



The University of the State of New York

The State Education Department

State Review Officer

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No. 10-050

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

Appearances:

Law Offices of Regina Skyer and Associates, attorneys for petitioners, Gregory Cangiano, Esq., of counsel

Michael Best, Special Assistant Corporation Counsel, attorney for respondent, Karyn R. Thompson, 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 Elija School (Elija) for the 2009-10 school year. The appeal must be sustained.

At the beginning of the impartial hearing, the student was attending Elija, a private school that has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (Tr. pp. 330, 367; see 8 NYCRR 200.1[d], 200.7). Elija is described as a school for students with moderate to severe autism that employs an applied behavior analysis (ABA) methodology (Tr. pp. 324, 343). The student has received diagnoses of an autism spectrum disorder and moderate mental retardation and presents with sensory deficits, including extreme photosensitivity to normal lighting conditions; difficulty tolerating odors, loud noise, disruptions, and crowded places; and difficulty functioning in group situations (Tr. pp. 115-16, 387, 407; Parent Ex. 9 at p. 1). He is described as exhibiting aggressive behaviors, such as pinching and scratching, tantrum behaviors, noncontextual vocalizations, impulsive behavior, echolalia, and as having difficulty making eye contact, maintaining attention, and interacting socially (Tr. p. 334; Dist. Ex. 9 at p. 1). The student is nonverbal and is learning to use the picture exchange communication system (PECS) to communicate (Tr. pp. 114-15, 338-40, 446-48). The student's eligibility for special education programs and services as a student with autism is not in dispute in this proceeding (34 C.F.R. § 300.8[c][1]; 8 NYCRR 200.1[zz][1]; see Dist. Ex. 2 at p. 1).

The student initially received a diagnosis of autism at the age of 2 1/2 years and received early intervention home-based special education services (Tr. pp. 114, 120-22). The student later attended a half-day, center-based program for children with developmental disabilities and received speech-language therapy and occupational therapy (OT) services, as recommended by the Committee on Preschool Special Education (CPSE) (Tr. p. 122). At the age of five, the student attended a public school in a 6:1+1 special education classroom for one year, as recommended by the Committee on Special Education (CSE) (Tr. pp. 123-24). The student's mother reported that the student did not progress in the 6:1+1 class because he appeared to be afraid, often hid, and was basically uncooperative (Tr. p. 125). The student transferred to a district ABA program for children with autism, which he attended for five years from 2002-2007 (Tr. pp. 126-127). The student's mother reported that the student was able to participate without fear and initially did "okay" there for the first few years; however, the program reportedly underwent some changes, including an increase in the number of students in the class, an increase in the number of children in the school, and the school began to integrate special education students into general education classes (Tr. pp. 127-129). The student's mother stated that as a result of these program changes, the student did not make progress in the district's 6:1+1 program (Tr. p. 130). In September 2007, the CSE recommended placement of the student in a 12:1+4 program at the Shield Institute (Shield),¹ a State-approved nonpublic school for students with multiple disabilities, where the student was placed with children with various disabilities, including mental retardation and emotional disturbance (Tr. pp. 130-32, 138; Dist. Ex. 14 at p. 1). The student attended Shield for 1 1/2 years (Tr. p. 137). According to the student's mother, the student regressed, exhibited hiding and escape behaviors, and was overwhelmed in this setting (Tr. pp. 132-33). The student's mother also reported that the school's vice principal and school psychologist told the parents that Shield was not an appropriate placement for the student (Tr. pp. 139-41, 267).

The school psychologist at Shield prepared a behavior support plan for the student dated April 2, 2008 (Dist. Ex. 15 at p. 1). The behavior plan reflected the functional assessment tools that were used to develop the plan, including teacher interview and classroom observations (id.). Challenging behaviors identified in the behavior support plan reflected a variety of forms of aggression, including hitting, kicking, punching, throwing objects, screaming, and crying (id.). The behavior support plan indicated that according to the data collected, the student's aggressive behaviors occurred when he did not know what was expected of him, when he was not provided with clear visual tasks and visual schedules, when he did not get rewards, or when he wanted something that he was unable to communicate (id.). The plan provided a list of 13 prevention strategies to be used with the student that included specific procedures to follow in various circumstances, in addition to preferred reinforcement for positive behavior (id. at pp. 1-2).

On May 21, 2008, the student's teacher at Shield prepared a progress report reflecting that the student was attending a 12:1+4 classroom that utilized the "TEACCH" methodology² and that he received speech-language therapy, OT, and counseling services (Dist. Ex. 14 at p. 1). The progress report indicated that the student had acquired "readiness level" academic skills, including

¹ Although the student's mother stated that the program at Shield had a 12:1+1 student-to-teacher ratio, the subsequent teacher progress report from Shield and the student's May 21, 2008 IEP reflected that the ratio in the student's classroom was 12:1+4 (Tr. p. 132; Dist. Exs. 13 at p. 1; 14 at p. 1).

² TEACCH is an acronym for Treatment and Education of Autistic and related Communication handicapped Children.

the ability to identify colors, shapes and letters; receptively label animals, food items and body parts; receptively identify numbers up to 10; sort by size, color, and shape; and complete 12-piece puzzles (id. at p. 2). The student was working on sequencing stories, coin recognition, 1:1 correspondence, and writing the alphabet (id.). The progress report reflected that the student communicated using vocalizations, eye gaze, facial expressions, reaching for and pointing to objects; that the student shook his head to indicate yes or no; and that he was able to follow one to two step commands (id. at p. 1). The report further indicated that the student utilized "picture symbols as part of a formalized exchange system" and visual schedules (id. at p. 2). The student reportedly worked well in a structured, orderly learning environment that employed discrete trial instructional methodologies, seated away from distractions and with the support of a 1:1 paraprofessional to provide immediate reinforcement of his appropriate behaviors and verbal praise (id. at pp. 1-2). The report reflected that the student required clear physical, social, and environmental boundaries and repetition of instruction across a variety of environments so that content could be mastered (id. at p. 2). The student's teacher indicated that socially, the student responded to his name, greeted staff with a handshake or wave when prompted, readily made eye contact, demonstrated peer and adult preferences for social interaction, and responded to initiations to play (id. at p. 1). However, when upset, the student exhibited tantrum behaviors, including yelling, crying, pounding on the table or wall, and throwing objects (id.). When bored, the student reportedly demonstrated self-stimulating behaviors and sometimes left his seat (id.). The teacher recommendations indicated that because of the student's sensory and cognitive needs, he would benefit from a structured, quiet setting with fewer students and less external stimuli than his current placement (id. at p. 2). The student's teacher also indicated that he required "more integration of multimodal methodologies such as discrete trial instruction" and "a full-time 1:1 paraprofessional" to provide him with "intensive supervision, support, and reinforcement" (id.).

