanley Greenspan Floor Time" method through a colleague (Tr. pp. 154-55, 218). The teacher of the recommended class also testified that the paraprofessionals in the school participated in daily training that consisted of collaboration between the classroom staff, in addition to a 1/2 day training session provided by the assistant principal at the beginning of the school year (Tr. pp. 225-26). He opined that with every lesson that the class completed, it was the classroom teacher's job to help prepare the paraprofessionals and to give the paraprofessionals the expectations of how to work with the students (Tr. p. 226). The classroom teacher added that because every student was different, the paraprofessionals received a lot of on the job training so "you have to kind of work with the child, work with the teacher, and together you develop your strategies..." (Tr. pp. 226, 254). The teacher of the recommended class also stated that he shared his knowledge with the paraprofessionals, which included differentiated reinforcement of other behaviors, and that he had trained the paraprofessionals in his classroom to collect daily data (Tr. pp. 196-97, 253-54). The teacher of the recommended class also testified that he initially presented new material to the class as a whole group, modeling his expectations to the students and to the paraprofessionals, and then he broke the class up into smaller groups based on functional levels or 1:1 settings where materials adapted for the students were utilized (Tr. pp. 169-70). He stated that the paraprofessionals would know what skills to work on with the students based on his presentation of the group lesson and that he would also give them some guidance as to his expectations and how to use the materials during 1:1 instruction (Tr. p. 169). Furthermore, the classroom teacher testified that if a student had a 1:1 paraprofessional pursuant to his or her IEP, that student would receive that 1:1 support and if a student needed more attention during a particular lesson, then that student would receive more 1:1 instruction (Tr. p. 170). Based on the foregoing, the hearing record illustrates that the recommended classroom would have been able to appropriately support the student with 1:1 paraprofessional support such that a FAPE was offered.

Moreover, I note that while the hearing record indicates that the student required 1:1 support to receive an educational benefit, there is nothing in the hearing record to suggest that the student would not be adequately supported by a 1:1 paraprofessional (Dist. Exs. 1; 2; 3; Parent Ex. C at pp. 3-4, 22-23). Although the McCarton School's director indicated that she believed that in order to be an appropriate teaching support for the student a "person would need training in [ABA] to be able to know what the function of the behavior is, and to know what the appropriate response would be," the hearing record does not reflect that the student would require more than a 1:1 paraprofessional if another teaching methodology were employed (Tr. p. 120). While the hearing

⁹ Although not indicated in the hearing record, upon information and belief, "TEACCH" is an acronym for "Treatment and Education of Autistic and related Communication-handicapped Children."

record reflects that throughout his school career the student has only attended the McCarton School and received strictly ABA instruction, there is no evidence in the hearing record showing that the student would be unable to benefit from another teaching methodology or that evidence demonstrates that the student would not be adequately supported with a 1:1 paraprofessional during the implementation of another methodology (Tr. p. 358).

Moreover, the hearing record demonstrates that the recommended 6:1+1 classroom would have been able to implement the student's IEP and address the student's educational needs. In addition to the information regarding the recommended program noted above, the hearing record reflects that the teacher of the recommended class would have adapted the New York State curriculum to meet the students' individual needs (Tr. p. 160). He testified that he completed assessments of the students in October and November using the "Brigance"¹⁰ or the "ABLLS" and then developed the students' goals for the school year (Tr. pp. 233-34).¹¹ The students are assessed again near the end of the school year to determine their progress (Tr. p. 270). The teacher of the recommended class testified that he provided opportunities for generalization of skills by going out into the community (Tr. p. 202). He also described how he would address the student's specific reading and math annual goals and short-term objectives reflected on the May 2008 IEP (Tr. pp. 192-95). For example, to address the student's ability to read sight words, the teacher explained how he would use flash cards, and the teacher further described his classroom as a "very print rich environment" for words (Tr. p. 194). In light of the foregoing, the hearing record reflects that the proposed program would have adequately addressed the student's educational needs in addition to his behavioral needs.

