



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 11-031

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

#### **Appearances:**

Michael Best, Special Assistant Corporation Counsel, attorney for petitioner, Neha Dewan, Esq., of counsel

Thivierge & Rothberg, P.C., attorneys for respondents, Christina D. Thivierge and Jessica Stein, Esqs., of counsel

#### **DECISION**

Petitioner (the district) appeals from the decision of an impartial hearing officer which found that it failed to offer an appropriate educational program to respondents' (the parents') son and ordered it to reimburse the parents for their son's tuition costs at the Manhattan Childrens Center (MCC) and home-based applied behavioral analysis (ABA) programming and related services for the 2010-11 school year. The parents cross-appeal from that part of the impartial hearing officer's determination which denied in part their request for reimbursement for the cost of the student's home-based services. The appeal must be dismissed. The cross-appeal must be sustained in part.

At the time of the impartial hearing, the student was attending MCC, a nonpublic school which has not been approved by the Commissioner of Education as a school with which school districts may contract to instruct students with disabilities (Tr. pp. 557, 702; see 8 NYCRR 200.1[d], 200.7). His eligibility for special education programs and related services as a student with autism is not in dispute in this appeal (Tr. p. 33; Dist. Ex. 3 at p. 1; see 34 C.F.R. § 300.8[c][1]; 8 NYCRR 200.1[zz][1]).<sup>1</sup>

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<sup>1</sup> The hearing record contains multiple duplicative exhibits. For purposes of this decision, only district exhibits were cited in instances where both district and parent exhibits were identical. I remind the impartial hearing officer that it is his responsibility to exclude evidence that he determines to be irrelevant, immaterial, unreliable, or unduly repetitious (see 8 NYCRR 200.5[j][3][xii][c]).

## Background and Procedural History

The student exhibits significant developmental delays in expressive and receptive language, cognition, academics, fine motor skills, and skills related to activities of daily living (Tr. pp. 514, 520-21; Dist. Exs. 6-9). To communicate, the student uses vocalizations, some phrases, and physically engages listeners to retrieve desired items (Tr. p. 252; Parent Ex. E at p. 2-3). The student follows one-step and some two-step directions with prompts (Parent Ex. E at p. 3). He displays distractible behaviors and occasionally engages in hand-biting (id. at pp. 4-5).

As a young child, the student received special education, occupational therapy (OT), and speech-language therapy through the Early Intervention Program, during which time he also received a diagnosis of autism (Tr. pp. 514-15). According to the student's father, the student initially received "Floor[t]ime therapy," which was subsequently changed to a home-based program that used ABA techniques due to observed regression with the Floortime method (Tr. p. 515).<sup>2</sup> "Immediately" following the change to instruction using ABA techniques, the parent stated that the student began to exhibit progress (Tr. p. 515). Through the Committee on Preschool Special Education (CPSE), the student continued to receive home-based ABA programming, OT, and speech-language therapy in addition to attending an 8:1+2 center-based program that utilized the "TEACCH" methodology where, according to the parent, the student "regressed dramatically" (Tr. pp. 515-16; Dist. Ex. 10 at p. 1).<sup>3, 4</sup> After a few months, the parents withdrew the student from the 8:1+2 center-based program and placed him in the David Gregory School (David Gregory), an out-of-state 1:1 ABA program (Tr. pp. 516-17; Dist. Ex. 10 at p. 1). The student attended David Gregory and continued to receive home-based ABA programming, OT, and speech-language therapy for approximately three and a half years (Tr. p. 517).

On December 1, 2008, the parents removed their son from David Gregory and placed him at MCC, where he remained through the 2009-10 school year (Tr. pp. 517-18, 590-91).<sup>5</sup> At the commencement of the 2009-10 school year, the student attended MCC in a classroom composed of six students, six instructors, and one lead teacher (Dist. Ex. 6 at p. 1). The student's day consisted of five hours of "one-to-one, individualized special instruction [ABA] and one hour of a 2:1 ratio during instructional lunch and leisure skills for a total of six hours per day" (id.). The student received three 30-minute sessions of speech-language therapy and two 30-minute sessions of OT per week, both services provided in 1:1 settings (id.). The student's class also offered daily "regular group instructional formats" (id.).

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<sup>2</sup> The MCC educational coordinator described ABA as "a science in which tactics are derived from the principles of behavior . . . applied to improve socially-significant behavior to a meaningful degree" (Tr. pp. 232, 235-36).

<sup>3</sup> TEACCH is an acronym for Treatment and Education of Autistic and Communication related handicapped Children. The district special education teacher described TEACCH as a method of setting up a classroom which offered organization, labels on materials, minimal distractions, and a predictable environment (Tr. pp. 123, 129, 177-78).

<sup>4</sup> The parent testified that the TEACCH program his son attended was a 6:1+1 ratio (Tr. pp. 515-16).

<sup>5</sup> The student's father indicated that the change in the student's school was "primarily an issue of convenience" due to the length of transportation time (Tr. p. 518). The hearing record reflects that the student continued to receive home-based ABA programming, OT, and speech-language therapy throughout his attendance at MCC (Tr. pp. 373-74, 659-60).

On April 30, 2010, the Committee on Special Education (CSE) convened for the student's annual review and to develop an individualized education program (IEP) for the 2010-11 school year (Dist. Ex. 3). Attendees included a district school psychologist who also acted as the district representative, a district speech-language pathologist, an additional parent member, and the parents (id. at p. 2). MCC personnel—including the MCC educational coordinator, the student's lead teacher, occupational therapist, and speech-language pathologist—participated at the CSE meeting by telephone (id.). Documents reviewed by the CSE included December 2009 educational progress, teacher, speech-language therapy progress, and OT progress reports; a March 2010 educational evaluation report; an April 2006 psychoeducational evaluation report; and a November 2008 social history (Tr. pp. 31-32; Dist. Exs. 6-11; Parent Ex. N; see Dist. Ex. 3 at p. 3).<sup>6</sup>