On May 21, 2008, the CSE met for an annual review of the student's program (Parent Ex. E at p. 1). The resultant individualized education program (IEP) recommended a 12-month, 12:1+4 program at Shield with related services, including three 30-minute individual OT sessions per week; three 30-minute group (of 3) speech-language therapy sessions per week; two 30-minute individual counseling sessions per week; and five 20-minute individual toilet training sessions per week, all in a separate location (id. at pp. 1, 19). The May 2008 IEP also recommended related services to be provided outside of school until August 8, 2008, including three 60-minute OT sessions per week in a group (of 2) and three 60-minute individual speech-language therapy sessions per week (id. at p. 19). The student's present levels of academic and social/emotional performance and academic and social/emotional management needs reflected the information provided in the May 21, 2008 teacher progress report noted above (compare Parent Ex. E at pp. 3-4, with Dist. Ex. 14). The May 2008 IEP also reflected that the student required a "voice output communication device 7 [l]evel [c]ommunicator" (Parent Ex. E at p. 3). The May 2008 IEP indicated that the student's behavior did not seriously interfere with his instruction and could be addressed by the special education teacher; however, it also recommended that the student follow an "[i]ntensive behavioral support plan that allow[ed] [the student]'s day to be highly structured" and that the student work to earn rewards throughout the day (id. at p. 5). The May 2008 IEP also recommended that the student receive behavioral support through counseling services and the provision of additional adults in the classroom (id.). The CSE developed annual goals and short-term objectives in the areas of math and reading readiness, comprehension, money skills, fine motor (handwriting skills), toileting, OT and speech-language skills (id. at pp. 7-16). The May 2008 IEP reflected that the CSE considered a general education placement for the student, but

determined that his cognitive, academic, and social/emotional needs required a highly supportive small group setting (id. at p. 18). The May 2008 IEP also reflected that the CSE considered a special class in a special school, which they determined was not sufficient to meet the student's academic and social needs at that time (id.).

The CSE reconvened on October 28, 2008 (Dist. Exs. 12; 13 at p. 2). The resultant IEP included the addition of transportation services, specifically, a mini-bus and also extended the provision of the student's outside speech-language therapy and OT to August 2009 (Dist. Ex. 13 at pp. 1, 20). Additionally, the October 2008 IEP reflected that the student's OT services were modified to individual sessions (id. at p. 20). The October 2008 IEP also added counseling goals to address the student's needs to improve play and social skills and a behavioral intervention plan (BIP) to address the student's aggressive and agitated behaviors, including hitting, kicking, biting, throwing or punching objects, and scratching himself (id. at pp. 17, 21). The October 2008 CSE meeting minutes included information consistent with and reflected in the October 2008 IEP, and indicated that the student's father was in agreement with the changes made to the student's IEP (Dist. Ex. 12). The meeting minutes also indicated that the student's father signed the IEP (id.).

During summer 2008, the parents began to search for public and private placement options for the student (Tr. p. 139). After visiting Elija and completing the application process, the parents enrolled the student at Elija in January 2009 (Tr. pp. 134-36).

On February 18, 2009, a comprehensive psychological evaluation of the student was conducted (Dist. Ex. 9 at p. 1).³ Behavior characteristics noted during the evaluation included the student's inability to sit still and listen carefully, difficulty concentrating, very short attention span, avoidant eye contact, and poor response to praise and encouragement (id. at p. 2). The evaluator indicated that due to the student's attention difficulties, the results of the evaluation might represent an underestimate of the student's true cognitive abilities (id.). Administration of the Stanford-Binet Intelligence Scales-Fifth Edition (SB-5) yielded a nonverbal IQ score of 42 (percentile rank of .01), within the moderate range of mental retardation (id.). Administration of the Wechsler Nonverbal Scale of Ability yielded similar results (full scale IQ score of 41, percentile rank of .01) (id.). The student's adaptive functioning was assessed using the Vineland Adaptive Behaviors Scales-Interview Survey Form-Second Edition (Vineland-II) through an interview with the student's mother (id. at p. 3). The student's mother's responses in the communication, daily living skills, and socialization domains resulted in standard scores of 50, 48 and 50 respectively, all within the low range of adaptive functioning (id.). The evaluation report also reflected that at the time of the evaluation, the student was attending a private special education program at Elija and receiving 1:1 ABA instruction, which was necessary due to the severity of his needs and his inability to focus and pay attention (id. at p. 5). The evaluation report further reflected that the student received speech-language therapy and OT services outside of school and was participating in a "double-blind" research study to determine the effectiveness of medication (id.). The student also reportedly exhibited "extreme photosensitivity, which ma[de] it difficult for him to function

³ The February 2009 comprehensive psychological evaluation report indicated that the student was referred for psychological testing to assess his level of cognitive and adaptive functioning in order to maintain his Office of Mental Retardation and Developmental Disabilities (OMRDD) waiver services (Dist. Ex. 9 at p. 1).

in normal lighting conditions" (id.). The evaluator recommended that the student continue with his current educational placement at Elija and all other services (id.).