Next, I turn to the district's contention that the May 2008 CSE's recommendation that the student receive five 30-minute sessions of OT per week was appropriate to meet the student's needs. The hearing record reflects that the student required OT related services to assist him in motor planning and coordination skills, fine motor and handwriting skills, self care skills, sensory processing and regulation skills, and attention and concentration (Dist. Ex. 3 at p. 6; Parent Ex. C at p. 6). To address the student's OT needs, the May 2008 CSE recommended five 30-minute OT sessions in a group of three and further delineated that the student's OT needs be addressed both in and out of the classroom (Parent Ex. C at pp. 2, 22). Initially, I note that the student's occupational therapist from the McCarton School, who participated in the May 2008 CSE meeting, testified that the district's recommendation of a 30-minute session five times per week would not provide the student with enough sensory input to keep him regulated and modulated throughout the rest of the session (Tr. p. 67); however, there is no indication in the hearing record that she raised any objection to the CSE's recommendation for OT for the student during the CSE meeting (Tr. pp. 64, 67, 73-74; see Parent Ex. C at p. 2). The May 2008 IEP included one annual goal and four short-term objectives that focused on improving the student's sensory processing skills for improved self-regulation and increased interactions with the environment; one annual goal and six short-term objectives that focused on improving the student's motor planning and coordination skills; and one annual goal and seven short-term objectives that focused on improving the student's

¹⁰ The hearing record defines the "Brigance" as series of checklists in various areas of development, such as toileting, early language social, math, reading, writing, speaking, and listening skills (Tr. p. 230).

¹¹ According to the hearing record, "ABLLS" is an acronym for the "Assessment of Basic Language and Learning Skills" (Tr. p. 51).

functional shoulder, arm, and hand control for greater success with fine motor, pre-writing, and self care skills (Parent Ex. C at pp. 12-14). The student's January 2008 McCarton School OT progress report indicated that the student's OT goals included performing a variety of desktop activities for seven minutes 80 percent of the time, engaging in a therapist directed activity for five minutes following sensory input 100 percent of the time, and directing and maintaining eye contact for three minutes 80 percent of the time (Dist. Ex. 3 at p. 1). The student's McCarton School occupational therapist reported that at the time of the progress report, the student was able to perform desktop activities for up to five minutes, participate in a therapist directed activity for up to four minutes following sensory input and for up to five minutes or longer with verbal reminders, and a clear start and end to the activity (id. at pp. 1-2). The occupational therapist further reported that the student's ability to engage in an activity for more than five minutes was dependent on the type of activity and distractions present and the time of day (id. at p. 2). However, the reports from the student's McCarton School speech-language pathologist and his teacher at the McCarton School both indicated that the student was able to attend for 10 to 15 minutes without the benefit of sensory input in a small structured reading group with "shadow support" and in a small structured math group for certain tasks previously taught in a 1:1 setting (Tr. p. 67; Dist. Exs. 1 at p. 1; 2 at p. 1; 3 at p. 1). Under the circumstances presented herein, I find that the recommended OT in the student's IEP was reasonably calculated to confer educational benefits to the student (see IHO Decision at p. 6; see also Karl v. Bd. of Educ. of the Geneseo Central School District, 736 F.2d, 878 [2d Cir. 1984]).

Next, the district asserts that the student's behavior would have been appropriately addressed by the IEP. When a student's behavior impedes his or her learning or that of others, the CSE must consider positive behavioral interventions and supports, and other strategies, to address such behavior (20 U.S.C. § 1414[d][3][B][i]; 34 C.F.R. § 300.324[a][2][i]; see 8 NYCRR 200.4[d][3][i]; see also A.C., 553 F.3d at 172; J.A. v. East Ramapo Cent. Sch. Dist., 603 F. Supp. 2d 684, 689 [S.D.N.Y. 2009]; M.M. v. Dep't of Educ., 583 F. Supp. 2d 498, 510 [S.D.N.Y. 2008]; Tarlowe, 2008 WL 2736027, at *8; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 149-50 [S.D.N.Y. 2006]; Application of a Student with a Disability, Appeal No. 08-028; Application of the Dep't of Educ., Appeal No. 07-120).¹² In addition to the federal requirement, State regulations require that an evaluation include an FBA for a student whose behavior impedes his or her learning or that of others, as necessary to ascertain the physical, mental, behavioral and emotional factors which contribute to the suspected disabilities (8 NYCRR 200.4[b][1][v]; see Connor v. New York City Dep't. of Educ., 2009 WL 3335760, at *4 [S.D.N.Y. 2009]). Additionally, under State regulations, when considering more restrictive programs or placements as a result of the student's

