



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 10-007

**Application of a STUDENT WITH A DISABILITY, by his parents, for review of a determination of a hearing officer relating to the provision of educational services by the Board of Education of the Bay Shore Union Free School District**

**Appearances:**

Pamela Anne Tucker, Esq., attorney for petitioners

Ingerman Smith, L.L.P., attorneys for respondent, Susan E. Fine, Esq., of counsel

### DECISION

Petitioners (the parents) appeal from the decision of an impartial hearing officer which denied their request to be reimbursed for their son's tuition costs at the West Hills Montessori School (West Hills) for the 2009-10 school year. The appeal must be sustained in part.

At the start of the 2009-10 school year, the student was attending West Hills (Tr. p. 795; Parent Ex. 29 at p.1). West Hills 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 services as a student with multiple disabilities is not in dispute in this proceeding (see 34 C.F.R. § [c][7]; 8 NYCRR 200.1[zz][8]).

The hearing record reveals that the student has been offered diagnoses of a of a pervasive developmental disorder, not otherwise specified (PDD-NOS), a disruptive behavior disorder-NOS, a breathing-related sleep disorder, a cognitive disorder-NOS, a phonological disorder (articulation disorder), executive functioning impairments, teratogen exposure, cerebral palsy, and a seizure disorder (Dist. Exs. 4 at p. 2; 29 at p. 1; Parent Exs. P at p. 1; NN at pp. 1, 17). The student has difficulty with communication, articulation, social/emotional/behavioral functioning, and fine motor skills (Dist. Ex. 30 at p. 2; Parent Ex. NN at pp. 3-6, 12, 16).

On November 3, 2000, several months after the student's birth; a developmental pediatrician assessed the student due to his high-risk neonatal history (Parent Ex. OO at p. 15). The pediatrician reported that the student's general examination was within normal limits; however, she was of the opinion that the student had a neurological delay and recommended a

follow-up examination of the student in two months as well as an audiological evaluation (id. at pp. 15-16). The pediatrician further opined that the student's prematurity and neonatal history placed him at a very high risk for cerebral palsy and other developmental problems and noted that the "Early [I]ntervention [Program] ha[d] already been contacted to schedule an evaluation" (id. at p. 15).

Another pediatrician conducted a developmental follow-up of the student on January 12, 2001, and reported that the student had a history of sleeping problems, tremors, and jerking movements with his arms and legs (Parent Ex. OO at p. 13). The pediatrician also reported that the student had been receiving early intervention services that included speech/feeding therapy and physical therapy (id.). The pediatrician's evaluation report indicated that the student's general examination was within normal limits; however, a neurological evaluation revealed that the student exhibited significant hypertonia as well as a delay in gross motor skills and language (id.). The pediatrician opined that the student's "hypertonia" likely represented "emerging cerebral palsy" (id.). In an April 2001 letter, the student's physician reported that the student had developed a seizure disorder, which the physician described as a "potentially dangerous and even possibly life-threatening condition" (id. at p. 10).

A May 17, 2003 report from a different developmental pediatrician, noted that the student was receiving occupational therapy (OT) and speech-language therapy but that physical therapy (PT) had been discontinued (Parent Ex. OO at p. 7). The pediatrician reported that the student exhibited language delays, decreased eye contact, a lack of developmentally appropriate peer interactions, perseverative/repetitive behaviors, stereotypical movements such as repetitive spinning, a lack of imaginary play, a high activity level, a short attention span, a lack of safety awareness, sensory integration concerns, and sleep pattern disturbances (id.). On the Childhood Autism Rating Scale (CARS) the student received a score of 44.5, which the pediatrician indicated placed him in the "severely autistic range" (id.). The pediatrician determined that the student met the criteria for a diagnosis of an autistic disorder and recommended that the student be placed in a small structured special education preschool class that incorporated an applied behavior analysis (ABA) approach (Tr. p. 533; Parent Ex. OO at p. 7). In the alternative, the pediatrician recommended home-based ABA services which she opined could also supplement center-based services (Parent Ex. OO at p. 7). The developmental pediatrician also recommended speech-language therapy, and an increase in the student's OT services (id.). The pediatrician subsequently recommended an increase in PT services for the student (id. at p. 9).

A March 3, 2004 letter from the developmental pediatrician who issued the May 2003 report, noted that the student continued to demonstrate significant sensory concerns, inappropriate behaviors, and difficulty with speech (Parent Ex. OO at p. 6). She further noted that the student's inappropriate behaviors increased and he demonstrated a loss of developmental skills during school breaks (id.). The pediatrician recommended the student attend a 12-month program for the 2004-05 school year, including a self-contained class with speech-language therapy, OT, and ABA services (id.).

The developmental pediatrician referred the student to another physician who conducted an evaluation of the student on October 7, 2004<sup>1</sup> (Parent Ex. OO at p. 1). The resultant evaluation

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<sup>1</sup> The physician conducted an "Evaluation" but did not indicate the type of evaluation.

report noted that the student was in his second year of attending a two and a half hour preschool program where he was in a self-contained class (id.). The student received speech-language therapy and OT at the preschool program as well as outside of school (id.). The evaluation report also indicated that the student had been receiving ABA services, three times per week for the past year (id.).<sup>2</sup> The evaluation report indicated that the student exhibited aggressive behaviors (hitting, pushing and biting) that were more evident at home than at school (id.). The student also was described as impulsive and he engaged in self-stimulatory behaviors; although the evaluation report also indicated that the student was demonstrating improved conversational and social skills and that he was invited to parties and play dates (id. at p. 3). The evaluation report reflected diagnoses of autism, a learning disability-NOS, cerebral palsy, asthma, and a history of seizure disorder (id. at p. 4). The evaluating physician recommended that the student be placed in a regular kindergarten class with a 1:1 aide (id.). He also "request[ed]" that the student attend a summer academic program with a 1:1 aide and receive special education itinerant teacher (SEIT) services at home (id.).

During the 2005-06 school year, the student attended a regular kindergarten classroom at a district elementary school (Tr. p. 530). During the 2006-07 school year, the student remained at the same school but attended a first grade integrated "class within a class" setting with a special education teacher and an aide (Tr. pp. 531-32).<sup>3</sup> During the 2007-08 school year, the student remained at the same elementary school in a second grade integrated class within a class setting (Tr. p. 532). During the 2007-08 school year, the student began demonstrating behavioral difficulties at school such as refusing to come in from the playground and refusing to complete academic tasks (Tr. p. 534).

A January 14, 2008 report written by the district's autism consultant described a behavioral incident concerning the student at school (Dist. Ex. 3 at p. 1). According to the autism consultant, the student refused to complete his math assignment before moving on to another activity with the rest of the class (id.). The student's autism consultant described the positive strategies she utilized in her attempts to encourage the student to comply, including showing him a "visual of the catalog of earning choices" and use of the "first then board" (id.). The report reflects that the student's noncompliance continued and escalated into more aggressive behaviors (id. at pp. 1-2). According to the report, the student initially curled up in a ball, put his fingers in his ears, crawled around on the floor, and grunted and then began to stamp his feet, bang with his hands, run toward the consultant "punching and kicking," break a pencil sharpener, throw books and dump baskets of materials (id.). The autism consultant reported that when the student "started to go for scissors," she "kept [the student] in a CPI hold to keep him and others safe" and the student's aide called for assistance (id. at p. 2). The report indicates that the autism consultant discussed the incident with the student's mother who reported that the student continued to exhibit behavioral difficulties at home that evening and that "she had to physically hold him until he calmed down" (id. at p. 3).

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<sup>2</sup> The record does not specify whether the ABA services were provided to the student in the preschool program or outside of school.

<sup>3</sup> A review of the record indicates that a class within a class refers to special education students attending a general education class (Tr. p. 301).

On January 24, 2008, the school psychologist completed a functional behavioral assessment (FBA) of the student (Dist. Ex. 4 at pp. 1-6). She reported that the student was in a "class within a class" setting with a "full time classroom aide" (id. at p. 1). The student was also reported to be receiving OT, speech-language therapy, social skills training, and skilled nursing services as needed (id. at p. 1). The psychologist conducted parent, teacher and counselor interviews, direct observations of the student across settings/times, a review of records and data, administered the Motivation Assessment Scale (MAS) to the student's teachers, and consulted with the district's autism consultant (id. at pp. 3, 5-6). The school psychologist reported that the student behaviors that were targeted to be increased included completion of academic work, using words or pictures to identify needs and differentiating between feelings and behaviors (id. at p. 1). The student's strengths included following the classroom routine, excelling in many academic areas and communicating with adults (id. at p. 2). The student was reported to be verbal; however, when frustrated he could "shut down and ...not communicate" (id.). The school psychologist indicated that antecedents for the student's inappropriate behavior included presenting the student with work (id.). The psychologist reported that the primary function of the student's behavior included escape from work and attention (id. at pp. 2-3). The school psychologist recommended multiple proactive procedures including, among others: social skills training, utilizing social stories, reinforcement, giving the student choices, verbal praise, modification of work, and frequent breaks (id. at pp. 3-4). The psychologist also recommended redirective strategies, designed to interrupt the student's refusal to complete work, and reactive strategies, including a safety plan (id.).