On April 22, 2009, the student underwent an educational evaluation by a district school psychologist (Dist. Ex. 8 at p. 1). The resulting report reflected background information and behavioral observations consistent with the February 2009 comprehensive psychological evaluation (compare Dist. Ex. 8 at p. 1, with Dist. Ex. 9 at pp. 1-2). Administration of the Wechsler Individual Achievement Test-Second Edition (WIAT-II) yielded a standard score of 40 in word reading and math reasoning, within the extremely low range of functioning (Dist. Ex. 8 at p. 2). The report reflected that administration of the listening comprehension subtest was attempted, but the student was unable to respond due to his inability to attend and focus (id.). The report also indicated that the student demonstrated significantly delayed fine motor skills (id.).

On April 23, 2009, the parents provided information to a district social worker for an addendum to the student's February 19, 2009 social history (Dist. Ex. 7 at p. 1).⁴ The updated social history reflected that the student had been attending Elija for three months, had "responded well to the calmer and more controlled environment" that Elija offered, and that he had made "much progress" since he began attending the school (id.). The student reportedly had made a friend at school (id.). According to the parents, the student was not yet fully toilet trained and wore "pull-ups" to his appointments and on his bus ride, although it was not necessary for him to do so during school (id.). The social history update also indicated that the student had been seeing a psychiatrist since September 2008, who had prescribed medication for the student (id.). The student was reportedly receiving outside speech-language and OT services after school (id.). The social history update reflected that the parents were "quite satisfied" with the student's current placement and wanted him to continue to attend school at Elija (id. at p. 2). The update also reflected that the evaluation procedures and parental due process rights were discussed with the parents (id.).

On May 29, 2009, the student's district-funded speech-language pathologist prepared a progress report of the student (Dist. Ex. 10 at p. 1).⁵ The progress report reflected that the student was receiving individual speech-language therapy three times per week for 60-minute sessions to address a severe receptive and expressive language delay as well as a severe apraxia of speech (id.). Although the speech-language pathologist indicated that the student was generally cooperative, remained focused on a presented activity and displayed good eye contact during sessions, she also reported that the student exhibited inappropriate, sometimes aggressive and self-stimulating behaviors, as well as vocal "stimming" behaviors (id.). The speech-language progress report indicated that although the student reportedly was able to use some signs and several meaningful words, he had demonstrated ability to produce only the word "yeah" and had not spontaneously used any signs during the course of the year (id. at p. 2). The speech-language pathologist indicated that she had begun to encourage the student to use vocalizations, words and/or signs to communicate instead of requesting via PECS symbols (id.). She further indicated that using yes/no appropriately was a target of therapy; however, at the time of the progress report, the student was not meaningfully or independently able to nod his head to indicate yes or no (id.).

⁴ The February 19, 2009 social history is not contained in the hearing record.

⁵ The student's October 2008 IEP recommended speech-language services "outside of school" (Dist. Ex. 13 at p. 20).

The student's verbal apraxia was reported to severely limit his ability to produce speech sounds and words (id. at p. 3). He was not able to produce precursors to meaningful speech such as environmental sounds, and therefore, therapy had focused on producing sounds in isolation; however, the student had made little, if any, progress in this area (id.). The speech-language pathologist also reported that oral motor therapy had been introduced, but due to the student's unpredictable aggressive behaviors and the close proximity with which the oral motor exercises would have to be carried out, the oral motor and sensory protocol was not a focus of the student's therapy (id. at p. 4). The speech-language pathologist recommended that the student continue to receive speech-language therapy at the same frequency and duration until his IEP goals were met (id.).

An OT progress report dated June 3, 2009 prepared by the student's district-funded occupational therapist reflected that the student was receiving two 60-minute individual OT sessions per week (Dist. 11 at p. 1).⁶ The progress report indicated that the student presented with decreased sensory processing skills in the area of attention, distractibility, behavioral overreactions, and self-regulation as well as severe delays in visual motor and fine motor skills (id.). The focus of the student's therapy was on improving the student's sensory processing, self-regulation, and behavior while addressing his fine motor and visual motor skills (id.). According to the OT progress report, the student had made limited and inconsistent progress in all areas of need and continued to demonstrate poor attention and willingness to try fine motor tasks (id. at p. 3). The student exhibited inappropriate behaviors to escape participation in fine motor tasks, such as pushing the therapist away with his head, banging on the table, and scratching or hitting the therapist (id. at p. 1). When aroused, upset, or frustrated, the student showed an increase in self-stimulatory behaviors, including touching his face or hair, finger movements, and noises (id.). However, the progress report reflected that the student benefited from 20 minutes of vestibular and proprioceptive input prior to attempting an activity, as it resulted in an increase in the student's attention to tasks and a decrease in his inappropriate behaviors (id. at pp. 1-2). The occupational therapist recommended that the student continue to receive OT for two 60-minute individual sessions per week in a sensory gym setting (id. at p. 3).

On June 12, 2009, the CSE convened for a review of the student's program and to develop an IEP for the 2009-10 school year (Dist. Ex. 2 at p. 1). The meeting was attended by the district representative who also functioned as the school psychologist, a district school social worker, the parents, and by telephone, the director of Elija and the student's Elija special education teacher (Tr. pp. 217-18; Dist. Ex. 2 at p. 2). The student's father signed a waiver declining the participation of an additional parent member at the CSE meeting (Dist. Ex. 3 at p. 1; see Dist. Ex. 2 at p. 2). The resultant IEP continued the student's classification as a student with autism and recommended placement in a 12-month, in-district, 6:1+1 special class in a specialized school (Dist. Ex. 2 at p. 1). The projected date of initiation of the June 2009 IEP was September 2009 (id. at p. 2). The June 2009 IEP continued the student's in-school speech-language therapy services of three 30-minute group (of 3) sessions per week, the student's in-school OT services of three 30-minute individual sessions per week, and the provision of special education transportation (mini-bus) and terminated the provision of the services of a toilet trainer (id. at pp. 1, 14). The June 2009 IEP did