¹² In developing an IEP and considering "special factors," when a student's behavior impedes learning, federal regulations (34 C.F.R. § 300.324[a][2][i]) and State regulations (8 NYCRR 200.4[d][3]) require consideration of strategies to address that behavior as part of the development of the IEP. Federal regulations (34 C.F.R. §§ 300.530[d][1][ii], 300.530[f][1][i]) and State regulations (8 NYCRR 201.3) also address preparation of, or review of, an FBA and BIP in disciplinary situations. In addition, State regulations (8 NYCRR 200.4[d][3][i], 200.22[a], [b]), but not federal regulations, require consideration of an FBA and BIP in certain non-disciplinary situations.

behavior, a CSE "shall consider the development of a behavioral intervention plan" (8 NYCRR 200.22[b]).¹³

With regard to the student's behavioral needs, the district contends that the May 2008 IEP directly addressed the student's behaviors using a visual schedule, verbal support, redirection, prompting, positive reinforcement, and the provision of a 1:1 paraprofessional to target the student's scripting, fleeing, and anxiety behaviors (Parent Ex. C at pp. 2-4, 23). The hearing record reflects that in addition to these elements, the use of a token economy and the provision of a clear and consistent routine were also recommended in the student's May 2008 IEP (*id.* at pp. 3-4). Additionally, the teacher of the proposed classroom described his experience in developing FBA/BIPs; specifically, how he would identify behaviors by collecting data using the "three-part ABC contingency" including the antecedent, the behavior, and the consequences of the behavior, as well as determining the frequency and duration of a student's behaviors (Tr. pp. 244-47). The teacher of the recommended class indicated that he analyzes and discusses the data with his staff and related service providers to determine why a behavior occurs during a particular time and how he can motivate and shape a student's behavior (Tr. pp. 179, 246). He further testified that the staff meets weekly to discuss behaviors and that they use a monthly rating sheet to assess whether the behavior plan is working (Tr. pp. 187-88). His testimony also reflected the specific strategies that he would use to address this student's scripting, impulsive running (fleeing), and anxiety during new situations (Tr. pp. 183-86). For example, to help transition the student, the teacher testified that he would use visual symbols and verbal cues (Tr. p. 185). If the student tried to escape, the teacher noted that he would address this sort of behavior by positioning the student's desk furthest from the door and that the teacher would also try to motivate the student by creating an environment where the student would not feel compelled to run (Tr. p. 184).

Based on the above set of circumstances, the hearing record reflects that the IEP contained appropriate positive behavioral interventions to address the student's behavioral needs. Also, the hearing record reflects that the district's recommended program would have been able to revise and employ appropriate interventions and strategies to address the student's behavioral needs as needed (Tr. pp. 244-47; see also Tr. pp. 285, 287). Additionally, I note that the McCarton School staff did not provide the CSE with a BIP that was reportedly used at the McCarton School for the student (Tr. p. 288). Moreover, the hearing record also shows that at the time of the development of the student's May 2008 IEP, the CSE did not yet know the extent or the manner in which the student would engage in behavior that would impede his learning in the recommended district setting with the recommended supports because the student had not attended the recommended program with the recommended special education and related services (Tr. pp. 285, 287; see M.M. v. New York City Dep't. of Educ., 2008 WL 4656876, at *10 [S.D.N.Y. Oct. 21, 2008]; E.H., 2008 WL 3930028, at *11; Application of the Dep't of Educ., Appeal No. 08-122; Application of a Child with a Disability, Appeal No. 07-012, Application of the Bd. of Educ., Appeal No. 05-023; Application of a Child with a Disability, Appeal No. 04-033). Under the circumstances herein,

¹³ In New York, a BIP is defined as "a plan that is based on the results of a functional behavioral assessment and, at a minimum, includes a description of the problem behavior, global and specific hypotheses as to why the problem behavior occurs and intervention strategies that include positive behavioral supports and services to address the behavior" (8 NYCRR 200.1[mmm]; see 8 NYCRR 201.2[a]).

the failure to conduct an adequate FBA and develop a BIP based on the FBA in compliance with State regulations did not procedurally or substantively rise to the level of a denial of a FAPE.