Information before the April 2010 CSE indicated that during the 2009-10 school year, the student received instruction in the areas of verbal behavior (receptive and expressive communication), social skills, academic skills, community of reinforcers (leisure skills), and self-management behaviors (Tr. p. 600; Dist. Ex. 6 at p. 1). Teacher progress reports provided information regarding the specific goals the student was working on in each domain, and his progress toward each goal (Dist. Exs. 6 at pp. 1-3; 7 at pp. 1-6). In the area of verbal behavior, the student's goals included following directions to a rate criterion; following functional, unchained two-step directions; generalizing facts; facting using autoclitics; and completing songs and phrases (Dist. Exs. 6 at p. 1; 7 at pp. 3-4). In the academic domain, the goals included visual tracking; typing on the computer; identifying community helpers; completing patterns; reading; decoding; identifying the alphabet, numbers, opposites, emotions, sight words, and body parts; tracing lines; and demonstrating 1:1 correspondence (Dist. Exs. 6 at p. 2; 7 at pp. 1-2). In the areas of reading, writing, and math, the teacher report described the student's instructional level as "pre-K" (Dist. Ex. 7 at pp. 1-2). Within the areas of social and leisure skills, the student was working on learning to play basic board games; completing activities such as puzzles, coloring, and playing with blocks independently without stereotypic (self-stimulatory) behaviors; and increasing eye contact (Dist. Ex. 6 at p. 3). Self-management and self-help goals included setting a table; sorting clothes; brushing teeth; following an activity schedule; responding appropriately to "no" when the student was told he could not have a particular item; waiting for a reinforcer; and washing/drying hands (id.).

The MCC lead teacher's progress report indicated that classroom personnel employed "various tactics" as part of a "treatment package" designed to reduce the instances of the student's hand-biting behavior (Dist. Ex. 6 at pp. 3-4). Although the student's hand-biting behavior reportedly interfered with his ability to relate to peers and adults, the MCC lead teacher indicated that with the implementation of the treatment package, such instances had "significantly decreased," and he did not "emit behaviors that warrant[ed] a functional behavior analysis or a behavior plan" as of the time of the report (Dist. Exs. 6 at pp. 1, 3-4; 7 at p. 4). The teacher reported that the student "often respond[ed] well to the principles, methods, and tactics of [ABA]," and that he understood and used a token economy system, which provided him with a visual display of his progress toward a reinforcer (Dist. Ex. 7 at p. 5).

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<sup>6</sup> The hearing record included MCC educational, OT, and speech-language progress reports; all dated April 30, 2010 (Parent Exs. G; J; M). The district representative who participated in the April 30, 2010 CSE meeting did not testify that these documents were reviewed and/or considered by the CSE (see Tr. pp. 28-120); however, the student's MCC speech-language pathologist testified that these documents were provided to the district (Tr. pp. 454-55, 476-77).

Included in the teacher report was a speech-language therapy progress note,<sup>7</sup> dated December 27, 2009, which indicated that the student presented with "overall severely delayed communication skills, characterized by limited spontaneous verbal production, and behaviors and errors that suggest[ed] an element of motor planning/execution difficulties" (Dist. Ex. 7 at p. 9). The report described the student's speech production skills, and indicated that a combination of the "Kaufman" and "PROMPT" approaches were used to improve his speech intelligibility (id. at p. 7). In the area of language, the progress report indicated that the student followed basic one-step and two-step related directions; and identified clothing, body parts, objects, actions, colors, and functions of objects (id. at p. 8). By report, the student exhibited difficulty accurately responding to "yes/no" questions, and answered some basic "wh" questions when provided with prompts (id.). The student used language to respond to greetings, to request highly desired items, and to reject; although the report indicated that he often communicated by pushing away, pulling, reaching, using the clinician to gain objects, and by using verbal approximations (id.). The report indicated that the student's language was primarily restricted to requests and responding to questions, and that he did not spontaneously use language to engage with the clinician or request activities (id.). The clinician recommended that the student receive speech-language therapy at "a high frequency" due to the student's "limited ability to convey basic wants and needs" (id. at p. 9).

The MCC speech-language pathologist reported that the student received three individual sessions per week of speech-language therapy (Parent Ex. N at p. 1). The speech-language pathologist indicated that the student's "greatest challenge continue[d] to be speech intelligibility in phrases and sentences," due to the addition of an extra sound at the end of the final word of an utterance (id.). The progress report indicated that the student worked on producing a variety of consonant-vowel combinations and sustaining breath support (id.). The speech-language pathologist reported that the student had a Picture Exchange Communication System (PECS) book; however, he was not using it at school as of the date of the report (id.). She further reported that the student expressed his wants and needs verbally, although there were few things he desired (id.). The student used one phrase spontaneously, and three phrases with minimal verbal and gestural cues (id.). Receptively, the student worked on following two-step directions under specific conditions; identifying category members within a field of three; identifying actions in pictures; independently responding to yes/no questions; responding verbally to greetings; increasing eye contact; and demonstrating appropriate means of protest (id. at pp. 1-2).

At MCC the student received twice weekly individual 30-minute sessions of OT (Dist. Exs. 6 at p. 1; 8 at p. 1). The MCC occupational therapist reported that the student's sessions included both gross motor therapy in the sensory gym and "table top fine motor/pre-handwriting activities" (Dist. Ex. 8 at p. 1). The OT progress report indicated that the student demonstrated improvement in motor planning skills for "both creation and execution of gross motor, sensory based activities," and "progress in building his core muscles and strength" (Dist. Ex. 8). The student had also successfully completed "many of the pre-handwriting activities associated with the Handwriting Without Tears program," and "improved his bilateral coordination during gross motor and table top activities" (id. at p. 1-2). While using sensory-based equipment, the student worked toward improving his visual perception and visual motor skills (id. at p. 2). The occupational therapist reported that due to "an increase[d] level of anxiety with sensory gym based activities," the student required both "verbal and physical assistance to remain modulated, focused and engaged" (id. at

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<sup>7</sup> This unsigned note was apparently prepared by the student's home-based speech-language pathologist.

p. 1). The occupational therapist recommended that the student continue to receive OT twice weekly for 30-minute sessions at MCC (id. at p. 2).