On January 30, 2008, a behavioral intervention plan (BIP) was developed for the student by the district (Dist. Ex. 4 at pp. 7-12). The BIP reflected that the student's behavior interfered with both his own learning and the learning of others (id. at p. 7). The BIP contained one goal: to increase the student's work completion (id. at pp. 11-12). The BIP proposed eight interventions including: (1) use of visuals; (2) use of social stories; (3) group counseling to give the student strategies to socially engage with peers; (4) communication with home; (5) denying him the ability to join group activities and/or removal from class; (6) adult attention when the student remained on task; (7) verbal praise; and (8) periodically allowing the student to be class leader (id. at p. 12). The district also developed a "[b]ehavior [c]ontract," a data sheet to comment on behaviors, and strategies for the student to use when he became angry or upset (Dist. Ex. 5 at pp. 1-5).

The Committee on Special Education (CSE) convened for an annual review on March 18, 2008 to develop the student's individualized education program (IEP) for the 2008-09 school year (third grade) (Dist. Ex. 6 at p. 1). Attendees included the CSE chairperson, a special education teacher, a regular education teacher, a social worker, a speech-language pathologist, an occupational therapist, a school psychologist, an autism consultant, the building principal, and the student's mother (id. at p. 10). The March 2008 IEP indicated that the student possessed above average reading and math skills, but had difficulty with handwriting neatness and legibility (id. at pp. 3, 5). The IEP also noted that the student had difficulty accepting criticism, could be highly distractible and impulsive, and episodically presented an aggressive posture toward peers and adults (id.). The IEP indicated that the student required a highly structured classroom with defined limits and expectations, verbal prompts, positive behavioral intervention techniques, and teacher and/or aide support to assist him with social situations and in working cooperatively with peers (id. at pp. 3-4, 5). The CSE provided the student with a classification of autism and recommended

that he be placed in a 12:1+1 "[s]pecial [c]lass [i]ntegrated"<sup>4</sup> with one 30-minute group (5:1) speech-language therapy session per week, one 30-minute group (5:1) OT session per week, one 30-minute group (5:1) counseling session per week, two 60-minute autism consultant sessions per month, and a full-time 1:1 aide (Tr. p. 114; Dist. Ex. 6 at pp. 1, 2).<sup>5,6</sup> The CSE also recommended testing accommodations including: an alternate location with minimal distractions, extended time (1.5), directions read and repeated, cues for on task behavior, and breaks (Dist. Ex. 6 at p. 2). The IEP also contained 27 annual goals to address the student's needs in study skills, speech-language skills, social/emotional skills, and motor skills (id. at pp. 5-9). The student's mother agreed with the CSE's educational classification, IEP, and placement recommendations (id. at p. 10).

A subcommittee on special education met on June 27, 2008 (Parent Ex. GGG at p. 1). By an addendum, also dated June 27, 2008, the district and the student's mother agreed to supplement the March 2008 IEP to include one 60-minute session per month of parent training with an autism consultant during July and August 2008 (Tr. p. 115; Dist. Ex. 7). The addendum reported that the parent training was to provide the parents with strategies to assist the student with transitioning to a new school (id.). Additionally, the district assistant director of pupil personnel services completed a "Commitment for Individual Student Itinerant Services" form stating that the student was to be provided with itinerant autism consultation services during summer 2008 (Parent Ex. S at p. 1). The frequency and duration of these services were to be determined by the provider (id. at pp. 2-3). Thereafter, by an additional addendum dated September 17, 2008, the student's mother and the district agreed to supplement the March 2008 IEP to include an individual bus matron for the student to provide for supervision and safety (Dist. Ex. 8 at pp. 1-2; Parent Ex. YY at pp. 1-2).

During fall 2008, the student's behavior deteriorated (Dist. Exs. 10 at pp. 1, 6, 7, 16, 18; 11 at pp. 1, 11, 14, 18). On September 24, 2008, while on a school bus, the student reportedly hit another student, pulled a second student's hair, removed his seat belt, stood and jumped while on the bus, and threatened to go out the emergency back door (Parent Ex. XX). On October 2, 2008, the student reportedly "yelled" at a teacher and hit her on the hand after being asked for his lunch ticket (Parent Ex. TT). On October 8, 2008, he yelled at a teacher who attempted to redirect him not to run in a hallway (Parent Ex. AAA).

On October 16, 2008, the student reportedly grabbed and kicked another student during recess (Dist. Ex. 12 at p. 1; see Dist. Exs. 11 at p. 10; 20). When a teacher separated the two students and the other student ran away, the student chased the fleeing student, grabbed the student, and kicked him (Dist. Ex. 12 at p. 1). It was further reported that on the same day, the student left the building and remained outside for approximately 45 minutes despite intervention by the school social worker (id. at p. 2). The student's mother then arrived and took the student home (Tr. pp.

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<sup>4</sup> The IEP noted that the recommended placement would occur at a different district elementary school than the student was attending at the time of the meeting (Dist. Ex. 6 at p. 1).

<sup>5</sup> The IEP reflected that the autism consultant was to provide school consultation one time per month and parent training one time per month (Dist. Ex. 6 at p. 2).

<sup>6</sup> The IEP stated that counseling services were provided to address the students' social skills training (Dist. Ex. 6 at p. 2).

351-54; Dist. Ex. 12 at p. 2). In response to these incidents, the student was suspended from school for one day on October 17, 2008 (Parent Ex. BBB).

On October 23, 2008, the student refused to comply with his classroom behavioral plan (Tr. pp. 355-57; Dist. Ex. 13 at p. 1; see Dist. Exs. 12 at p. 14; 20). Attempts by the classroom teacher and school social worker to persuade the student to comply were unsuccessful and the student's behavior escalated to include threats that his father would come to school and "kill" people at the school, (Tr. pp. 357-60; Dist. Ex. 13 at pp. 1-2).

On October 29, 2008, the student was asked to put down his pen and complete a classroom group activity (Dist. Ex. 14 at p. 1; see Dist. Exs. 12 at p. 18; 20). He refused and began exhibiting escalating aggressive behavior including using threatening language, shouting, kicking a staff member, running out of the room, and running through the school hallway kicking at glass doors (Tr. p. 360; Dist. Ex. 14 at p. 1; Parent Ex. RR; see Dist. Exs. 12 at p. 18; 20). The record reflects that the school social worker "secured him in a restraining hold" and he was taken to the principal's office where he continued to be restrained until his mother arrived, approximately 15 minutes later (Tr. pp. 360-63; Dist. Ex. 14 at p. 2).

By letter dated October 29, 2008, the principal informed the parents that the student was suspended from school starting on October 30, 2008 and continuing through November 7, 2008 (Parent Ex. V at pp. 1, 2; see Dist. Ex. 15). The student's infractions were listed as "assault (hitting, biting and kicking staff), insubordination . . . eloping from the classroom, and obscenity/profanity" (Parent Ex. V at pp. 1, 2). On October 30, 2008, the superintendent of schools informed the parents that a superintendent's hearing would be held on November 7, 2008 (id. at p. 1). By letter dated October 31, 2008, the executive director of pupil personnel services notified the parents that the CSE would meet on November 7, 2008 for a manifestation determination to determine if the student's misconduct was related to a disability (Parent Ex. W at p. 1).<sup>7</sup> By two letters dated November 3, 2008, the executive director of pupil personnel services notified the parents that the CSE would meet on November 7, 2008 for a review of the student's educational program (Parent Exs. X; Y).

By letter dated November 4, 2008, the student's developmental pediatrician reported that the student was being treated with medication for a sleep disturbance (Parent Ex. LL at p. 1; see Dist. Ex. 9 at p. 3). The pediatrician also reported that the student had undergone a polysomnogram study in September 2008, which indicated that the student's sleep efficiency was "severely diminished" and "significantly compromised by the fragmented nature of his sleep" (Parent Ex. LL at p. 1). The pediatrician reported that the polysomnogram study revealed that the student had fewer periods of rapid eye movement (REM) sleep and multiple episodes of apnea and hypopnea (id.). The pediatrician indicated that the "polysomnogram study... is consistent with severe Obstructive Sleep Apnea as well as severe Sleep Fragmentation" (id.). She further indicated that sleep apnea, especially when associated with severe sleep fragmentation, can cause or worsen a difficulty with focus/attention and that it can also cause or aggravate mood instability (id. pp. 1-2). The pediatrician reported that the student's sleep difficulties were caused by tonsillar hypertrophy and that the student was scheduled for surgery in December 2008 to undergo a

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<sup>7</sup> The hearing record reflects that the manifestation determination and CSE review were rescheduled to November 13, 2008 (Parent Exs. M; N; Z; see Dist. Ex. 16 at p. 2; Parent Ex. N).

tonsillectomy and adenoidectomy (id. at p. 2; Parent Ex. MM). The pediatrician requested that the student's school day be "truncated" until three or four months after the December surgery in order to allow the student to have more opportunity for REM sleep (Parent Ex. LL at p. 2).

A report from the student's developmental pediatrician dated November 6, 2008, reported that the student had been recently offered a diagnosis of a seizure disorder for which he was being treated (Parent Ex. MM at p. 1). The pediatrician opined that the seizures and the student's severe sleep loss were "very likely having significant [sic] impact on... [the student's] behavior" (id.). She recommended a limited period of home tutoring while these medical issues were being addressed (id. at p. 2). She further recommended that upon returning to school, in order to diffuse any potential behavioral outbursts, the student's BIP should be closely followed and that the involvement of the autism consultant/behavior specialist and 1:1 aide should be increased (id.). The pediatrician also opined that abrupt removal of the student from his class should be avoided as it tended to escalate the student's outbursts (id.).