Lastly, the hearing record supports the district's contention that the proposed school and classroom would have offered the parents adequate parent training and counseling. State regulations require that an IEP indicate the extent to which parent training will be provided to parents, when appropriate (8 NYCRR 200.4[d][2][v][b][5]). State regulations further provide for the provision of parent counseling and training for the purpose of enabling parents of students with autism to perform appropriate follow-up intervention activities at home (8 NYCRR 200.13[d]). Parent counseling and training is defined as: "assisting parents in understanding the special needs of their child; providing parents with information about child development; and helping parents to acquire the necessary skills that will allow them to support the implementation of their child's individualized education program" (8 NYCRR 200.1[kk]).

In the instant case, the school psychologist testified that the May 2008 CSE advised the student's father that when he visited the recommended program he could speak with the assistant principal or the parent coordinator to discuss any parent training that he may need (Tr. p. 295). The teacher of the recommended class also indicated that the school had a "wealth of information" available to the parents (Tr. p. 201). He stated that there were parent workshops that took place throughout the school year, that the school had guest speakers or university professors who presented on the different methodologies used in the classroom to help carry over what was happening in the classroom to the home and that there are also parent support services including referrals to other services (*id.*). The teacher of the recommended class also testified that he had daily or weekly communication with the parents via a notebook, explaining the skills that were being worked on, the topics covered or any significant "happenings" that had occurred (Tr. pp. 177-78). The teacher also testified that he sent home materials and explained in writing or by telephone how to use the materials at home (Tr. p. 178). For example, he sent home items or icons so parents could make their own schedule and try to shape their home environment to be very structured like the school environment (*id.*). Based on the foregoing, the hearing record shows that the recommended placement would have afforded the parents sufficient parent training and counseling in accordance with State regulation. Lastly, I note that, although parent counseling and training was not specifically set forth in the May 2008 IEP, in light of the evidence presented herein regarding the available services for parent counseling and training at the proposed placement, the district's failure to include these services on the IEP did not procedurally or substantively, result in the denial of a FAPE to the student (*see also T.Y. v. New York City Dep't of Educ.*, 2008 U.S. Dist. LEXIS 89827, 51 IDELR 78 [E.D.N.Y. July 2, 2008] *aff'd*, 584 F.3d 412 [2d Cir. 2009]; *Application of the New York City Dep't of Educ.*, Appeal No. 08-140; *Application of a Child with a Disability*, Appeal No. 07-030).

Based on the above, I find that the May 2008 IEP accurately reflected the student's needs and that the district's recommended program was reasonably calculated to confer educational benefits to the student in the LRE (*Viola v. Arlington Cent. Sch. Dist.*, 414 F. Supp. 2d 366, 382 [S.D.N.Y. 2006], citing *J.R. v. Bd. of Educ. of the City of Rye Sch. Dist.*, 345 F. Supp. 2d 386, 395 n.13 [S.D.N.Y. 2004]). Therefore, I find that the impartial hearing officer erred by finding that the district failed to offer the student a FAPE for the 2008-09 school year.

Having found that the district offered the student a FAPE for the 2008-09 school year, I need not reach the issue of whether equitable considerations support the parents' request for relief and the necessary inquiry is at an end (Mrs. C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134; Application of a Child with a Disability, Appeal No. 05-038; Application of a Child with a Disability, Appeal No. 03-058).

I have considered the parties' remaining contentions and find that it is unnecessary to address them in light of my determinations herein.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the decision of the impartial hearing officer dated August 28, 2009 is annulled.

**Dated: Albany, New York
December 14, 2009**

**PAUL F. KELLY
STATE REVIEW OFFICER**