The student's then-current home-based ABA provider/coordinator (ABA coordinator) reported that the student received ten hours of home-based 1:1 instruction using ABA techniques, and her educational evaluation report described the student's abilities in the areas of activities of daily living, motor, communication, cognition and learning style, and social-emotional skills (Tr. pp. 761-62; Dist. Ex. 9). Following her assessment of the student, she reported that the student demonstrated "daily living skills at approximately a 42 month level, communication skills . . . between 18 and 24 months and cognitive skills between [a] 30 and 36 month level" (Dist. Ex. 9 at p. 5). The student also demonstrated "social skills between a 12-15 month old level and motor skills at approximately a 48 month level" (id.). According to the ABA coordinator, the student "learn[ed] new skills when they [were] presented in highly structured individual teaching sessions," consisting of "direct 1:1 instruction with the immediate presentation of reinforcement for correct responses and corrective feedback for incorrect responses" (id.). She further reported that the student did not "independently generalize skills which he ha[d] learned, he [did] not demonstrate learned skills in different settings, with different stimuli or with different instructors, unless he [was] specifically taught to do so, skills [must] be presented in many different settings and he must be provided with many opportunities to practice" (id.). The educational evaluation report further indicated that the student did not "attend to instruction in groups and even in a 1:1 setting he demonstrate[d] much difficulty in maintaining attention independently for longer than a few minutes at a time" (id.). The ABA coordinator concluded that it was "important" for the student to "continue to receive the combined educational services of both a school whose personnel [were] trained in [ABA], as well as the services of home based instructors with similar training, so that [the student could] be taught the skills needed for him to function in school, home and community settings" (id.). She further recommended that the student continue to receive speech-language therapy and OT services (id.).

Following the review of the student's present levels of performance and the annual goals proposed by MCC, the CSE determined that the student was eligible for special education and related services as a student with autism and recommended a 12-month 6:1+1 special class program in a specialized school (Tr. pp. 49-50; Dist. Ex. 3 at p. 1). The April 2010 CSE also recommended that the student receive school-based related services consisting of four 30-minute individual sessions of OT per week and five 30-minute individual sessions of speech-language therapy per week (Dist. Ex. 3 at p. 20). The IEP also indicated that the student would participate in adapted physical education and the alternative assessment for students with severe disabilities (id. at pp. 1, 20).

A May 28, 2010 facsimile from the parents to the CSE chairperson advised that the district's "Parent Notice" was incorrect, and that the parents had not placed the student in a non-public school at their expense (Parent Ex. U).<sup>8</sup> The parents indicated that they had not made any decisions as to where the student would attend school for the 2010-11 school year, that they were available to visit any programs that the district recommended for their son, and that they would like to visit "any such class (or a similar class) while school [was] in session" (id.).

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<sup>8</sup> The referenced Parent Notice is not contained in the hearing record.

By letter dated June 15, 2010, the CSE informed the parents of the April 30, 2010 CSE program recommendations, and identified the location of the school to which the student was assigned (Dist. Ex. 4). In a response facsimile dated June 18, 2010, the parents acknowledged their receipt of the program summary and school location notice, and informed the CSE chairperson that they were working on arranging a visit to the assigned school (Parent Ex. T at p. 1). The parents indicated that if the assigned school was "not appropriate and no appropriate placement [was] offered," they would continue to send the student to MCC, and continue their son's receipt of home-based ABA, ABA supervision, speech-language, and OT services (id.). The parents further advised that they would seek reimbursement from the district for their son's "tuition, costs and expenses of [the student's] program and placement" (id.).

On June 23, 2010, the student's father visited the assigned school and spent approximately 45 minutes in the classroom that "would likely have been the classroom for" the student (Tr. pp. 530-31). The parent stated that he also spent time speaking with the classroom teacher and touring the school (Tr. pp. 531, 533-34). In a facsimile to the CSE chairperson dated June 24, 2010, the parents informed the district that, after visiting the assigned school and speaking with staff, they were rejecting the district's placement (Parent Ex. S at p. 1). The parents relayed that their "biggest concerns" with the assigned school were the "student to staff ratio" and that it appeared "that the classes lack[ed] any clear curriculum and or cohesive educational programming" (id.). The parents further indicated that the district's placement "would not allow [the student] to receive sufficient instruction at a level which would enable him to receive an educational benefit" (id.). The parents signed an enrollment contract with MCC for the 2010-11 school year and paid a deposit on July 1, 2010 (Parent Exs. P; R).

In August 2010, the student's MCC lead teacher, occupational therapist and speech-language pathologist prepared progress reports similar to those generated in April 2010, which included updated information regarding the student's goals and observed progress (compare Parent Exs. G; J; M, with Parent Exs. F; I; L).

At the commencement of the 2010-11 school year, the student attended MCC, where he received five hours per day of 1:1 instruction or support using ABA techniques, three 30-minute sessions per week of speech-language therapy and two 30-minute sessions per week of OT provided in 1:1 settings (Tr. pp. 241-42, 245-46, 329-30, 387-89, 406-07, 444-45). The student also received ten hours per week of home-based instruction using ABA techniques, two hours per week of ABA "supervision," two 45-minute sessions of home-based speech-language therapy, and two 30-minute sessions of OT provided outside of MCC (Tr. pp. 373, 483-84, 424-25).<sup>9</sup> On September 20, 2010, the student's ABA coordinator prepared an educational evaluation report similar to the March 2010 report, which provided updated information regarding the student's progress toward his goals (compare Dist. Ex. 9, with Parent Ex. E).

### **Due Process Complaint Notice**

In a due process complaint notice dated July 2, 2010, the parents asserted that the district failed to offer the student a free appropriate public education (FAPE) for the 2010-11 school year

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<sup>9</sup> The hearing record indicated that there was a break in the student's home-based OT services during fall 2010 (Tr. pp. 419-20, 424-25, 543, 707-09) and that there were occasions during summer 2010 and fall 2010 when the student's home-based ABA programming was limited due to a lack of providers (Tr. pp. 680-82, 695-96, 712-13)

and requested reimbursement for the tuition at MCC, transportation costs, and a continuation of the student's home-based services (Dist. Ex. 1). Specifically, the parents asserted that the IEP was procedurally defective, because the district predetermined the student's placement and services, failed to treat the parents as part of the IEP team, and that the IEP reflected impermissible policies and procedures (id. at pp. 3-4). The parents claimed that the IEP failed to offer individualized instruction sufficient to meet the student's needs, that a 6:1+1 classroom would be unable to "provide the intense and consistent educational and behavioral program" that the student required, and that the IEP failed to offer the home-based services necessary to allow the student to receive an educational benefit (id.).

In its response, the district did not indicate that it considered other placements, but stated that it properly relied on the available progress reports and evaluations in making the program recommendation (Dist. Ex. 2 at pp. 2-3). Furthermore, the district contended that all members of the CSE were able to participate and that the district considered documents submitted by the parents (id. at pp. 3-4).