⁶ The student's October 2008 IEP recommended OT services "outside of school" (Dist. Ex. 13 at p. 20). I note that the October 2008 IEP recommended three 60-minute sessions, but the OT progress report reflected that the student received two 60-minute sessions (compare Dist. Ex. 13 at p. 20, with Dist. 11 at p. 1).

not continue the recommendation for outside speech-language therapy services or outside OT services that previously had been recommended in the student's October 2008 IEP (compare Dist. Ex. 2 at p. 14, with Dist. Ex. 13 at p. 20). The June 2009 IEP reflected that the student received psychotropic medication to "calm him" and "partly address [his] obsessive-compulsive disorder" (id. at p. 6). The June 2009 IEP indicated that the student's behavior seriously interfered with instruction and required additional adult support; however, it did not include a BIP to address this need (id. at p. 5). Annual goals in the areas of academics, speech-language, and OT were included in the student's June 2009 IEP (id. at pp. 7-11). The June 2009 IEP reflected that the CSE considered three alternatives to the recommended program: a general education program and a special class in a community school, both of which were deemed inadequate to address the student's significant needs in academic, language/communication and behavior; and a nonpublic school that was deemed too restrictive for the student at the time of the June 2009 CSE meeting (id. at p. 13).

The meeting minutes of the June 12, 2009 CSE meeting reflected that the CSE reviewed a February 19, 2009 social history and an April 23, 2009 social history update, an April 2009 psychoeducational evaluation, a May 29, 2009 speech-language report, and a June 3, 2009 OT report (Dist. Ex. 4). The parents reported to the CSE that the student had responded well to the calmer, controlled environment at Elija and the director and special education teacher from Elija indicated that the student was toilet trained, continued to use PECS to communicate, and that his behavior had improved greatly (id.). The meeting minutes reflected that the June 2009 CSE explained that it believed that there was a program within the district to address the student's needs, explained the parents' due process rights to them, and provided forms to the parents regarding appeal procedures and legal services for impartial hearing requests (id.).

On June 23, 2009, the executive director of Elija signed the student's enrollment contract for the 2009-10 school year (Tr. p. 174; Parent Ex. D at pp. 1, 4). Although the enrollment contract in the hearing record does not include the parents' signatures (see Parent Ex. D at p. 4), their petition alleges that they also signed the contract on June 23, 2009 (Pet. ¶ 93). The contract provided that a portion of the deposit would be refunded to the parents if they provided notice to Elija that the CSE had recommended an appropriate program for the student on or before September 15, 2009 (Parent Ex. D at p. 1).

The district sent the parents a Final Notice of Recommendation (FNR) dated June 24, 2009, reflecting the recommendations of the June 12, 2009 CSE for a 6:1+1 special class in a specialized school and related services of speech-language therapy and OT to be provided at a specific district school (Dist. Ex. 5). The hearing record reflects that the student's mother visited the recommended placement on July 9, 2009 (Tr. pp. 243-44; Dist. Ex. 5). She subsequently returned the FNR to the district, indicating that she had visited the proposed school and that she believed the school was inappropriate for the student, and requested that the district provide the student with an alternative program (id.). She further provided a contact number where she could be reached to discuss placement options (id.).

By letter dated August 24, 2009, the parents notified the district that its recommended program was inappropriate for the student; that while they were awaiting a response from the district to their prior letter, they were unilaterally placing the student at Elija for the 2009-10 academic year; and that they intended to seek funding from the district for the student's placement at Elija (Parent Ex. A).

By due process complaint notice dated December 10, 2009, the parents, through their attorney, requested an impartial hearing (Dist. Ex. 1 at p. 3). The parents alleged that the June 2009 CSE failed to secure the attendance of a regular education teacher, that the recommended program was substantively deficient, and that the district's proposed placement did not offer the student a suitable and functional peer group (*id.* at pp. 4-6). The parents asserted that the goals and objectives on the June 2009 IEP were generic, vague, and did not provide a baseline of the student's performance (*id.* at p. 5). The parents also argued that the June 2009 goals and objectives were inadequate, unquantifiable, and ambiguous (*id.*). The parents further alleged that the June 2009 IEP failed to address the student's educational and emotional needs (*id.*). The parents contended that the June 2009 CSE failed to conduct a functional behavioral assessment (FBA) and develop a BIP for the student (*id.*). The parents further asserted that the district could not provide the "constellation of services" that the student required, and that the district's recommended program would have resulted in regression (*id.* at p. 6).

The parents alleged that Elija was appropriate to address the student's needs and was reasonably calculated to enable the student to receive educational benefits (Dist. Ex. 1 at p. 6). The parents also asserted that they cooperated with the district at all times (*id.*). The parents requested reimbursement of the student's tuition costs at the Elija school and an RSA⁷ to fund related services that were mandated on the student's IEP for the months of July and August (*id.*).

An impartial hearing began on January 26, 2010 and ended on March 23, 2010, after three days of testimony (IHO Decision at p. 2). By decision dated April 26, 2010, the impartial hearing officer found that the parents had decided to place the student at Elija as early as April 2009 (*id.* at p. 6). The impartial hearing officer further found that if the parents had a sincere intention to consider the district's placement, the student should have started attending the district's school on July 6, 2009 (*id.*). The impartial hearing officer determined that the district provided a timely placement for the student (*id.*). He then found that the parents' notice of unilateral placement in August 2009 failed to demonstrate that the parents' unilateral placement was not determined until that date; thus, the impartial hearing officer denied the parents' request for summer tuition reimbursement (*id.* at pp. 6-7). The impartial hearing officer found that the district's failure to conduct an FBA was a procedural flaw, but did not render the June 2009 IEP "legally inadequate" (*id.* at p. 7). The impartial hearing officer determined that the district carefully and "thoroughly crafted" the June 2009 IEP, and any omission, oversight or error was "diminimus" (*id.*). The impartial hearing officer found that the June 2009 IEP was substantively appropriate and reasonably calculated to provide the student with a free appropriate public education (FAPE) (*id.*). The impartial hearing officer determined that the parents failed to demonstrate that the June 2009 IEP was not reasonably calculated to offer the student a FAPE and there was no evidence that the goals or objectives on June 2009 IEP were erroneous or inappropriate (*id.*). The impartial hearing officer noted that there was no allegation that the parents did not meaningfully participate in the development of the June 2009 IEP (*id.* at p. 8). Based on the above, the impartial hearing officer dismissed the parents' claims (*id.* at p. 9).