By addendum dated November 14, 2008,<sup>8</sup> the district and the student's mother agreed to modify the March 2008 IEP (Parent Ex QQ). The addendum indicated that a "nexus" was found between the student's behavior on October 29, 2008 and his disability (id.). It provided that the student would receive home instruction for five hours per week along with OT, speech-language therapy, and counseling services (id.). The addendum also noted the need for a comprehensive psychiatric evaluation of the student (id.). The reasons given for these IEP changes were: (1) that the student's behaviors were found to be directly related to his disability; (2) to assess the student's behavioral/emotional functioning; and (3) to address the student's learning needs until an appropriate placement was determined (id.).<sup>9</sup>

By letter dated November 19, 2008, the district's executive director of pupil personnel informed the parents that based upon a review of evaluations, student records, and the current IEP, the CSE had determined that the student's behavior was a manifestation of his disability (Parent Ex. N).<sup>10</sup>

By letter dated December 9, 2008 to a "Center for Autism," the district executive director of pupil personnel requested a comprehensive psychiatric evaluation of the student as soon as possible to allow the CSE to review the evaluation and determine appropriate special education services (Parent Ex. L at p. 1).

By letter dated December 15, 2008, the parents' attorney informed the district's attorney that the parents would "not insist on [the student's] return to school forthwith" if the district immediately signed the contract necessary for a particular center to complete a comprehensive

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<sup>8</sup> The district's executive director of pupil personnel signed the addendum on November 13, 2008, and the student's mother signed the addendum on November 14, 2008 (Parent Ex. QQ).

<sup>9</sup> The hearing record reflects that the student remained on home instruction for the rest of the 2008-09 school year (Tr. p. 510).

<sup>10</sup> Although the parties had already signed the IEP addendum (Parent Ex. QQ) agreeing to several modifications, the November 19, 2008 letter informed the parents that the CSE had determined that the student's IEP did not require modification at that time (Parent Ex. N).

evaluation, "together with the psychiatric evaluation" (Parent Ex. C at p. 2). The letter further indicated that "[i]nstead the [p]arents prefer that the [d]istrict begin the process of exploring outside placements" in neighboring districts or at private schools (*id.*). The parents' attorney also informed the district that the student was not yet ready to have the special education teacher, speech-language therapy, or OT services occur in his home because he was still recovering from surgery performed on December 2, 2008 (Parent Exs. C at p. 2; BB at p. 2).

By letter dated December 16, 2008, the district's executive director of pupil personnel wrote to the Board of Cooperative Education Services (BOCES) to request that the student's autism consultant services be suspended because the student was receiving home instruction (Parent Ex. D at p. 1).

By letter dated February 20, 2009, the parents' attorney informed the district's attorney that it was "entirely unacceptable that [the student] remain out of school receiving a bare minimum of five hours a week of instruction" (Parent Ex. U). The parents' attorney noted that the student had been out of school for "months" and that he should return to school (*id.*). The parents' attorney opined that the student should receive "a minimum" of an additional hour per day of behavioral therapy "by a properly credentialed therapist" and suggested that if the parties began that process immediately, perhaps the student would be able to return to a public school setting with "proper support at least on a truncated basis" (*id.*). The parents' attorney requested that the district get back to her "as soon as possible" (*id.*).

In February and March 2009, a multidisciplinary team conducted a "Comprehensive Assessment" of the student that included a diagnostic evaluation, a psychological evaluation, a speech-language evaluation, and an adaptive functioning evaluation (Parent Ex. NN).<sup>11</sup> The evaluation report noted the student's previous diagnoses, that he had been suspended from school in October 2008 for eloping, aggression and assault, and that he had been receiving home instruction from the district that included special education, OT, speech-language therapy, and social skills training (*id.* at pp. 1-2). The diagnostic portion of the evaluation indicated that an administration of the Autism Diagnostic Observation Schedule-Generic (ADOS-G) revealed that within the communication domain, the student demonstrated mild to moderate impairments in spontaneous appropriate offering of personal information and also in reciprocal social conversation (*id.* at pp. 3-4). He was also reported to exhibit a severe impairment in sequential reporting of events (*id.* at p. 4). Within the socialization domain, the student exhibited mild to moderate impairment in the quality of social responses or overtures, in the quality of rapport, and in the frequency of reciprocal social communications (*id.*). He was reported to have severe impairments in the communication of experienced emotions, in the communication or understanding and empathy for others, and in the communication of his insight into the nature of social relationships (*id.* at p. 4). Within the behavioral domain, the student occasionally displayed both repetitive behaviors and mild anxiety (*id.*). The evaluation report reflected that the student met the criteria for an autism spectrum disorder (*id.*). The Autism Diagnostic Interview-Revised (ADI-R) completed by the student's mother indicated that within the social domain, the student possessed significant impairments in imaginative play with peers, interest in children, seeking to share enjoyment with others, offering comfort to others, quality of social overtones, social smiling, and direct gaze (*id.* at pp. 4-5). The evaluation report also indicated that the student displayed mild to

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<sup>11</sup> The CSE recommended and arranged for the comprehensive evaluation (Tr. p. 118).



moderate impairments in his range of facial expressions, group play with peers, and responses to approaches by other children (*id.*). Within the communication domain, the student exhibited significant impairments in conventional/instrumental gestures, imaginative play, reciprocal conversation, and stereotyped utterances (*id.* at p. 5). He also demonstrated mild to moderate impairments in imitative play, pointing to express an interest, and idiosyncratic language (*id.*). The evaluators further reported that within the restricted, repetitive and stereotyped behavioral domain, the student displayed moderate to severe circumscribed interests, unusual preoccupations, verbal rituals and compulsions (*id.*). The evaluation report indicated that the student met both the Diagnostic and Statistical Manual- 4th Edition (DSM-IV) criteria and the International Classification of Diseases- 10th Edition (ICD-10) criteria for an autistic disorder (*id.* at pp. 4, 5). Completion of the Social Responsiveness Scale (SRS) by the student's mother and teacher indicated that based on the mother's responses, the student displayed severe difficulties in social awareness, social cognition, social communication, social motivation, and autistic mannerisms; whereas the teacher's responses indicated that the student displayed mild to moderate difficulties in social cognition, social motivation, and autistic mannerisms but "normal" functioning in social awareness and social communication (*id.* at pp. 6-7).

The psychological portion of the evaluation noted that the findings reported were likely an underestimate of the student's intellectual abilities because the student possessed a limited ability to sustain attention and motivation for an extended period of time and had a poor frustration tolerance (Parent Ex. NN at pp. 8, 16). Administration of the Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV) yielded a full scale intelligence quotient (IQ) (percentile rank) of 87 (19), a standard score of 93 (32) in verbal comprehension, 104 (61) in perceptual reasoning, 77 (6) in working memory, and 78 (7) in processing speed (*id.*). The evaluation report noted that the student's full scale IQ score was not a meaningful representation of his overall cognitive abilities due to the statistically significant differences between the composite scores (*id.* at pp. 8, 9). The Behavior Rating Inventory of Executive Functions (BRIEF)<sup>12</sup> was completed by the student's mother and his home tutor (*id.* at p. 10).<sup>13</sup> The student's mother's responses yielded a standard score (percentile rank) of 82 ( $\geq 99$ ) for the behavioral regulation index, 69 (96) for the metacognition index, and 76 (98) for the general executive composite (*id.* at p. 11). The student's mother's responses revealed that the student had difficulty at home with inhibiting; impulsive responses; shifting flexibly between situations, activities, or aspects of a problems; controlling his emotional responses; problem solving; checking his work; and self-monitoring (*id.*). The home tutor's responses yielded a standard score (percentile rank) of 61 (84) for the behavioral regulation index, 61 (85) for the metacognition index, and 62 (86) for the general executive composite (*id.* at pp. 11-12). The evaluation report also indicated that the tutor's responses revealed that in the home-based academic setting, the student exhibited difficulty with transitions between activities, problem solving, and organization (*id.* at p. 12).

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<sup>12</sup> The hearing record reflects that the BRIEF is designed to assess executive functioning across eight sub-scales or categories and is administered via a questionnaire given to the parent and teacher (Parent Ex. NN at p. 10). Executive functions are a collection of processes that are responsible for guiding, directing and managing cognitive, emotional and behavioral functions (*id.*).

<sup>13</sup> The private evaluators noted that the BRIEF responses are assessed for negative bias and reliability (Parent Ex. NN at p. 10). For the student's mother's responses, the negativity scale was elevated, suggesting either that her view of the student was excessively negative or that the student had a significant executive dysfunction" (*id.*).

The speech, language and communication portion of the evaluation noted that the student had numerous articulation errors; deficits in his use of pragmatic language; deficits in modulating his nonverbal communication, particularly his facial expressions; and delays in initiating and maintaining reciprocal interactions (Parent Ex. NN at pp. 12-13). Administration of the Comprehensive Assessment of Speech and Language (CASL) yielded a standard score (percentile rank) of 99 (47) in the nonliteral language subtest, 91 (27) in the pragmatic judgment subtest, 93 (32) in the inference subtest, and 95 (37) on the supralinguistic index (*id.* at pp. 14-15). The evaluation report noted that these results indicated average functioning (*id.*). Completion of the Social Skills Improvement System (SSIS) by the student's mother resulted in a social skill score in the below average range and a problem behavior score in the above average range (*id.* at p. 15).