## **Impartial Hearing and Decision**

### **Pendency Determination and Appeal**

An impartial hearing convened on August 2, 2010, at which time the parties disputed whether David Gregory or MCC should be considered the student's current educational placement for purposes of pendency (Tr. pp. 4-12). In a decision dated September 30, 2010 (IHO Interim Decision), the impartial hearing officer found that the services provided to the student at MCC were the same as at David Gregory and that, by paying for the student's tuition and services for the 2009-10 school year, after the student had begun attending MCC, the district was now estopped from challenging MCC as the student's pendency placement (IHO Interim Decision at p. 2). Upon appeal by the district, a State Review Officer remanded the matter to the impartial hearing officer to reconvene the impartial hearing and make "a redetermination of the student's pendency placement based upon development of an adequate record regarding whether the parents' change of the location of the student's school . . . constitute[d] a change in the student's educational program" (Application of the Bd. of Educ., Appeal No. 10-110).

Upon remand, the pendency hearing was reconvened on January 5, 2011 and, after taking testimony from educators from both David Gregory and MCC (Tr. pp. 752-816), the impartial hearing officer, in a decision dated January 19, 2011 (IHO Interim Decision II), found that David Gregory and MCC were "not materially or substantially different," as both provided 1:1 instruction using ABA techniques and related services, despite that David Gregory "infused" its related services into its program, rather than providing them on a push-in or pull-out basis (IHO Interim Decision II at pp. 4-5; see Tr. pp. 793-794, 811). The impartial hearing officer ordered the district to continue providing the services the student was currently receiving, and found MCC to be "the pendency placement school" (IHO Interim Decision II at p. 5).<sup>10</sup>

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<sup>10</sup> The district has not appealed the IHO Interim Decision II dated January 19, 2011; accordingly, that decision is final and binding on the parties (34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[j][5][v]; see, e.g., Application of the Bd. of Educ., Appeal No. 11-014; Application of a Student with a Disability, Appeal No. 10-010).

## **Impartial Hearing and Decision on the Merits**

The impartial hearing continued on October 5, 2010, November 30, 2010, December 7 and 14, 2010 and concluded on January 20, 2011, with the district presenting three witnesses and introducing 11 exhibits, and the parents presenting nine witnesses and introducing 24 exhibits. In a decision dated February 14, 2011, the impartial hearing officer found that the district failed to offer the student a FAPE, both on procedural and substantive grounds. Procedurally, the impartial hearing officer found that "the parents were denied the right to meaningfully participate" in the formation of the student's IEP by the district's failure to discuss other programs or consider the parents' request for 1:1 instruction (IHO Decision, at p. 11). The impartial hearing officer went on to find that the district "boxed" the parents into a "pre-approved . . . 'one size fits all,' autism program" and that the CSE chair impermissibly acted as a "gatekeeper" by limiting the placements to be considered to those which the district had available, in effect predetermining the recommended placement (*id.* at pp. 11-12). Substantively, the impartial hearing officer found that the IEP failed to offer the student a FAPE because it did not offer sufficient 1:1 instruction (*id.* at p. 11). The impartial hearing officer also found that MCC was an appropriate placement for the student and ordered reimbursement for the student's tuition at MCC, five hours of home-based ABA programming, three 30-minute individual sessions per week of home-based OT and one 30-minute individual session per week of home-based speech-language therapy (*id.* at pp. 12-14). With respect to the equities, the impartial hearing officer found that the parents cooperated with the district, were open to considering programs other than their preferred placement, and gave sufficient notice of their rejection of the IEP and intention to unilaterally place the student (*id.* at pp. 14-15).

## **Appeal for State-Level Review**

The district now appeals, asserting that (1) it offered the student a FAPE; (2) the parents' unilateral placement was inappropriate; and (3) in any event, the equities weigh against reimbursement. Specifically, the district argues that the IEP offered the student a FAPE inasmuch as it thoroughly described the student's present levels of performance, contained goals developed by MCC – and upon which all the CSE members agreed – and stated the method by which the student's progress would be measured. The district further contends that the student would have been grouped with functionally similar students, and that the assigned school would have offered the student sufficient 1:1 instruction in the least restrictive environment (LRE) and offered parent training. According to the district, the CSE's placement recommendation was not predetermined, as the CSE considered the parents' input, as well as that of the MCC staff, in deriving the recommended placement. With regard to the student's placement at MCC, the district contends that it provided insufficient support to the student and was not individualized for his needs, as evidenced by the fact that the student received three speech-language therapy and two OT sessions per week, despite that the parties agree that the student required additional therapy, and the parents were compelled to seek additional services outside of MCC. Finally, the district argues that the parents are not entitled to reimbursement because they had no intention of placing the student in a public school and failed to give the district the statutorily-mandated notice.

The parents answer and cross-appeal, asserting that (1) the district denied the student a FAPE; (2) the unilateral placement was appropriate; (3) the equities support full reimbursement for the unilateral placement; and (4) the impartial hearing officer erred in diminishing the amount of home-based services the student received. Among other things, the parents argue that the IEP failed to indicate the student's current levels of performance, improperly indicated that the student

did not have behavioral management needs, and did not offer parent training. The parents also assert that the district predetermined the placement recommendation and denied the parents the right to meaningfully participate in the formation of the IEP, refused to offer home-based services, and refused to consider the parents' request for 1:1 support at the assigned school. The parents further assert that MCC was an appropriate placement and that the student has made progress both academically and behaviorally. With respect to the home-based services, the parents assert that they are both appropriate and necessary for the student to make academic progress, generalize skills learned at MCC,<sup>11</sup> and avoid regression.<sup>12</sup> With respect to their equitable right to reimbursement, the parents assert that they provided sufficient notice of their intent to place the student privately. In their cross-appeal, the parents argue that the impartial hearing officer "improperly," "incorrectly," "inexplicably," "arbitrarily" and "without reason" reduced the amount of home-based services the student requires to receive an appropriate education and avoid regression. They assert that the hearing record supports the amount of services the student was receiving under pendency and that there is no evidence that the student would be able to avoid regression with the reduced amount of services. In addition, the parents assert that the district did not challenge the amount of home-based services the student was receiving, such that it was an improper exercise of the impartial hearing officer's discretion to reduce those services.

The district answers the cross-appeal, asserting that the impartial hearing officer did not reduce any services; rather, he did not award the parents reimbursement for all the home-based services which they were requesting. Furthermore, the district asserts that the parents failed to show that the student required all of the requested home-based services in order to benefit from his education at MCC. The district further contends that the student's need for additional home-based services only supports its argument that MCC was not an appropriate placement for the student.