The parents appeal and assert that the impartial hearing officer lacked sufficient knowledge of the law, as evidenced by his misapplication of the burden of proof and his statements of an incorrect legal standard in his decision. The parents allege that the impartial hearing officer erred

⁷ "RSA" are the initials for related services authorization.

by: (1) ignoring evidence, misapplying the district's requirements, and improperly dismissing the matter without deciding fundamental aspects of the case; (2) placing the burden of proof on the parents with regard to whether the district offered the student a FAPE; (3) misinterpreting case law, which does not require an impartial hearing officer to defer to the CSE; (4) determining that the district's failure to conduct an FBA did not render the June 2009 IEP legally inadequate; (5) failing to find that the lack of a BIP impeded the student's right to a FAPE; (6) finding that the proposed class would have provided a suitable and functional peer grouping for the student; (7) failing to determine whether the lack of toileting goals on the June 2009 IEP deprived the student of a FAPE; and (8) failing to determine whether the exclusion of parent training and counseling from the June 2009 IEP denied a FAPE. The parents further assert that the 6:1+1 program recommended in the student's June 2009 IEP was not appropriate for the student and would not have permitted the student to benefit educationally from instruction. The parents allege that a special class with a 6:1+1 staffing ratio is not appropriate for the student because he requires 1:1 support throughout the school day to acquire skills, he can be very distracted, and he has a hard time functioning in a group setting. The parents further allege that the student exhibits behaviors that significantly impede his learning, such as self-stimulatory and aggressive behaviors, and that he requires highly intensive supervision. The parents assert that the June 2009 IEP does not contain a meaningful description of the student's behaviors. The parents also allege that the June 2009 CSE lacked justification for removing a toilet trainer from the student's IEP.

The parents further assert that Elija conferred educational benefits on the student and was appropriate. They allege that the student has made progress at Elija across all domains, including self-help, communication, behavior reduction, and socialization. The parents also allege that the impartial hearing officer erred by determining that the student's mother decided to reenroll the student at Elija because she signed a contract with the school before the date of the June 2009 CSE meeting. The parents contend that they cooperated in good faith and did not hinder the June 2009 CSE's efforts to create an IEP. The parents allege that they signed the enrollment contract after the June 2009 CSE meeting, and that the enrollment contract contained a clause whereby the parents could have removed the student from Elija if the district offered an appropriate placement. The parents assert that they provided the district with the required 10-day notice for their claim of tuition reimbursement for the student's tuition costs at Elija from September 2009 to June 2010.

In its answer, the district asserts that the impartial hearing officer correctly determined that it offered the student a FAPE. The district alleges that the parents indicated at the June 2009 CSE meeting that they were happy with Elija and wanted the student to continue attending school there. The district asserts that it recommended a 6:1+1 class in response to the parents' concern that the prior placement was too noisy for the student and the class size was too large. The district contends that the student's mother agreed with almost all of the June 2009 IEP goals and objectives; however, she objected to the district's proposed reduction in the number of hours of speech-language therapy and OT, and the recommendation of a 6:1+1 class.

The district also asserts that the parents did not raise their arguments that parent training and counseling were not recommended in the June 2009 IEP and that the 6:1+1 class was too big for the student in their due process complaint notice. Thus, the district argues that these issues should not be considered on appeal. In the alternative, the district contends that since parent training and counseling are a programmatic component of the recommended program, the student was not denied a FAPE, and that the proposed class would have been appropriate since he would have been grouped with students with similar functioning levels and needs.

The district further contends that the absence of an FBA and BIP did not impede the student's right to a FAPE, significantly impede the parents' opportunity to participate, cause a deprivation of educational benefits, or render the June 2009 IEP substantively inadequate. The district also asserts that the lack of toileting goals on the June 2009 IEP did not constitute a deprivation of a FAPE because the school would have provided a toilet trainer if the student needed one. Moreover, the district argues that the impartial hearing officer appropriately found that the June 2009 IEP was substantively appropriate and reasonably calculated to provide the student with a FAPE.

The district asserts that Elija was inappropriate for the student's needs because it failed to provide the student with speech-language therapy and OT. The district also contends that equitable considerations favor the district because the parents decided to enroll the student at Elija before attending the June 2009 CSE meeting. In the alternative, the district asserts that even if the parents are entitled to tuition reimbursement, their claim should be denied because they failed to submit evidence of a signed contract and proof of tuition payments to Elija.

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 least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see 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]). Also, a FAPE must be available to an eligible student "who needs special education and related services, even though the [student] has not failed or been retained in a course or grade, and is advancing from grade to grade" (34 C.F.R. § 300.101[c][1]; 8 NYCRR 200.4[c][5]).

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).

As an initial matter, the parents assert that the impartial hearing officer erred by incorrectly placing the burden of proof upon the parents to show that the program offered by the district was not reasonably calculated to provide the student with a FAPE. 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 this case (see Application of the Bd. of Educ., Appeal No. 08-016). Here, the impartial hearing officer misapplied the burden of production and persuasion by determining that the parents failed to demonstrate that the June 2009 IEP was not reasonably calculated to provide the student with a FAPE (IHO Decision at pp. 7-8). In general, a misapplication of the burden of persuasion is reversible error (see M.M. v. Special Sch. Dist. No. 1, 512 F.3d 455, 459 [8th Cir. 2008]).

Although the impartial hearing officer's misapplication of the burden of proof is grounds for annulling his decision regarding whether the district offered the student a FAPE, I will review the parents' contention that the district did not offer the student a FAPE for the 2009-10 school year. For the reasons set forth below, I agree with the parents' contention. Although the impartial hearing officer found that the student's June 2009 IEP was substantively appropriate and reasonably calculated to provide the student with a FAPE, the hearing record does not support the impartial hearing officer's conclusion because, as discussed below, the June 2009 IEP failed to adequately address the student's highly intensive behavioral needs (IHO Decision at p. 7).