For the adaptive functioning portion of the evaluation, the student's mother completed the Vineland Adaptive Behavior Scales- Second Edition Caregiver Report Form (Parent Ex. NN at pp. 15-16). The results yielded a standard score (percentile) of 96 (39) for communication, 112 (79) for daily living skills, 62 (10) for socialization, and 88 (21) for the behavior composite (*id.*). The evaluation report indicated adequate general adaptive functioning regarding both communication skills and daily living skills (*id.* at p. 15-16). The report also noted that the student's socialization skills were "low" related to interpersonal relationships, play and leisure skills as well as coping skills (*id.*). The evaluation report noted that the student's tendency toward externalization of emotional distress was elevated (*id.*). Additionally, it was reported that his emotional distress was displayed in dependency, avoidance, eating difficulties, sleeping difficulties, school refusal and truancy, anxiety, emotional control, poor eye contact, impulsivity, temper tantrums, teasing of others, lying, physical aggression, stubbornness, bed wetting, biting fingernails, tics, difficulty paying attention, restlessness, and swearing (*id.*).

The evaluation report offered the student diagnoses of a PDD-NOS, a disruptive behavior disorder-NOS, a breathing-related sleep disorder, a cognitive disorder-NOS, a phonological disorder (articulation disorder), executive functioning impairments, teratogen exposure, cerebral palsy, and a seizure disorder (Parent Ex. NN at p. 17). The student was recommended for an intensive home-based family behavioral program facilitated by a board certified behavior analyst (BCBA) to address his motivation, frustration tolerance, limitations in attention, and his tendency to display aggression in response to demands (*id.*). The evaluation report also recommended that the student's educational classification be changed to multiple disabilities; his school placement be changed to a small, highly structured therapeutic environment that utilizes an intensive behavioral approach; he receive a 12-month educational program; he receive the services of an autism consultant to assist with behavioral programming, educational programming and parent training; an FBA and BIP be developed; and he receive speech-language therapy, OT, social skills programming, and school-based individual and group counseling to assist with self-regulation, anxiety, and social skills (*id.* at pp. 18-19, 21, 24). The evaluation report recommended an educational consultant with expertise in autism to consult with the student's teaching staff and provide training to all educators working with the student and his family, and that any paraprofessional working with the student be "highly trained" (*id.* at p. 19).

To address the student's behavioral difficulties, the evaluation report recommended that the student be taught: (1) self-awareness for situations and events that trigger feelings of frustration, anger, stress and anxiety; (2) coping and problem solving solutions on how to handle problematic situations; and (3) how to self-evaluate and review his own behavior to determine how well he

handled a situation (Parent Ex. NN at p. 21). The evaluation report also recommended that the student's behavioral plan focus on increasing positive behaviors rather than decreasing undesirable ones, and on changing the environment in order to reduce the likelihood that problems arise (id.). The evaluation report also suggested modifying programmatic factors to provide contextual supports and adaptive alternatives for dealing with distressing situations (id. at p. 22). Moreover the evaluation report recommended that a positive reinforcement system be developed and consistently implemented at school and at home in order to ensure cooperation and provide motivation for the student (id. at pp. 22-23).

By letter dated March 24, 2009, the parent's attorney informed the district that the comprehensive assessment had been completed and the parents would attend the "[p]arent [c]onference" scheduled for April 1 (Parent Ex. CC at p. 2). The parents requested that a CSE meeting be scheduled as soon as possible after April 1 so that the district could "start sending packets of information to neighboring districts and/or BOCES programs" (id.).

The CSE convened on May 21, 2009, for an annual review and to develop the student's IEP for the 2009-10 school year (Dist. Ex. 22 at p. 1; see Parent Ex. F at pp. 1-2). Attendees included the executive director of pupil personnel, who acted as the CSE chairperson; a special education teacher; a regular education teacher; two school social workers; a speech-language pathologist; an occupational therapist; a school psychologist; the home instructor, a principal; the parents' attorney; the district's attorney, and the parents (Dist. Ex. 22 at p. 1).<sup>14</sup> The IEP reflected that the parents waived their right to the attendance of an additional parent member at the May 2009 CSE meeting (id.). The CSE continued the student's home instruction for five hours per week along with the OT, speech-language therapy, and counseling as recommended in the student's previous March 2008 IEP (compare Dist. Ex. 22 at p. 2, with Dist. Ex. 6 at pp. 1, 2). The CSE changed the student's classification from a student with autism to a student with multiple disabilities and recommended that the student be placed in a 12:1+1 special class with a full-time 1:1 aide, one 30-minute session of individual speech-language therapy per week, two 30-minute sessions of individual OT per week, one 30-minute session of group (5:1) counseling per week, one 30-minute session of individual counseling per week, and ten hours of services from an autism consultant (id. at pp. 1, 2).<sup>15</sup> The CSE also recommended testing accommodations including an alternate location with minimal distractions, extended time (1.5), directions read and repeated, cues for on task behavior, breaks, use of a word processor, and use of a scribe (id. at p. 3). Additionally, the IEP noted that a BIP would be developed after the autism consultant began to work with the student (id.). The IEP contained 19 annual goals to address the student's identified needs: two related to study skills, seven for speech-language skills, five for social/emotional/behavioral skills, and five related to motor skills (id. at pp. 6-8).

By letter dated May 21, 2009 to a BOCES program, the district's executive director of pupil personnel services requested a placement for the student at a local BOCES facility for a

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<sup>14</sup> The IEP also indicated that a specific named individual participated by telephone at the end of the meeting; but did not designate this person's title (Dist. Ex. 22 at p. 1).

<sup>15</sup> The exact level of autism consultant services is unclear from the IEP (see Dist. Ex. 22 at p. 2). The IEP indicated that the autism consultant was to provide 10 hours of individual services, but it also indicated that the consultant would provide 20 hours of support to both the student and his parents as needed (id.). The IEP also indicated that the autism consultation was approved for up to 10 hours "to conduct an assessment" (id.).

"[s]ummer/[f]all" placement (Dist. Ex. 23 at p. 1; see Parent Ex. O at p. 1). The letter indicated that information regarding the student was enclosed and that the parents had requested that they be permitted to tour the BOCES facility (Dist. Ex. 23 at p. 1). The letter also indicated that the student's mother had an appointment to have an updated physical completed for the student (id.).

On May 27, 2009, the student underwent an OT evaluation by the district's occupational therapist (Parent Ex. P. at p. 1). The therapist noted that throughout the evaluation the student demonstrated increased distractibility to extraneous auditory and visual stimuli and required verbal redirection back to task (id. at p. 2). She also opined that the student's rushing through graphomotor tasks may have negatively affected his scores on the testing (id. at pp. 2, 3). Administration of the Beery-Buktenica Developmental Test of Visual-Motor Integration (VMI) yielded a standard (percentile) score of 81 (10) for the visual motor integration full format subtest, 89 (23) for the visual perception subtest, and 68 (2) for the motor coordination subtest (id.). The occupational therapist reported that the student displayed difficulty utilizing capital letters appropriately, spacing his words, writing in a legible fashion, and copying shapes appropriately (id. at pp. 2-3). She also indicated that the student's muscle tone appeared to be within normal limits, the active range of motion in his upper extremities was within functional limits, his gross motor abilities were age appropriate, his pencil grasp was functional and did not impede his stability or control, he held scissors with a mature "supinated" pattern and was able to turn paper while cutting shapes, and his skills in activities of daily living were age appropriate (id. at pp. 2-3). The occupational therapist recommended OT services to address the student's difficulty with visual motor integration and sensory integration (id. at p. 3).

A third grade report card for the 2008-09 school year, revealed that during the first quarter the student received a B in math, reading, music and physical education; a D in writing; a C- in social studies and science; and a B+ in art (Dist. Ex. 26). During the second quarter, the student received a C in both math and science, a B in reading, a D in writing, and a D+ in social studies (id.). During the third quarter, the student received a B- in math, a B+ in reading and science, a D in writing, a B in social studies, and an A- in art (id.). During the fourth quarter, the student received a B in both math and reading, a D in writing, a B+ in social studies, an A in science, and an A- in art (id.).

The district completed a progress report for the student's IEP annual goals for the 2008-09 school year (Dist. Ex. 27).<sup>16</sup> The student was reported to have made "some progress" in one of his seven study skills goals, but his progress was not reported for the other six study skills goals because he was not attending school and was receiving home tutoring (id. at p. 1). The progress report also reflected that the student achieved one of his annual goals related to speech-language, but failed to reach the other nine speech-language goals (id. at pp. 2-4). He achieved one of four annual social/emotional/behavioral goals and failed to achieve the other three goals (id. at p. 4). For his six motor goals, the report only indicated measurements for the second quarter (id. at pp. 4-5). The student was reported to have made some progress on three of the motor goals and was not progressing satisfactory on the remaining three goals (id.).

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<sup>16</sup> The progress report is undated; however, the cover letter included with the report indicated a date of July 31, 2009 (Dist. Ex. 27 at p. 6).