### **Applicable Standards**

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]-

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<sup>11</sup> Several courts have held that the IDEA does not require school districts as a matter of course to design educational programs to address a student's difficulties in generalizing skills to other environments outside of the school environment, particularly in cases in which it is determined that the student is otherwise likely to make progress in the classroom (see Thompson R2-J Sch. Dist. v. Luke P., 540 F.3d 1143, 1152-53 [10th Cir. 2008]; Gonzalez v. Puerto Rico Dep't of Educ., 254 F.3d 350, 353 [1st Cir. 2001]; Devine v. Indian River County Sch. Bd., 249 F.3d 1289, 1293 [11th Cir. 2001]; JSK v. Hendry County Sch Bd., 941 F.2d 1563, 1573 [11th Cir 1991]). In this case, the district does not contest the parents' assertions that the student requires additional home-based services and, for the purposes of this decision, I assume without deciding that generalization of skills is an appropriate aspect of the student's unilateral placement.

<sup>12</sup> I note that New York State regulations define "substantial regression" as "a student's inability to maintain developmental levels due to a loss of skill or knowledge during the months of July and August of such severity as to require an inordinate period of review at the beginning of the school year to reestablish and maintain IEP goals and objectives mastered at the end of the previous school year" (8 NYCRR 200.1[aaa]).

[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 hearing 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]).

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 v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; 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 burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at \*7 [S.D.N.Y. Aug. 27, 2010]).

## **Discussion**

### **Procedural Defects at the CSE Meeting**

Before addressing the substantive adequacy of an IEP, it is first necessary to determine whether the district complied with the procedural requirements of the IDEA. While the IEP here is comprehensive, containing numerous annual goals and extensive discussion of the student's present levels of performance and management needs (see generally Dist. Ex. 3),<sup>13</sup> the parents' uncontradicted testimony established that, when the parents attempted to discuss placement

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<sup>13</sup> The parents contend that the district improperly relied on evaluations from December 2009 in formulating the IEP, despite having been provided with new evaluations on the day of the CSE meeting.

options other than a 6:1+1 or the provision of a 1:1 paraprofessional to the student at the IEP meeting, the district refused to consider such services or to discuss these options with the parents (Tr. pp. 526-28, 714-16). Although the IEP indicates that the parents' concern that a 6:1+1 program would "not provide the intensity of services that [the student] needs . . . was discussed" (Dist. Ex. 3 at p. 19), it reflects no discussion with regard to the parents' specific request that the student receive the services of a 1:1 paraprofessional or the consideration of, and reasons for rejecting, any other special education placement options (id.; see Tr. pp. 55-56; c.f. Application of the Bd. of Educ., Appeal No. 10-067; Application of the Bd. of Educ., Appeal No. 10-025; Application of the Bd. of Educ., Appeal No. 09-143). While the district representative at the CSE meeting testified that the parents were able to participate during the meeting (Tr. pp. 32-33), he also testified that the CSE discussed placing the student only in a 6:1+1 program (Tr. pp. 33-34, 89, 91-92, 118; see Dist. Ex. 3 at p. 19), despite the expressed concerns of the parents and MCC staff that such a program would be insufficient to meet the student's needs and that they "were adamant" that the student needed a higher level of support (Tr. pp. 68-70, 92-93; see Tr. pp. 283-84, 371, 380-82). According to the district, the 6:1+1 program was "specifically tailored to address the needs of children with autism" and was the district's "only [program] uniquely matched to a disability," such that other programs offered by the district would have been insufficient to meet the student's needs (Tr. pp. 33-34, 91). Although the district representative testified as to the reasons a 1:1 placement would have been unsuitable (Tr. pp. 34-35), no testimony was adduced that these reasons were shared with the parents at the CSE meeting, nor were they reflected in the student's IEP (Dist. Ex. 3 at p. 19).

To the contrary, the student's father testified that the district was unwilling to explain its rationale for recommending a 6:1+1 placement: "their response, which was repeated numerous times, was no, this discussion is complete. This discussion is now over" (Tr. p. 526). Furthermore, the student's mother testified that the district failed to respond to the parents' questioning as to how the district arrived at a 6:1+1 recommendation (Tr. pp. 714-15) and, when the parents attempted to continue the discussion, they "were told . . . that this discussion had to end and [the parents] should leave" (Tr. p. 716). Under the circumstances of this case, I find that the district conducted its CSE meeting in a manner that significantly impeded parental participation due to its unwillingness to "consider the parents' concerns and revise the IEP when appropriate" (R.K. v. New York City Dep't of Educ., 2011 WL 1131492, at \*14 [E.D.N.Y. Jan. 21, 2011]; see 20 U.S.C. § 1414[d][3][A][ii]; 34 C.F.R. § 300.324[a][1][ii]; 8 NYCRR 200.4[d][2]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 524, 530-32 [2007]; T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir. 2009]; Application of the Bd. of Educ., Appeal No. 09-143; Application of a Student with a Disability, Appeal No. 08-078; Application of the Dep't of Educ., Appeal No. 08-037).<sup>14</sup> The district's failure to adequately respond to and address the parents' queries during the formation of the IEP constituted a procedural infirmity which "significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student" (20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Application of a Student with a Disability, Appeal No. 08-035; see Matrejek, 471 F. Supp. 2d at

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<sup>14</sup> That is not to say that, had the district properly considered the parents' concerns, it would have been obligated to modify the student's IEP accordingly; only that the failure to do so deprived the parents of their statutory right to meaningful participation in the formation of the student's IEP and, correspondingly, the student of a FAPE. I also note that, while the IHO found—and the parents urge me to find on appeal—that the student's placement was predetermined, it is unnecessary to reach that issue, as I hold that the failure to adequately consider the parents' concerns independently operated to deprive the student of a FAPE, regardless of whether the district's program was predetermined.

426-27). Therefore, I find that the district failed to offer the student a FAPE for the 2010-11 school year.

### **The Parents' Unilateral Private Placement**

Having found that the district failed to offer the student a FAPE, I turn now to the appropriateness of the parents' placement of the student at MCC. A unilateral 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 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). 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"]]).

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).