A careful review of the hearing record reveals that the student had significant deficits in his ability to attend and focus and that the student exhibited aggressive, interfering and self-stimulatory behaviors that affected his ability to learn; however, the extent of these deficits were not described in the student's present levels of performance or addressed by goals in his June 2009 IEP (see Dist. Exs. 2 at pp. 3-11; 8 at p. 1; 10 at pp. 1, 4; 11 at pp. 1-3; 14 at pp. 1-2). Moreover, testimony by the clinical supervisor at Elija indicated that at the time of the impartial hearing, the student demonstrated a very high rate of non-contextual verbalizations and non-contextual laughter, elopement from the instructor, some forms of self-injury and aggression, and some disrobing (Tr. p. 436).

According to the meeting minutes taken at the June 2009 CSE meeting, the CSE reviewed the student's February 19, 2009 social history, an April 2009 social history update, an April 2009 district educational evaluation, a May 29, 2009 speech-language progress report by the student's outside speech-language pathologist, and a June 3, 2009 OT progress report by the student's outside occupational therapist (Dist. Ex. 4). The hearing record also indicates that the CSE considered the student's private comprehensive psychological evaluation dated February 18, 2009.⁸

The student's deficits in attention and focusing and his significant behavioral needs were noted in the June 2009 OT progress report, which reflected that the student exhibited decreased sensory processing skills in the areas of attention, distractibility, behavioral overreactions, and self-regulation (Dist. Ex. 11 at p. 1). The report reflected that the focus of the student's therapy was on improving these areas while addressing his fine motor and visual motor skills, and that the

⁸ Although not noted in the CSE meeting minutes, the hearing record reflects that the June 2009 CSE considered the student's February 18, 2009 comprehensive psychological evaluation. For example, the June 2009 IEP specifically references the student's test scores as being from a psychological evaluation dated February 18, 2009 (Dist. Ex. 2 at p. 3). Additionally, the district's April 22, 2009 educational evaluation references the February 18, 2009 psychological evaluation in its discussion of the student's background information (Dist. Ex. 8 at p. 1).

purpose of the OT sessions was to give the student the sensory input he "need[ed] and crave[d] to help him sit and attend better at the table" (id.). The report also reflected that the student exhibited inappropriate and aggressive behaviors, including pushing the therapist away with his head, banging on the table, and scratching or hitting the therapist in order to escape participation in fine motor tasks (id.). The occupational therapist reported that when the student was aroused, upset or frustrated, he exhibited self-stimulatory behaviors including touching his face or hair, finger movements, and making noises (id.). The OT progress report indicated that the student required high levels of 1:1 assistance to complete fine motor tasks. For example, the student required constant tactile cues for proper finger positioning and hand-over-hand assistance when using coloring or writing utensils due to his immature and inefficient grasp (id. at p. 2). Regarding activities of daily living (ADL) skills, the student reportedly required verbal cues and supervision to use the bathroom and to perform dressing and other self-care tasks (id. at pp. 2-3).

The May 29, 2009 speech-language progress report also noted the student's aggressive and self-stimulatory behaviors (Dist. Ex. 10 at p. 1). The speech-language pathologist indicated that the student demonstrated a sequence of self-stimulatory behaviors including touching his lips, teeth, tongue, nose, eyes and then his hair with his fingers which he would repeat throughout the session, along with vocal "stimming" (id.). The speech-language pathologist also indicated that the student displayed aggressive behaviors such as hitting the table with his fists and lifting the table up, and would sometimes tap the clinician's hands with his fingers or kick the clinician with his feet (id.). The speech-language pathologist indicated that these behaviors occurred when the student had an "atypical day," and when he was frustrated by tasks presented or in an attempt to be playful; however, the speech-language pathologist also indicated there had been instances when it appeared that the student was not aware that he was exhibiting these behaviors (id.). The speech-language pathologist further indicated that, due to the student's aggressive behaviors, she was unable to address certain of his speech-language needs (id. at p. 4). The speech-language pathologist reported that oral motor exercise and sensory protocol were not a focus during therapy due to the unpredictability of the student's aggressive behaviors combined with the close proximity in which these exercises had to be carried out (id.).

In addition, the hearing record shows that the student's deficits in attending and his interfering, aggressive, escape, and self-stimulatory behaviors resulted in the need for 1:1 assistance in order for the student to participate in and benefit from instruction. The February 18, 2009 comprehensive psychological evaluation report indicated that 1:1 instruction was necessary "due to the severity of [the student's] condition and his inability to focus and pay attention" (Dist. Ex. 9 at p. 5). The teacher progress report from Shield recommended a "full-time 1:1 paraprofessional to provide the intensive supervision, support, and reinforcement [the student] requires to be successful" and indicated that a 1:1 paraprofessional would provide the student with immediate reinforcement of appropriate behaviors (Dist. Ex. 14 at p. 2). Testimony by the clinical supervisor at Elija, who was also one of the student's teachers during summer 2009, indicated that the student was "definitely more on task" during 1:1 instruction, and that because his behaviors interfered with his learning, being in a 1:1 instructional setting improved his skill acquisition and his attention (Tr. pp. 434-35). Testimony by the district's social worker who participated in the June 2009 CSE meeting reflected that during her interview with the parents for the social history, they had indicated that they were seeking a program with a lower student-to-teacher ratio where the student would receive more individualized attention (Tr. p. 17).

Additionally, the hearing record indicates that the student had difficulty functioning in a group setting. Testimony by the clinical supervisor at Eliza indicated that the school has a program where the students work in a group for one session per day and that the student "struggle[d] very much in that setting" and could "barely tolerate even being in a room with multiple learners without one-to-one instruction" (Tr. pp. 451-52). She further testified that the student's problem behaviors emerged during the group time and that the student might need to focus on "prerequisite skills in terms of even just tolerating the group atmosphere before [they] can target specific goals within a group" (Tr. p. 452). As such, the clinical supervisor testified that she did not believe the student could be successful in a 6:1+1 class (Tr. pp. 451-52).