The CSE convened on June 26, 2009, for an annual review and to develop the student's IEP for the 2009-10 school year (Parent Ex. HHH). Attendees included the executive director of pupil personnel, who acted as the CSE chairperson; a special education teacher; a regular education teacher; a school social worker; a speech-language pathologist; an occupational therapist; a school psychologist; the parents' attorney; the district's attorney, and the parents (id. at p. 1). A BOCES principal and the student's home instructor participated by telephone (id.). The IEP reflected that the parents waived their right to the attendance of an additional parent member at the May 2009 CSE meeting (id.). As previously reflected in the May 21, 2009 IEP, the CSE continued to recommend that the student be placed in a 12:1+1 special class with a full-time aide (id. at p. 2).<sup>17</sup> Unlike the prior May 2009 IEP, the June 2009 IEP recommended a 12:1+1 class at a specific out-of-district BOCES program (compare Dist. Ex. 22 at p. 2, with Parent Ex. HHH at p. 2). The CSE also recommended one 30-minute group (5:1) session of speech-language therapy per week, one 30-minute individual session of speech-language therapy per week, two 30-minute individual sessions of OT per week, one 30-minute group (5:1) session of counseling per week, one 30-minute individual session of counseling per week,<sup>18</sup> and two 2-hour sessions with an autism consultant per week (Parent Ex. HHH at p. 2).<sup>19, 20</sup> The CSE also recommended extended school year (ESY) services that included two hours of home instruction, and home-based related services consisting of two 2-hour sessions with an autism consultant per week,<sup>21</sup> one 30-minute session of counseling per week, two 30-minute sessions of OT per week, and one 30-minute session of speech-language therapy per week (id.). The June 2009 CSE also recommended testing accommodations including an alternate location with minimal distractions, extended time (1.5), directions read and repeated, cues for on task behavior, breaks, use of a word processor, and use of a scribe (id. at p. 3). The CSE also recommended an "individual driver assistant" and door to door transportation (id. at p. 12). Additionally, the June 2009 IEP noted that a BIP would be developed after the autism consultant began to work with the student (id. at p. 3).<sup>22</sup> The June 2009 IEP contained 31 annual goals to address the student's identified needs: seven related to study skills, two for writing, nine for speech-language skills, six for social/emotional/behavioral skills, and seven related to motor skills (id. at pp. 6-10).

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<sup>17</sup> The aide was listed in the June 2009 IEP as a 3:1 aide (Parent Ex. HHH at p. 2). This reflected a change from the 1:1 aide that was recommended in the May 2009 IEP (Dist. Ex. 22 at p. 1).

<sup>18</sup> The IEP indicated that counseling services were recommended for social skills training (Parent Ex. HHH at p. 2).

<sup>19</sup> The 5:1 group session of speech-language therapy that was recommended on the June 2009 IEP was an additional service that was not previously recommended by the May 2009 CSE (compare Dist. Ex. 22 at p. 2, with Parent Ex. HHH at p. 2). Additionally, the recommendation for two 2-hour sessions per week with the autism consultant was also a change from the 10 hours previously recommended by the May 2009 CSE (id.).

<sup>20</sup> The autism consultant was to provide school consultation and parent training to support the student, parents and school as needed (Parent Ex. HHH at p. 2).

<sup>21</sup> The IEP indicated that during summer 2009, the autism consultant was to provide support to the student, parents, and school as needed (Parent Ex. HHH at p. 2).

<sup>22</sup> A June 5, 2009 letter from the district's director of pupil personnel to a private behavioral and psychological consulting service confirmed the existence of an agreement to provide autism consultation services and an FBA (Parent Ex. E at p. 1).

The hearing record indicates that the parents disapproved of the classification and placement recommendations in the June 2009 IEP (Parent Ex. HHH at p. 13). At the June 2009 CSE meeting, the parents notified the district that they would unilaterally place the student at West Hills and would be seeking tuition reimbursement (Tr. pp. 590-91).

By a "Commitment For Special Education Services," the local BOCES recommended a 6:1+1 special education class for the student, along with counseling, OT, and speech-language therapy services, and a full-day individual aide at the same specific BOCES program recommended on the June 2009 IEP (Dist. Ex. 23 at p. 3; Parent Ex. HHH at p. 2). The document was signed by the district's executive director of pupil personnel services on July 2, 2009 (id.).<sup>23</sup>

By a due process complaint notice dated July 9, 2009, the parents, through their attorney, requested an impartial hearing (Dist. Ex. 1). The parents asserted that the district failed to offer the student a free appropriate public education (FAPE) (id. at p. 4). Specifically, the parents alleged that the district failed to address the student's needs while he was in attendance at the district school and further, that the district's personnel were not "properly trained" (id.). The parents also alleged that the student remained on home instruction without any additional support "in spite of multiple communications with the [d]istrict" (id. at p. 3). The parents disagreed with the district's recommendations at the May 2009 CSE meeting for outside consultation for four hours per week and an increase in home instruction to ten hours per week (id.). The parents further disputed the district's recommended submission of an application packed to BOCES and alleged that the parents' rejected the recommended BOCES placement after visiting and observing the placement (id.). As relief, the parents requested that the district reimburse the parents for the cost of the program at West Hills, for related service costs, and for transportation costs (id. at p. 4).<sup>24</sup>

The impartial hearing began on August 12, 2009, and concluded on October 16, 2009 (Tr. pp. 1, 252, 500, 633, 759, 905, 1012).

On August 24, 2009, as the impartial hearing was proceeding, a licensed clinical psychologist to whom the district had referred the student for an independent FBA, completed her report (Dist. Ex. 30). The FBA report reflected that the student had been assessed by the independent psychologist over the period of June 23 to August 19, 2009 (id. at p. 1). The psychologist identified the student's "areas of challenge" as sleep disturbance/fatigue; fine motor skills; impulse control; frustration tolerance and anger management; transitions; planning, organizing and completing multistep activities; and socialization in the areas of reciprocity, social communication, emotional perception, and developing friendships (id. at p. 2). The behavioral areas of concern included self-stimulatory behaviors, uncooperative behavior, tantrums/meltdown, physical aggression, and elopement (id.). The independent FBA report noted that the factors which

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<sup>23</sup> It is unclear from the document when this commitment for special education services was sent by BOCES to the district (Dist. Ex. 23 at p. 3).

<sup>24</sup> By letter dated July 15, 2009, the district's executive director of pupil personnel services requested that the parents attend a resolution meeting regarding the concerns raised in the due process complaint notice (Parent Ex. T). On July 20, 2009, the district responded to the due process complaint notice and asserted that it offered a FAPE to the student for the 2009-10 school year and that its recommendations were based on the most recent evaluations together with input from several professionals familiar with both the student and his program, and from the parents (Dist. Ex. 2 at pp. 1-2).

functioned as precursors for the student's behavior problems included his sleep disorder, his complex medication regimen and its side effects, his diet and appetite, his obsessive compulsive tendencies including possessiveness, and his preference for the home environment (id. at pp. 2-3). Antecedent events that triggered the student's behavior included overstimulation; non-preferred task demands in the academic, household, daily living skills, and medical realms; and social demands (id. at p. 4). The independent psychologist also reported that "consequence events" that resulted from the student's behavior (withdrawing the student from anxiety provoking situations, from difficult tasks or from unwanted social demands), only served to reinforce the student's problem behaviors (id. at pp. 4-5). The independent psychologist reported that the following behavior intervention strategies had proved ineffective: (1) an inclusion academic setting; (2) the home-school communication log; (3) use of language-based interventions such as social stories; (4) advance warnings for transitions; (5) visual aids; (6) coping strategies such as squeeze balls, taking walks, and the token economy reinforcement system; and (7) crisis strategies that included calling his parents and removing the student from school (id. at pp. 5-6). The independent psychologist recommended, among other things: (1) an after-school community group that could tap into the student's interests and develop a peer network for him; (2) multisensory academic stimulation and opportunities for hands-on creative learning projects; (3) breaking down tasks into specific steps; (4) use of strategies such as errorless learning and/or backward chaining; (5) functional communication training to encourage the student to request breaks as a temporary strategy to remove an unwanted stimulation or demand; (5) use of antecedent-based strategies rather than consequence-based strategies to encourage positive social behavior; (6) access to social control such as choice making, shared decision making, or teaching others; (7) data collection systems that establish or rule out the connection between physiological events such as sleep quality, medications or diet, and problem behaviors; (8) parent training to desensitize the student to his known sensitivities; and (9) a home environment that more closely mimics the school environment in terms of its demands, schedules, transitions, and rules (id. at pp. 6-8).

On December 21, 2009, the impartial hearing officer rendered his decision (IHO Decision at p. 1). In the decision, the impartial hearing officer noted that the district maintained "procedural due process requirements" and provided support services to reinforce the student's educational progress (id.). He also noted that with regard to placement decisions, the parties engaged in open communication "in an informed consent context" (id.). He found that the district's placement "had the components that would allow [the student] to learn in a structured environment with behavioral controls," but that the parents' unilateral placement had no such structure and depended on the student to guide the educational activities (id. at p. 2). The impartial hearing officer found that the district "fulfilled its obligation to provide [the student] with an appropriate evaluation and placement" and that it had no obligation to reimburse the parents for their unilateral placement (id.).

The parents appeal, and assert that the district recommended a 12:1+1 class at a specific BOCES, which did not exist at that placement. The parents also assert that when the recommended BOCES placement conducted a screening and recommended a 6:1+1 program with a full-time aide for the student, the CSE failed to reconvene to change the student's IEP. The parents further assert that the decision of the impartial hearing officer was improper because, among other things, it was only 1 1/2 pages long, and it failed to reference the transcript or hearing record, set forth the reasons and factual bases for his determinations, provide findings of fact, attach a list identifying the exhibits admitted into evidence, and advise the parties of their appellate rights. The parents allege

further that the impartial hearing officer's decision was lacking substantively because, among other things, it failed to address: the lack of training of the staff at the district's school, the district's recommendation that the student be placed in a non-existent 12:1+1 class, and the student's progress at West Hills. The parents further allege that the recommended BOCES program was not the student's least restrictive environment (LRE). The parents also contend that equitable considerations weigh in their favor. The parents assert, among other things, that they notified the district of the student's unilateral placement and their intention to seek reimbursement, attended all CSE meetings, cooperated with the district, and visited the recommended BOCES placement. As relief, the parents request that the decision of the impartial hearing officer be annulled and that the parents be awarded reimbursement for West Hills and for related services for the 2009-10 school year.