## **The Appropriateness of MCC's Educational Program**

The impartial hearing officer determined that MCC was "appropriate and provid[ed] for meaningful educational progress" (IHO Decision at p. 12). The district asserts that MCC was not appropriate for the student because it failed to meet the student's related services and home-based services needs; that the student did not make meaningful progress at MCC; that MCC and the student's home-based service providers did not share information to ensure he benefitted from both programs; and that the environment was overly distracting and impeded the student's progress. For the reasons explained in more detail below, the hearing record supports the impartial hearing officer's finding that the student's program at MCC was specially designed to meet his unique needs.

The hearing record described MCC as serving 45 students ages 3-12 years old using a 1:1 ABA teaching model (Tr. pp. 239-40; Parent Ex. Z at p. 2). Each classroom consists of six students, six ABA instructors, and one lead teacher (Tr. p. 241; Parent Ex. Z at p. 2). Students are placed into classrooms based upon their age, and their verbal behavior, communication, academic, social and leisure skills (Tr. pp. 248-49). The lead teachers are certified in special education and some are also board certified behavior analysts (BCBAs) (Tr. p. 241). The ABA instructors have bachelor's degrees "typically in some sort of related field to ABA or [e]ducation" (Tr. p. 241). Students receive 1:1 instruction/support in both individual and group settings for five hours out of the six hour school day, with one hour of instruction and support provided in a 2:1 ratio (Tr. pp. 241-42, 320-22). All students receive three individual 30-minute sessions of speech-language therapy, and two individual 30-minute sessions of OT per week (Tr. p. 245; Parent Ex. Z at p. 3). The MCC educational coordinator testified that she assisted classroom staff in creating classroom behavior guidelines and, when needed, conducting functional behavioral assessments and developing corresponding behavior plans to support students' needs (Tr. pp. 236-37). She testified that the student had made progress in various areas, including communication, behavior, and academics, since the beginning of the 2010-11 school year (Tr. pp. 341-342).

The lead teacher of the student's class during the 2010-11 school year testified that she was responsible for designing individual programs for each student and maintaining those programs on a daily basis (Tr. pp. 590-91). She stated that MCC staff record data "on everything we do in our classrooms" and that data was collected and graphed for each of the student's programs (Tr. p. 605). The lead teacher also supervised the ABA instructors, and observed their teaching methods while collecting data to ensure the accuracy of the instruction being delivered (Tr. p. 590).

The lead teacher described the student's strengths as his ability to vocalize frequently to indicate his wants and needs, that he responded well to a token economy system, and that he exhibited an ability to complete puzzles and one-step directions (Tr. p. 592). Although the student was characterized as "generally compliant," and "fairly easily redirectable," according to the lead teacher, the student's "biggest weakness" was his high degree of distractibility (Tr. p. 592). She further testified that the student exhibited difficulty following multiple step directions and possessed a limited repertoire of reinforcers (Tr. pp. 592-93). The lead teacher explained that the student's 29 ABA programs "range[d] across multiple domains" including academic, verbal behavior, social skills, leisure skills, self-management, and behavior management (Tr. pp. 593-605).

The lead teacher's testimony included descriptions of activities she used with the student to achieve the student's goals in various domains (Tr. pp. 593-605). In the academic domain, the

student worked on improving his reading, math, and writing skills, which were in the pre-k to kindergarten range (Tr. pp. 593-96, 641-42). In the area of verbal behavior, the student worked on increasing his tact (label) repertoire, expanding on his mands (requests), and improving his social language skills (Tr. pp. 596-98). The student's social skills goals included improving his parallel play skills; his ability to sit appropriately during group instruction; his appropriate play with cause-effect toys; and his response to greetings (Tr. pp. 598-600). To improve leisure skills, the student worked on watching videos without engaging in self-stimulatory behavior, playing with blocks appropriately, and playing board games with a peer (Tr. p. 600). In the area of self-management, the student's goals included accepting "no" appropriately, setting the table, and sorting clothing (Tr. pp. 601-02). Behaviorally, the student worked on decreasing the incidents of hand-biting and increasing his food repertoire (Tr. pp. 403-04, 602-05). The educational coordinator stated that MCC staff successfully implemented "simple intervention strategies" designed to decrease the student's instances of hand-biting and stereotypy behaviors such as eye gaze (Tr. pp. 264-69, 403-04).

### **The Appropriateness of the Student's MCC Speech-language Therapy**

The student's MCC speech-language pathologist testified that she began working with the student in October 2009 and, in conjunction with the student's MCC ABA instructor, provided him with three 30-minute individual sessions of speech-language therapy per week (Tr. pp. 443-45, 453).<sup>15</sup> The educational coordinator stated that speech-language sessions may be either push-in or pull-out depending on the student's needs (Tr. p. 245). The speech-language pathologist described the student's difficulty with pragmatic language and peer interaction as his greatest deficits, and also his "pretty severe articulation deficit," which reportedly significantly affected his speech intelligibility (Tr. pp. 445-47, 460-62). According to the speech-language pathologist, the student's instructors needed to prompt the student to interact with peers, and at times he exhibited hand-biting behavior when he became frustrated by communication attempts (Tr. pp. 461-63). The speech-language pathologist indicated that she addressed the student's needs by providing opportunities for the student and a peer to play structured games during therapy sessions to improve turn-taking, expressive language, and articulation skills (Tr. pp. 447-48). In testimony the speech-language pathologist described how she used various activities to improve the student's ability to answer "wh" questions; place pictures in a sequence to form sentences; answer questions about pictures; sort colors, shapes, and items by category; and develop functional phrases, comments, and questions (Tr. pp. 447-51). According to the speech-language pathologist, the student had exhibited progress in his ability to independently reciprocate a greeting, formulate a sentence when given picture cues, answer "wh" questions with picture cues during structured tasks, and to participate during therapy sessions with a peer (Tr. pp. 448-51).

The educational coordinator testified that MCC's speech-language pathologists "work very hand in hand with our classrooms, and with the educational or ABA staff" at the school (Tr. p. 240). Two of the student's three speech-language therapy sessions per week were "co-treatment sessions," which entailed the student's lead teacher or ABA instructor accompanying the student to the session (Tr. p. 245). Classroom staff took notes and received "feedback" from the speech-language pathologist regarding what the student should be "practicing each day in the classroom" (*id.*). The educational coordinator indicated that classroom staff "take those assignments back and

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<sup>15</sup> In order to provide the student with peer interaction, one of the student's sessions was conducted with another student and that student's speech-language pathologist (Tr. p. 445).

practice them daily because we know that the students will need more practice" (*id.*). Although the MCC speech-language pathologist testified that the student required five sessions of speech-language therapy per week (Tr. p. 452), I find that the hearing record reflects that the three sessions per week of speech-language therapy provided by MCC in conjunction with the carryover by classroom staff addressed the student's communication and language needs.