Based on the foregoing, the hearing record demonstrates that the student's behavioral needs, as described above, were not adequately reflected on the June 2009 IEP and would not have been adequately addressed in the district's recommended program. The extent of the student's deficits in attending skills and the extent of his behavioral needs at the time the June 2009 IEP was formulated, warranted 1:1 support in order for the student to benefit from instruction in the recommended program. Despite the student's need for greater adult support, the June 2009 IEP did not include a recommendation for the provision of a 1:1 paraprofessional. Moreover, the June 2009 IEP did not include appropriate goals or objectives to address the student's significant attending and behavioral needs. Therefore, I find that the district failed to offer the student a FAPE for the 2009-10 school year.

Having found that the district failed to offer the student a FAPE, I turn to the appropriateness of the parents' unilateral placement. 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).

A review of the hearing record reveals that the services that the student received at Elija during the 2009-10 school year were appropriate to address his needs and that the student demonstrated progress while attending there. The director of Elija testified that the school is a very small program of 12 students ranging in age from 7 to 13 years, which provides 12-month behavior analytic services for children with moderate to severe autism (Tr. pp. 324, 326). The school has three classrooms, each with four students and four instructors (Tr. pp. 327, 356). The four instructors rotate between students every 1/2 hour so that students have the opportunity to engage with different instructors and generalize learning (Tr. p. 356). An additional "floating instructor" and a teacher assistant are available to replace an instructor in the event of an absence, in order to ensure that a 1:1 teaching ratio is maintained (Tr. pp. 326-27). The director of Elija indicated that like the student, most of the children at the school demonstrate severe interfering behaviors as well as problem behaviors and self-injurious behaviors (Tr. p. 329). The school employs a 1:1 instructional model that utilizes an ABA methodology and provides high rates of reinforcement and repetition of instruction, and also includes comprehensive data collection (Tr. p. 352). Testimony by the director of Elija indicates that Elija uses three curricula: the Alpine Learning Group curriculum developed by a well known behavior analyst specifically for research in teaching children with autism; the Syracuse model, which is based on the developmentally disabled population, specifically for those who are more severely impaired; and the Assessment of Basic Language and Learning Skills (ABLLS) curriculum, which is described as an inventory and curriculum guide for children with autism (Tr. pp. 346-47). Within each classroom, at least one of the instructors is a New York State certified teacher with a Masters degree in special education (Tr. pp. 357-58). The other instructors are required to have a Bachelors level degree with three years experience working with children with autism (Tr. p. 327). Testimony by the clinical

supervisor indicated that one of the instructors in the student's class was pursuing certification as a Board Certified Behavior Analyst (BCBA) (Tr. p. 442).

The hearing record reflects that at Elija, students are grouped based on age, skill set, and behavioral needs (Tr. pp. 331-32). Testimony by the clinical supervisor at Elija indicates that the student was grouped with other students within his age range (Tr. p. 436). Testimony by the director of Elija further indicated that they placed the student with other students who had skill levels similar to his and with students who used similar communication methods including augmentative devices and PECS (Tr. pp. 332-33). She further testified that the staff in the student's classroom was trained and capable of redirecting and implementing any behavioral procedures necessary to reduce the student's aggressive behaviors and that some of the students in the class exhibited self-stimulatory behaviors such as noncontextual vocalizations similar to the student (id.).

To address the student's needs, Elija developed and administered ABA programs in the areas of attending, expressive and receptive language, fine motor, imitation, leisure, preacademic, prevocational, self-care, socialization and behavior skills (Parent Ex. C at pp. 2-11). The director of Elija testified that the student responded "very positively" to the ABA methodology and the 1:1 instructional model, and noted that the student had progressed in the areas of behavior reduction, communication, and self-help skills (Tr. pp. 351-52). She testified that they used "extinction procedures" to address the student's aggressive behaviors, described as redirecting the student in a very neutral manner and trying not to give any attention to the aggressive behaviors, in an effort to avoid increasing or reinforcing those behaviors (Tr. pp. 335-36). The teachers also proactively taught an alternative response to the student so that the aggressive behavior did not recur (Tr. p. 337). The director of Elija indicated that the student had responded well to this approach, that the student was very compliant, had become very independent, that his problematic behaviors were at low levels, and that they were very pleased with his progress (Tr. p. 338). Testimony by the clinical supervisor indicated that the student's progress also included a decrease in his noncontextual vocalizations (Tr. pp. 439-40). Although the director of Elija testified that the student had entered Elija with no functional form of communication except for a few signs, according to the clinical supervisor, the student had become "quite fluent in requesting with the PECS" and utilized approximately 30 pictures in his PECS wallet (Tr. pp. 338, 447-48). With regard to self-help skills, the clinical supervisor indicated that the student had gained independence in using the bathroom, had increased his ability to button from no ability to independently buttoning his entire shirt, and had progressed from being completely unable to tolerate a shower to learning how to shower himself (Tr. pp. 450-51). The student's mother reported that the student responded well to the calmer, more controlled environment that Elija offered (Dist. Exs. 7 at p. 1; 8 at p. 1).

The hearing record further reflects that Elija provided for ongoing assessment and individualization of the student's program goals. The director of Elija testified that data is taken daily and reviewed weekly by the clinical supervisor (Tr. p. 345). The director stated that if a skill does not increase after a period of five days of teaching, they will review the programming, problem solve, and begin implementing new teaching procedures to increase the student's ability to acquire the skill (id.). The director testified that review of each student's progress and program is conducted monthly by the clinical director and the school's director, and also at a monthly clinic at which the instructor, the student, the parents, the clinical supervisor, and any member of the parents' team can participate (Tr. pp. 345-46).