In its answer, the district asserts that the recommended BOCES placement offered the student a FAPE for the 2009-10 school year. The district also asserts that its recommended program met the student's academic and behavioral needs. The district asserts further that the students in recommended BOCES placement were appropriately grouped according to the similarity of their needs. The district also asserts that although it recommended a 12:1+1 student-to-teacher ratio for the class at the recommended BOCES placement, a staffing ratio that they admit did not exist at that placement, this recommendation did not infringe upon the parents' rights nor did it impede their understanding of the recommended program because: (1) the principal of the recommended BOCES placement participated at the June 2009 CSE meeting, (2) the parents had the opportunity to ask questions about the program at the CSE meeting, and (3) the parents toured the recommended BOCES placement. The district asserts that if the student had attended the recommended BOCES placement, then the district would have requested an amendment to the student's IEP to accurately reflect that the program occurred in a 6:1+1 class setting. The district also asserts that its recommended program for the prior 2008-09 school year was appropriate because that 2008-09 program provided for parent training, an appropriate BIP, and home instruction. The district also contends that the parents' placement of the student at West Hills was inappropriate because the school was overly restrictive, had only 13 elementary school aged students, six of who are in the student's class, and because the West Hills staff was not equipped to handle behavioral crises.

Two purposes of the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove v. T.A., 129 S. Ct. 2484, 2491 [2009]; Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). While school districts are required to comply with all IDEA procedures, not all procedural errors render an IEP legally inadequate under the IDEA (A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v.



Carmel Cent. Sch. Dist., 2007 WL 465211, at \*10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if a procedural violation is alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; E.H. v. Bd. of Educ., 2008 WL 3930028, at \*7 [N.D.N.Y. Aug. 21, 2008]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an impartial hearing officer's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 130 [2d Cir. 1998]; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at \*15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the LRE (20 U.S.C. § 1412[a][5][A]; 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

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

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

The New York State Legislature amended the Education Law to place the burden of production and persuasion upon the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of production and persuasion regarding the appropriateness of such placement (Educ. Law § 4404[1][c], as amended by Ch. 583 of the Laws of 2007). The amended 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).

Returning to the instant case, I will first address the parents' assertion that the impartial hearing officer's decision was improper because it was only 1 1/2 pages long, and it failed to reference the transcript or hearing record, set forth the reasons and factual bases for his determinations, provide findings of fact, attach a list identifying the exhibits admitted into evidence, and advise the parties of their appellate rights.

State regulations provide in relevant part that "[t]he decision of the impartial hearing officer shall be based solely upon the record of the proceeding before the impartial hearing officer, and 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 (see Application of a Student with a Disability, 09-084; Application of a Student with a Disability, 09-034; Application of a Student with a Disability, 08-138; Application of a Student with a Disability, 08-043). Moreover, 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 (see Application of the Dep't of Educ., 09-092; Application of a Student with a Disability, 09-034; Application of a Student with a Disability, 08-064). 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.

Although the hearing record contains 1014 pages of hearing transcript and 90 exhibits, the impartial hearing officer's 1 1/2 page decision is devoid of any specific cites to transcript pages, exhibit numbers, or to any legal authority (see IHO Decision at pp. 1-2). Moreover, the decision contains very little factual bases for the determinations made by the impartial hearing officer, does not contain an exhibit list, and does not contain a notice of the parties' appeals rights as mandated

by the State regulations. I caution the impartial hearing officer that he must comply with State regulations, cite to relevant facts in the hearing record with specificity, provide a reasoned analysis of those facts, and reference applicable law in support of his conclusions. He must also include an exhibit list and a notice of the parties' appeals rights. A continued failure to adhere to the State regulations could result in a determination of misconduct or incompetence and may subject the impartial hearing officer to a suspension or revocation of his certification (8 NYCRR 200.21[b][1-4]).

I now turn to the parents' assertion that the district's recommendation in the June 2009 IEP for a 12:1+1 class was not available at the recommended specific BOCES placement, thereby denying the student a FAPE for the 2009-10 school year (Tr. p. 136; Parent Ex HHH at p. 2).

The IDEA sets forth procedural safeguards that include providing parents with an opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child" (20 U.S.C. § 1415[b][1]). Federal and State regulations governing parental participation require that school districts take steps to ensure that parents are afforded the opportunity to participate (34 C.F.R. § 300.322; 8 NYCRR 200.5[d]). In deciding whether parents were afforded an opportunity to participate in the development of their child's IEP, courts have considered both the extent of participation and the opportunity for participation (Cerra, 427 F.3d at 193 [finding meaningful parental participation when the student's mother attended numerous CSE meetings and a CSE meeting transcript reflected that she "participated actively" in the development of her daughter's IEP and was "frequently consulted for input about the CSE's proposed plan"]; Matrejek, 471 F. Supp. 2d at 423 [affirming State Review Officer's decision that parents were not afforded meaningful participation because no one at the CSE meeting was able to discuss the curriculum requirements of the proposed class]; Perricelli, 2007 WL 465211, at \*14-15 [finding no denial of a meaningful opportunity to participate when the student's mother was in "frequent contact" with teachers and school officials, "active[ly] participat[ed]" at her daughter's CSE meetings, and questioned the CSE about documents that she did not understand]; see also Paolella v. District of Columbia, 2006 WL 3697318, at \*1 [D.C. Cir. Dec. 6, 2006] [finding no denial of a meaningful opportunity to participate when the parents were involved in the development of the IEP, had a "special education representative," and visited the school recommended by the school district]).

State regulations provide that an "IEP shall indicate the recommended special education program and services...that will be provided for the student" and "as appropriate indicate the class size" (8 NYCRR 200.4[d][2][v][a],[d][2][v][b][2]; see 8 NYCRR 200.6[h][1][stating that "a student with a disability shall be placed in a special class... to the extent indicated in the student's [IEP]"; see also 34 C.F.R. § 300.116[b][2][stating that "each public agency must ensure that... the child's placement... is based on the child's IEP"). State regulations also provide that IEP recommendations are to be developed at meetings of the CSE (8 NYCRR 200.4[d][4]). In developing the recommendations for the IEP, the CSE must consider the concerns of the parents for enhancing the education of their child (8 NYCRR 200.4[d][2]; see also 34 C.F.R. § 300.327 [stating that "each public agency must ensure that the parents of each child with a disability are members of any group that makes decisions on the educational placement of their child"]; 34 C.F.R. § 300.510[c]). Additionally, a CSE is required to provide written prior notice to the parents whenever it plans to modify or change a student's educational placement (8 NYCRR 200.5[a][1]; Educ. Law § 4402[1][b][3][c]; 8 NYCRR 200.1[oo]; 20 U.S.C. § 1415[b][3]; 34 C.F.R.

§ 300.503[a]; see also Educ. Law § 4402[1][b][3][b] [stating that a CSE is required to make recommendations based upon a written evaluation that sets forth the reasons for the recommendation to the parent and the advisability for the continuation, modification or termination of the special class program or placement]).

The principal of the recommended BOCES placement testified that her facility only offers 6:1+1, 8:1+1, and 8:1+1 plus two classes (Tr. pp. 639, 672; see Tr. pp. 199, 225). She also testified that it was not unusual for the school to receive a screening packet with an IEP that recommends a class with a ratio that is not offered at the facility (Tr. pp. 676, 678). She explained that districts often send screening packets that include an IEP that does not reflect one of the school's programs, but rather the program and services that are currently under review by a district's CSE, or those that are currently being provided to the student (id.). She further explained that if the school has an available program that it believes can meet the needs of a student; it sends a commitment letter to the district offering a class (Tr. p. 678). She also testified that the school does not accept a student until it receives the returned commitment signed by the district (id.).

The district asserts that its recommendation for a 12:1+1 class at a specific BOCES placement that did not have such a class did not infringe upon the parents' rights nor did it impede their understanding of the recommended program. According to the district, at the time of the June 2009 CSE meeting, it was "clear" that the specific recommended BOCES placement was recommending a 6:1+1 class because: (1) the principal from the BOCES placement described the program at the June 2009 CSE meeting; (2) the parents participated at the June 2009 CSE meeting; and (3) they also had toured the program prior to the CSE meeting (see Tr. pp. 581-83, 704-05; see also Parent Ex. HHH at p. 1).

A review of the hearing record reveals that there is no evidence to support the district's claim that it was "clear" that a 6:1+1 class was being recommended for the student at the time of the June 2009 CSE meeting (see Tr. pp. 581-83; 704-05). The June 2009 IEP specifically recommended a 12:1+1 class at the specific BOCES placement (Parent Ex. HHH at p. 2). The prior May 2009 IEP also recommended a 12:1+1 class, although it did not delineate at what school the program would be implemented (Tr. p. 124; Dist. Ex. 22 at p. 2). Additionally, the student's third grade special education teacher testified that at the June 2009 CSE meeting, several class sizes were discussed by the CSE and "the consensus was a 6[:]1[+]1 was too restrictive" and "a 12[:]1[+]1 was written down as the best possible recommendation" (Tr. p. 326). Similarly, the district's executive director of pupil personnel who attended the June 2006 CSE meeting as the CSE chairperson, stated that the district's outside autism consultant had suggested the higher student-to-teacher ratio at the June 2009 CSE meeting so that the student would not be in a 6:1+1 class setting (Tr. pp. 136-37; see Tr. p. 225).