### **The Appropriateness of the Student's MCC OT**

The MCC occupational therapist testified that she had worked with the student since his admission to the school in December 2008, and that during the 2010-11 school year she provided him with twice weekly 30-minute individual OT sessions (Tr. pp. 389-91). She stated that the student exhibited needs in the areas of sensory processing, "body" awareness, and core strength and endurance (Tr. pp. 390, 397-98, 405-06). The occupational therapist testified that during therapy she worked on improving the student's visual motor integration, transition, safety awareness, bilateral coordination, sensory integration, and attention skills (Tr. pp. 390-91). She explained that most of her therapy sessions with the student occurred in the sensory gym, where she focused on "moving [the student's] body in space," and improving his ability to follow and process auditory and visual directions while performing an activity (Tr. p. 391). Examples of activities designed to improve the student's ability to process information and use his body in space included completing obstacle courses, crab walking, and performing "animal walks" (Tr. p. 391). To assist the student in performing those activities, the occupational therapist stated that she provided physical prompts and gestural cues (Tr. pp. 414-15). The occupational therapist testified that during therapy she used "sensory tools" such as proprioceptive input, deep pressure, weighted blankets, therapy balls, rough and tumble play, and linear motion (Tr. pp. 391-92). OT sessions also included activities intended to improve the student's ability to imitate upper extremity movements with visual cues, and functional shoulder and hand control (*id.*).

During the 2010-11 school year the student improved his self-regulation skills, evidenced by his requests for hugs and "head compressions" which, according to the occupational therapist, the student needed in order to "self-regulate and calm himself" (Tr. pp. 392-93). The student also improved his upper body strength, in turn increasing his ability to sit and attend longer at a table (Tr. pp. 394-95). The occupational therapist stated that the student's hand-biting and other stimulatory behaviors had "decreased significantly" and he exhibited an improvement in his ability to transition to OT sessions when provided with verbal and physical cues (Tr. pp. 411, 413-15). According to the occupational therapist, the student no longer engaged in elopement behavior (Tr. p. 416).

The hearing record reflected that MCC offered co-treatment OT sessions (Tr. pp. 245-46, 395). The occupational therapist testified that either the student's classroom instructor or teacher observed every other OT session and took notes, so that on the days the student did not receive OT, "they can implement what we are doing in OT in the classroom" (Tr. p. 395). She further testified that at the end of the OT sessions, the student's classroom staff developed specific programs to address skills such as handwriting, and fine motor and gross motor imitation, to be incorporated into the student's "everyday program" (Tr. pp. 395-96). According to the occupational therapist, due to their observation of the student, classroom staff was able to "fulfill some of [the student's] OT needs" while working with him in the sensory gym and when completing daily living skill activities (Tr. p. 396). Although the MCC occupational therapist testified that she agreed that the student needed four sessions of OT per week, her testimony also showed that MCC classroom staff carried skills and goals from the student's OT sessions to be

addressed in the classroom environment (Tr. pp. 395-96, 399; see Tr. pp. 409-10). She further testified to her belief that the student was receiving OT services "on an everyday basis because we constantly are collaborating with the teachers [and] everyone here at the school," and that she believed the student's OT needs were met at MCC on a daily basis (Tr. pp. 425-26, 433-34). Based on the above, the hearing record supports the finding that the amount of OT provided at MCC, in conjunction with the carryover of the student's OT goals by MCC classroom staff, was appropriate to meet the student's needs.

### **Parent Training and Coordination of School and Home-Based Services**

MCC staff testified that the student's home-based program was important, in part due to his need to generalize skills across environments (see, e.g., Tr. pp. 312-13, 374-77, 400, 425-27, 452-53, 467, 473-74, 610-11, 636-37). However, the student's 2010-11 lead teacher from MCC testified that the student received an appropriate education at MCC, and that his home-based program was not necessary in order for him to receive an appropriate education at the school (Tr. p. 637). Additionally, the hearing record showed that MCC was aware of and provided services to address the student's needs in the area of generalization. The educational coordinator testified that in the student's class, students received instruction from one ABA instructor in the morning and a different ABA instructor in the afternoon to provide generalization across people and different settings (Tr. p. 255). She explained that MCC offers "a lot of programming to make sure that the student has maintained different skills that we've taught, and that they can perform those when they're in different settings," such as in different locations within the school, and out in the community (Tr. pp. 256, 263-64). The student's lead teacher testified that she structured her classroom so that the student would be taught by three different instructors during the course of a school day (Tr. pp. 622-23). The hearing record reflects that the student received co-treatment sessions of OT and speech-language therapy to provide carryover of skills from treatment sessions to the classroom (Tr. pp. 245-46). Regarding the two hours per week of parent training requested by the parents, I note that MCC offers two sessions per month of parent training opportunities in special education or ABA, and one parent training session per month related to OT or speech-language therapy (Tr. pp. 237-38, 243-44). If needed, MCC offers individualized training with parents at home to address student-specific behaviors unique to the home environment (Tr. pp. 244, 345-47).<sup>16</sup>

To the extent that the district challenges—without citing to the hearing transcript—the failure of MCC staff to adequately correspond with the student's home-based service providers, I find this assertion to be without merit. The MCC educational coordinator testified that MCC staff maintained communication with the home-based service providers, both in the form of a communication log and clinical team meetings, held every six to eight weeks and attended by the student's MCC teachers, the parents, and the home-based service providers (Tr. p. 295). In addition, the educational coordinator testified that the student's home-based ABA coordinator had visited MCC to observe the student in that setting (Tr. pp. 311-12). The student's lead teacher for the 2008-09 and 2009-10 school years testified that home-based providers attended some of the clinical team meetings, and that she exchanged e-mails with the student's home-based ABA coordinator (Tr. pp. 356, 373-75). The student's lead teacher for the 2010-11 school year testified

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<sup>16</sup> The parents had not availed themselves of this opportunity during the 2010-11 school year as of November 30, 2010, although the student's lead teacher during the 2009-10 school year conducted home visits (Tr. pp. 226, 328, 345).