The director of Elija testified that parent training is provided by Elija in both the school and the home setting (Tr. pp. 350-51). Her testimony indicated that parents can observe their child's instruction and discuss any questions they have with the staff or they can participate as a member of the student's team by learning how to implement the teacher's procedures and provide carryover and generalization of skills to the home (*id.*). The director stated that the school also provides in-home consultations up to two times per month on an as needed basis to address any concerns that arise in the home setting (*id.*). Further testimony from the director revealed that the school had conducted several home consultations for the student and that the parents had come to the school to meet with staff and participate in parent training sessions (Tr. p. 351).

With regard to the student's speech and language needs, as noted above, the hearing record reflects that when he began attending Elija, the student was nonverbal and had no functional form of communication except for a few signs (Tr. pp. 114, 338). Testimony by the director of Elija indicated that the school believed that PECS would provide the student with a more effective form of communication (Tr. p. 338).⁹ The hearing record reflects that the student utilized approximately 30 PECS cards and exhibited very low levels of frustration using the system (Tr. pp. 341, 447). The student used PECS to make choices to communicate his wants and needs; for example, to choose what room he wanted to be in, what reinforcer he wanted to work for, and to make choices for basic functions such as to get a drink or something to eat, use the bathroom, or request a break (Tr. p. 339; *see* Parent Ex. C at pp. 3, 4). Additionally, to address the student's functional vocalizations, Elija provided a consulting speech-language pathologist on a bi-monthly basis for a full day (Tr. p. 341). The speech-language pathologist helped implement vocalization treatment procedures and helped to program augmentative communication devices (*id.*). The school also addressed increasing students' ability to vocalize using the Whistle program, which works on oral motor skills (*id.*). They also utilized many exercises and routines to increase their students' ability to control their breathing and vocalizations on a daily basis (Tr. p. 342).

The hearing record also reflects that Elija was meeting the student's sensory, perceptual, and fine motor needs through ABA programming. The January 2010 progress report from Elija reflected that the student's fine motor deficits were addressed through an ABA program, which focused on improving the student's ability to perform tasks using a pincer grasp (Parent Ex. C at p. 4). Another program addressed the student's visual perceptual and visual motor skills and focused on completing interlocking puzzles of up to 25 pieces (*id.* at p. 6). The student's attending deficits were addressed by three programs that focused on the student's ability to establish and maintain eye contact in response to his name, during teaching trials, and during group instruction (*id.* at pp. 2-3). The student's ABA programming also addressed his self-stimulatory behavior of non-contextual vocalizations (*id.* at p. 11). The January 2010 progress report from Elija reflected that the student had made progress in each of these programs, except for making and maintaining eye contact during group instruction (*id.* at pp. 2-4, 6, 11). The hearing record also reflects that Elija addressed the student's sensory needs. As noted above, the student exhibited extreme photosensitivity and demonstrated problem behaviors related to tolerating disruptions, loudness, crowded places, and crowds (Tr. p. 387; Dist. Exs. 8 at p. 1; 9 at pp. 1, 5). Testimony by the student's mother indicated that the school used lighting to which the student was not sensitive (Tr. p. 119). The student's mother also reported that the student had responded well to the calmer, more

⁹ Testimony by the student's mother indicated that the student previously started learning to utilize PECS in the district's recommended school; however, he was not successful with it until he started using it at Elija (Tr. p. 115).

controlled environment that the school offered (Dist. Ex. 7 at p. 1). Testimony by the clinical director at Elija indicated that they are attempting to teach the student to ask for a break so he would not engage in problem behavior when he is anxious (Tr. p. 395). The progress report further reflected that a program that addressed requesting a break had been implemented, although the student had not yet mastered it (Parent Ex. C at p. 4).

Based on the foregoing, I find that the parents demonstrated that the program at Elija offered educational instruction specially designed to meet the unique needs of the student for the 2009-10 school year (see Gagliardo, 489 F.3d at 112, citing Frank G., 459 F.3d at 364-65).

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

The IDEA allows that reimbursement may be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent CSE meeting prior to removing the student from public school, or by written notice ten business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 C.F.R. § 300.148[d][1]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). Although a reduction in reimbursement is discretionary, courts have upheld the denial of reimbursement in cases where it was shown that parents failed to comply with this statutory provision (Greenland, 358 F.3d at 160; Ms. M. v. Portland Sch. Comm., 360 F.3d 267 [1st Cir. 2004]; Berger v. Medina City Sch. Dist., 348 F.3d 513, 523-24 [6th Cir. 2003]; Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 27 [1st Cir. 2002]); see Frank G. v. Bd. of Educ., 459 F.3d 356, 376 [2d Cir. 2006]; Voluntown, 226 F.3d at 68; Lauren V. v. Colonial Sch. Dist.; 2007 WL 3085854, at * 13 [E.D. Pa. Oct. 22, 2007]).

The parents contend that the impartial hearing officer erred by finding that they did not intend to consider the district's program. Here, however, I find that the hearing record does not support the impartial hearing officer's finding. In this case, the impartial hearing officer found that if the parents had a "sincere intention" to consider the district's program, they should have enrolled the student at the district's school at the beginning of July 2009 (IHO Decision at p. 6). However, since the start date for the program and services offered by the district in the June 2009 IEP was September 2009 (Dist Ex. 2 at p. 2), the impartial hearing officer's determination was based upon his misunderstanding of the start date of the June 2009 IEP and an apparent erroneous belief that the parents had to enroll the student in public school prior to seeking tuition reimbursement. I find that the impartial hearing officer's conclusion that the equities required a denial of reimbursement is not supported by the hearing record. I further find that the equities support reimbursement.

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

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the impartial hearing officer's decision dated April 26, 2010 is annulled; and

IT IS FURTHER ORDERED that the district shall, upon proof of payment provided by the parents, reimburse the parents for the cost of the student's tuition at Elija for the time period from September 2009 until the end of the 2009-10 school year.

**Dated: Albany, New York
July 21, 2010**

**PAUL F. KELLY
STATE REVIEW OFFICER**