Although the hearing record reveals that the BOCES commitment letter to the district altered the recommended student-to-teacher ratio from a 12:1+1 class to a 6:1+1 class, the hearing record fails to establish that the parents had an opportunity to participate in the decision-making process regarding the recommended change in program or that such a change would have been an appropriate program for the student in the LRE (see Dist. Ex. 23 at p. 3). Moreover, although the hearing record reveals that the parents eventually became aware of the 6:1+1 class ratio contained in the commitment letter, it does not indicate when the parents were advised of this class/program change (Tr. p. 587). Such a change to the student's program recommendation to a more restrictive

setting on the continuum of special class programs required the district to provide prior written notice to the parents in order to fully apprise the parents of the change prior to the commencement of the 2009-10 school year (Educ. Law § 4402[1][b][3][b], [c]; 8 NYCRR 200.5[a], 200.6; 34 C.F.R. § 300.115; see 8 NYCRR 200.1[oo]; 8 NYCRR 200.6[h][1]). The district has failed to meet its burden to show that the parents were notified that the recommended program was being changed from the 12:1+1 class to a 6:1+1 class and that they were able to participate in the decision-making process regarding that change (see Dist. Ex. 23 at p. 3; Parent Ex. HHH at p. 2). The district also did not meet its burden to show that a 6:1+1 class would have been appropriate for the student and would have been in the LRE. Moreover, the CSE did not reconvene to change the student's IEP to reflect a recommendation for a 6:1+1 class and the hearing record reflects that the recommended BOCES placement could not have implemented the June 2009 IEP as written.

Additionally, as discussed below, the hearing record shows that the district did not have sufficient information regarding the student's behavioral needs before recommending the specific BOCES placement reflected in the June 2009 IEP (Dist. Ex. 23 at p. 3).

In the case of a student whose behavior impedes his or her learning or that of others, the CSE shall consider, when appropriate, strategies, including positive behavioral interventions, and supports to address that behavior (20 U.S.C. § 1414[d][3][B][i]; 34 C.F.R. § 300.324[a][2][i]; see 8 NYCRR 200.4[d][3][i]; see 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).<sup>25</sup> 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

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<sup>25</sup> In developing an IEP and considering "special factors," when a student's behavior impedes learning, federal regulations (34 C.F.R. § 300.324[a][2][i]) and State regulations (8 NYCRR 200.4[d][3]) require consideration of strategies to address that behavior as part of the development of the IEP. Federal regulations (34 C.F.R. §§ 300.530[d][1][ii], 300.530[f][1][i]) and State regulations (8 NYCRR 201.3) also address preparation of, or review of, an FBA and BIP in disciplinary situations. In addition, 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. Additionally, under State regulations when considering more restrictive programs or placements as a result of the student's behavior a CSE "shall consider the development of a behavioral intervention plan" (8 NYCRR 200.22[b]).

as a result of the student's behavior, a CSE "shall consider the development of a behavioral intervention plan" (8 NYCRR 200.22[b]).<sup>26</sup>

The hearing record contains significant evidence to support the conclusion that the student's behavior deteriorated during the prior 2008-09 school year to such an extent that it impeded that student's learning (Tr. pp. 117, 918-21; Dist. Exs. 3; 4; 12 at pp. 1-2; 13 at p.p. 1-2; 14 at pp. 1-2; 15; Parent Exs. N; V at p. 2; QQ; TT; XX; AAA). The hearing record also shows that the strategies which the district utilized to address the student's behavior during the prior 2008-09 school year (e.g. the classroom token economy, the behavioral clip, social stories, and removal of the student from the school during/after behavioral incidents) were unsuccessful (Tr. pp. 126, 171, 186, 297, 317, 326, 541-42; Dist. Exs. 3 at pp. 7-12; 5 at pp. 1-5; 30 at pp. 5-6). The student's third grade classroom teacher, the executive director of pupil personnel, the autism consultant, the student's third grade special education teacher, the multidisciplinary team, and the private psychologist all opined that the district's behavior strategies used during the prior school year were not successful in addressing the student's behavioral needs (Tr. pp. 52, 126, 171, 186, 285, 317, 326; Dist. Exs. 21 at pp. 21-22; 30 at pp. 4-5).

The hearing record reflects that despite the student's deterioration in behavior at the start of the 2008-09 school year, which lead to placement on home instruction beginning October 30, 2008, the district did not update the student's prior FBA and BIP, which were created during the 2007-08 school year, before the June 2009 CSE meeting.<sup>27</sup> In order to address the student's behavioral needs for the 2009-010 school year, an updated behavioral assessment and proposed behavior plan should have been developed for the June 2009 CSE meeting so that current behavioral needs and programming could have been discussed at the CSE meeting by all CSE participants. In this case, the district's failure to do so amounts to a failure to properly assess the student's behavioral needs in developing the student's program for the 2009-10 school year (Tr. pp. 71-72, 156, 285; Dist. Ex. 3 at pp. 7-12).<sup>28</sup> Moreover, the hearing record reflects that the specific recommended BOCES placement would have utilized the same behavioral strategies (token economy, honor cards, removal of student) that had previously been shown to be ineffective at the district's school (Tr. pp. 126, 158-59, 171, 297, 317, 326, 541-42; Dist. Exs. 3 at pp. 7-12; 5 at pp. 1-5; 21 at pp. 21-22; 30 at pp. 5-6).<sup>29</sup> By waiting until after the CSE process to conduct an

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<sup>26</sup> In New York, a BIP is defined as "a plan that is based on the results of a functional behavioral assessment and, at a minimum, includes a description of the problem behavior, global and specific hypotheses as to why the problem behavior occurs and intervention strategies that include positive behavioral supports and services to address the behavior" (8 NYCRR 200.1[mmm]; see 8 NYCRR 201.2[a]). An FBA is defined as "the process of determining why a student engages in behaviors that impede learning and how the student's behavior relates to the environment" (8 NYCRR 200.1[r]). An FBA shall be conducted as part of an evaluations or reevaluations, in the consideration of "special factors" during the recommendation process to the board of education, or as part of disciplinary actions (see 8 NYCRR 200.4[b][1][v], 200.4[d][3][i], 200.22[a][1]).

<sup>27</sup> At the May 2009 CSE meeting, the CSE reviewed the January 2008 BIP (Dist Ex. 22 at p. 1).

<sup>28</sup> The student's third grade inclusion classroom teacher testified that the January 2008 BIP had not been updated and that the teachers were working with the autism consultant to determine the student's "new triggers" and "the best course of action for him" (Tr. pp. 71-72).

<sup>29</sup> According to the private psychologist, the recommended BOCES placement "probably would not [have] work[ed]" without changes to the program, including to the behavioral strategies used by the recommended placement (Tr. p. 984).

updated FBA and develop a new BIP, the district failed to timely obtain information to evaluate a key component of the student's educational needs, which would have assisted the CSE in the development of his IEP and in making an appropriate program and placement recommendations for the 2009-10 school year.

I find that the hearing record does not support a determination that the district offered the student a FAPE for the 2009-10 school year because of the following: 1) the district failed to sufficiently evaluate the student's extensive behavioral needs before making program and placement recommendations in the June 2009 IEP, therefore the recommendation was based upon insufficient evaluative data, 2) the specific BOCES placement did not have the recommended 12:1+1 program, 3) the district's failed to meet its burden to show that a 6:1+1 program was substantively appropriate for the student and was in the LRE, and 4) the district's recommendation for a 6:1+1 program was made with insufficient parent participation.

Having determined that the district did not offer a FAPE to the student for the 2009-10 school year, I must now consider whether the parents have met their burden of proving that placement of the student at West Hills was appropriate.

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129; Matrejek, 471 F. Supp. 2d at 419). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. 7; Application of the Bd. of Educ., Appeal No. 08-085; Application of the Dep't of Educ., Appeal No. 08-025; Application of the Bd. of Educ., Appeal No. 08-016; Application of the Bd. of Educ., Appeal No. 07-097; Application of a Child with a Disability, Appeal No. 07-038; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-105). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ., 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement...'" (Gagliardo, 489 F.3d at 112; Frank G. v. Bd. of Educ., 459 F.3d at 364 [2d Cir. 2006] [quoting Rowley, 458 U.S. at 207 and identifying exceptions]). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether the parents' unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether that placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115 [citing Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] [stating "evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA" ]]). A "private placement is only appropriate if it provides 'education instruction specifically designed to meet the unique needs of a handicapped child'" (Gagliardo, 489 F.3d at 115 [emphasis in original], citing Frank G., 459 F.3d at 365 quoting Rowley, 458 U.S. at 188-89).

The Second Circuit has set forth the standard for determining whether parents have carried their burden of demonstrating the appropriateness of their unilateral placement.

No one factor is necessarily dispositive in determining whether parents' unilateral placement is reasonably calculated to enable the child to receive educational benefits. Grades, test scores, and regular advancement may constitute evidence that a child is receiving educational benefit, but courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs. To qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special service necessary to maximize their child's potential. They need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.

(Gagliardo, 489 F.3d at 112; see Frank G., 459 F.3d at 364-65).

According to the hearing record, West Hills is one of several schools under the auspices of the Gersh Academy, an organization that provides educational programs for students with disorders such as autism, anxiety, or depression (Tr. pp. 763-65, 790). West Hills has approximately 100 students and provides programs for toddlers, kindergarteners, and elementary students through sixth grade (Tr. pp. 766, 792). Slightly less than half of the students are preschool students, approximately 30 students are kindergarteners, and the rest are elementary school students (Tr. pp. 792-93, 766). The elementary school students are grouped into two multi-year classes: the first through third grade class, and the fourth through sixth grade class (Tr. pp. 766, 776, 826-27). There are seven students in the first through third grade class and six students in the fourth through sixth grade class (Tr. pp. 792-93, 870). For the 2009-10 school year, the first through third grade class included four special education students and the fourth through sixth grade class included three special education students (Tr. p. 871).<sup>30</sup> Related services, which can include ABA and the services of a BCBA, are provided on site (Tr. p. 768). Additionally, all staff is trained in crisis prevention intervention (CPI) techniques (Tr. pp. 767-68, 788; see Tr. p. 800). The elementary school program is described as a transitional program that gets students ready to return to the mainstream public school environment (Tr. pp. 765-66, 772, 815, 834, 881).

At the time that the impartial hearing concluded in October 2009, the student had been attending West Hills for only a few weeks (Tr. pp. 776, 827, 843, 858). The student is in the fourth through sixth grade class and the hearing record reflects that the student's classroom teacher is "Montessori certified" (Tr. pp. 779, 863).<sup>31</sup> The hearing record shows that the student's class is integrated; the student and one other student have disabilities, and the remaining four are typically

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<sup>30</sup> According to the vice president of education, within the last three years, approximately six to eight West Hills students had IEPs (Tr. p. 800).

<sup>31</sup> The hearing record is unclear as to what "Montessori certified" refers to, indicating that the certification may involve training and responsibility for a class (Tr. p. 863).



developing students (Tr. pp. 775-76, 790, 799, 849). The class provides three hours of academic instruction in the morning (Tr. pp. 886-87). More instruction is provided in the afternoon, but the amount provided is unclear (*id.*). The student receives academic instruction in English language arts (ELA), math, and science (Tr. pp. 852-53, 883-84). According to the hearing record, a certified special education teacher splits her time between the two elementary classes and provides instruction to this student and one other student in the class for approximately 50 percent of the day (Tr. pp. 782-83, 796, 855, 867, 869). The special education teacher is responsible for addressing any academic deficits identified in the student's West Hills IEP, "break[ing] down" the student's assignments into segments, implementing modifications indicated in his IEP, monitoring the student's academic performance, and conducting updated standardized testing at the end of the year (Tr. pp. 783, 794-95).<sup>32</sup> The special education teacher also performs baseline academic testing of new students within 45 days, but at the time of the impartial hearing, the student's baseline assessment had not yet been completed (Tr. pp. 795, 852). The vice president of education and therapeutic programs at Gersh testified that when the assessment is completed, a plan and goals will be developed for the student; including academic goals if the student demonstrates any academic deficits (Tr. p. 786). Report cards and progress reports on students' goals are issued quarterly (Tr. pp. 794-95). West Hills provides the student with a 1:1 paraprofessional due to the student's history of behavior problems and medical needs (Tr. pp. 787-88). The hearing record reflects that the student's 1:1 paraprofessional is trained in collaborative problem solving and CPI (*id.*). The student also receives OT, individual and group counseling and individual and group speech-language therapy (Tr. pp. 788-89, 805, 810, 840-41, 847, 857, 876-77). The related service providers are Gersh employees who are "available everyday" but are only on-site at West Hills two to three days per week providing services to their assigned students unless they are providing additional student consultations, training or participating in team meetings (Tr. pp. 810-11). The vice president of education testified that if the social worker or staff required more support to address the student's behaviors, the services of a BCBA would be provided (Tr. pp. 803-04). The parents pay an additional fee for related services (Tr. p. 803).

West Hills is based on the Montessori philosophy of education, described in the hearing record as multisensory, child-centered, and flexible (Tr. pp. 766-67, 778). The program "works around" students' interests and strengths, but is structured so that "students are being measured and progress is being monitored" (Tr. p. 766). Students progress at their own level and "the teacher adapts to the child, rather than the child adapting to the teacher" (Tr. p. 767). According to the vice president of education, the students at West Hills do not have difficulties with learning, "[t]he major problem is the social/emotional issues" (Tr. p. 773). To address these needs, the vice president of education testified that the school uses a cognitive behavior approach to address problem behavior, which focuses on the reason or "root" of why certain behaviors occur rather than on just the behavior itself (Tr. pp. 768-69). He provided further testimony on this approach including how West Hills incorporates the strategies specifically recommended in the student's August 2009 independent FBA report such as systematic desensitization strategies, functional communication training, antecedent strategies, collaborative problem solving, and shared decision

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<sup>32</sup> According to the vice president of education, West Hills writes its own IEP but the school does not call the document an IEP (Tr. p. 786). Annual goals of incoming students are updated as needed and added to this document (Tr. pp. 783, 786).

making (Tr. pp. 770-71, 778-802). A token economy program is not used at West Hills (Tr. pp. 783-84); however, as discussed above, such a program was not effective with this student.

The vice president of education indicated that the environment at West Hills is "flexible within limits" (Tr. pp. 804-05). The director of West Hills testified that their priority for the student is for him to develop trust (Tr. p. 835, 885). The student is "prep[ped]" before certain situations and has a visual schedule that is reviewed with him so he is very clear on what is happening next (Tr. p. 806). The director of West Hills testified that the student participates in some lessons but not all, and that at the time of the hearing he was participating in approximately 75 percent of the classroom lessons (Tr. p. 883). Initially if the student exhibits uncooperative behavior, the teachers move away from the student and request that he let them know when he is ready (Tr. pp. 895-96). If the student continues to indicate he does not want to do the scheduled activity, he is able to choose another activity that is appropriate and academic in nature, such as workbook choices, math choices, or independent reading (Tr. pp. 883, 887-888). The director testified that West Hills is not creating a program around the student, but rather is modifying its program so that when the student is able to attend he does, and when he is not he is given other choices that will keep him functioning as a student in the classroom (Tr. pp. 888-89). She further testified that the student's class is structured such that not all the students are working on the same thing at the same time (Tr. p. 884). All of the students are expected to complete a certain amount of work during the school day; however, the choice of "when" they complete the work is up to each student and there are consequences if the work is not completed (*id.*). The director testified that the student is able to meet that expectation and that although their academic expectations of the student are currently less than of other students, the expectations will grow as the year progresses (Tr. p. 885).

According to the director, West Hills had not yet formally assessed the student's academic skills in order to allow the student to become comfortable in the program and thereby ensure a true assessment of his abilities (Tr. p. 852). She indicated however that the student read "very well," and that his reading comprehension was probably above grade level but that math was a challenge for him, specifically regrouping (Tr. pp. 852, 855). She further indicated that at the time of her testimony, the class was working on writing paragraphs and that the student was "sitting at those lessons" (Tr. p. 855).

As described in more detail above, the February/March comprehensive assessment recommended, among other things, a "small, highly structured and specialized therapeutic school environment that utilizes an intensive behavioral approach;" the use of visual prompts, repetition, visual cues and visual schedules; the use of organizational and self-monitoring strategies; and a comprehensive positive behavior support plan that teaches the student valuable skills and adaptive alternatives, and modification of significant environmental and programmatic factors (Parent Ex. NN at pp. 18-22). The independent FBA report recommended, among other things, that initially the student engage in challenging tasks for relatively brief periods of time and as the student began to tolerate longer periods of engagement in challenging tasks, that he be expected to demonstrate increased responsibility and independence; supportive teaching strategies including errorless learning and backward chaining as well as a multisensory approach to learning; functional communication training; antecedent based strategies; and access to social control including choice-making, shared decision-making, and opportunities to teach others (Dist. Ex. 30 at p. 7).

The hearing record shows that although the student exhibited some uncooperative behavior during his first few weeks of attendance at West Hills; the student did not exhibit any tantrums/meltdowns or the aggressive and threatening behavior he had exhibited prior to his suspension from the district's program in October 2008 (Tr. pp. 837, 843, 896-97). The hearing record further demonstrates that the cognitive behavior approach and associated strategies used within the West Hills program are aligned with the recommendations made in both the February/March 2009 comprehensive assessment report and the August 2009 independent FBA report and with the testimony of the independent psychologist who conducted the FBA (Tr. pp. 933, 936-37, 939, 943-44, 957, 970, 972, 978-79, 990, 1004; see Dist. Ex. 30 at pp. 6-9; Parent Ex. NN at pp. 17-27).

For the above reasons, I find that the hearing record supports a conclusion that West Hills is appropriate to meet the student's needs during the 2009-10 school year and the parents' request for reimbursement must be sustained.

Turning to the parents' request for reimbursement of related services, the hearing record indicates that the parents pay additional monies for the student's OT, individual and group counseling, and individual and group speech-language therapy (Tr. pp. 788-89, 803, 805, 810-11, 840-41, 847, 857, 876-66). Although the vice president of education testified that West Hills writes its own IEPs, and that the annual goals of incoming students are updated, it is simply unclear from the hearing record what specific needs are being addressed by the therapy sessions and counseling sessions (Tr. pp. 783, 786). In this case the parents have not met their burden to show that the therapy sessions and counseling sessions were appropriate to meet the student's unique needs in these areas. Consequently, the student's related services costs must be denied.

Lastly, no issues have been raised regarding equitable considerations in this case and a review of the hearing record does not reveal any equitable considerations that would bar tuition reimbursement to the parents; therefore, the necessary inquiry is at an end (Mrs. C. V. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134; Application of a Child with a Disability, Appeal No. 05-039).

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

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

**IT IS ORDERED** that that the impartial hearing officer's decision dated December 21, 2009 is annulled in its entirety; and

**IT IS FURTHER ORDERED** that the district is to reimburse the parents for the student's tuition costs at West Hills for the 2009-10 school year upon proof of payment.

**Dated:** Albany, New York  
March 22, 2010

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