that she spoke with the home-based ABA supervisor approximately once per week (Tr. p. 636) and noted that she collaborated with the ABA supervisor regarding several areas, including teaching the student to respond to greetings implementing a differential reinforcement of low rates of behavior intervention strategy; reading strategies; and the newly introduced feeding program, which the lead teacher had made arrangements to train the ABA supervisor to implement in the student's home (Tr. pp. 600, 602-04, 607-08, 631-32). The home-based ABA supervisor had visited MCC once between September and December 2010 to observe the student in the classroom and once to attend a clinical team meeting (Tr. pp. 634-35). Furthermore, the lead teacher testified that the parents facilitated the transfer of information between the student's MCC teachers and the home-based service providers (Tr. p. 611). The home-based ABA supervisor testified that she coordinated with MCC to ensure "that there is appropriate carryover between the school and home," observed the student at MCC every six weeks, attended clinical meetings with MCC staff and the parents, and e-mailed the student's lead teacher at least weekly (Tr. pp. 660, 667-69, 672). In addition, she worked with MCC to develop a behavior protocol to address the student's self-injurious behaviors (Tr. pp. 686-89). The student's MCC occupational therapist testified that she maintained contact with the student's home-based ABA providers via e-mail to ensure that his OT needs were being met at home (Tr. pp. 400-01). The student's MCC speech-language pathologist testified that she was in contact with the student's home-based speech-language pathologist and ABA provider via telephone and e-mail, and that the home-based service providers and parents both ensured that the information she provided them reached each other (Tr. pp. 455-56, 466-71). The student's home-based speech-language pathologist testified that she had been in contact with the student's MCC speech-language pathologist and that the student's mother facilitated the relay of information between MCC and the home-based service providers (Tr. pp. 495-96).

Although the district focuses on testimony that the student "required" the home-based services, thereby rendering MCC inappropriate to meet the student's needs, a close review of the hearing record indicates that the student could continue to make progress without the home-based services, although not as quickly (see, e.g., Tr. pp. 692-95 [testimony of the home-based ABA supervisor that when the student "regressed" as a result of receiving fewer services, he could recoup the lost skills within a few days]). The home-based services were "required" only insofar as they helped the student to generalize his skills from MCC to the home environment, not to attain educational benefit at MCC (Tr. pp. 312-13, 374-77, 400, 425-27, 452-53, 467, 473-74, 610-11, 636-37; see Application of the Dep't of Educ., Appeal No. 09-046). Because maximization of potential is not required for the parents to show the appropriateness of their unilateral private placement (Rowley, 458 U.S. at 189, 199; Frank G., 459 F.3d at 364-65; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132), I find that these alleged deficiencies in MCC's educational program did not preclude the student from the opportunity to receive educational benefits from his placement at MCC, especially considering that speech-language therapy and OT were integrated throughout his instruction (see M.N. v. New York City Dep't of Educ., 700 F. Supp. 2d 356, 367-68 [S.D.N.Y. 2010]). "The test for the parents' private placement is that it is appropriate, not that it is perfect" (Gabel v. Bd. of Educ., 368 F. Supp.2d 313, 326 [S.D.N.Y. 2005]; see C.B. v. New York City Dep't of Educ., 2005 WL 1388964, \*24 [E.D.N.Y. 2005]).

Based on the foregoing, I hold that the parent's unilateral placement of the student at MCC was appropriate to meet the student's identified special education needs (see Dist. Ex. 3 at pp. 3-7; Dist. Exs. 6-11; Parent Exs. G, J, M-N) and provided him with the opportunity to receive educational benefits. Specifically, I find that, under the totality of the circumstances described above, MCC reasonably served the student's behavioral, academic, cognitive, communication,

and motor needs by providing him with instruction specially designed to his unique needs (Gagliardo, 489 F.3d at 112; see Frank G., 459 F.3d at 364-65). As the district raises no specific objections on appeal with regard to the appropriateness of the student's home-based services, that issue is not properly before me in considering the appropriateness of the parents' unilateral placement and I express no opinion thereon.<sup>17</sup>

### **Equitable Considerations**

The final consideration in determining whether—and in what amount—reimbursement for a unilateral placement is appropriate requires balancing of the relevant equitable considerations which apply to the parents' claim. 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

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<sup>17</sup> An issue decided by an impartial hearing officer which is not timely appealed to a State Review Officer becomes final and binding on the parties (34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[j][5][v]; see, e.g., Application of the Bd. of Educ., Appeal No. 11-014; Application of a Student with a Disability, Appeal No. 10-010).

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 district argues that the parents failed to give sufficient notice of their intention to place the student in a private placement and that the parents would not have been satisfied with any placement offered by the district, weighing against any reimbursement. The parents respond that their letters to the district provided adequate notice and, in any event, they expressed a willingness to consider any placement the district offered. It is noted that, as addressed above, the parents expressed their concerns with regard to the proposed placement at the CSE meeting and their concerns went unaddressed (Tr. pp. 526-28, 714-16). Accordingly, the parents met their obligation pursuant to the IDEA to inform the district that they did not agree with the district's proposed placement at the CSE meeting (see 20 U.S.C. § 1412[a][10][C][iii][I]; Tr. pp. 525-29, 714-16). To the extent that the parents did not unequivocally state that they intended to enroll the student in MCC at public expense at the time of the CSE meeting, I find that the parents' letters informing the district that the parents would seek reimbursement for the student's tuition and educational expenses (Parent Exs. S at p. 1; T at p. 1) provided sufficient notice to the district. The district argues that these letters regarding the student's removal were sent less than ten days prior to the beginning of the 2010-11 school year; however, the district failed to adduce any evidence as to the date that the student was considered "removed" from the public school.<sup>18</sup> Assuming, for the sake of argument, that the parents' notice was untimely, weighing against the district is a lack of evidence showing that the district complied with the prior written notice provisions by explaining to the parents in writing why the district refused to change the student's educational placement as requested by the parents (see 34 C.F.R. § 300.503[a][2], [b][1]-[2]), especially after refusing to consider the parent's input at the CSE meeting.

With regard to the district's argument that the parents never intended to place the student in a public school, as manifested by their opposition to the offered 6:1+1 placement, I note that the parents each testified that, although they were concerned that the offered placement would not provide the student with sufficient support, they were willing to consider the district's placement (Tr. pp. 528-29, 729-30). The student's father visited the assigned school but found it to be inappropriate to meet the student's needs (Tr. pp. 530-536, 560-564). Further supporting the parents' willingness to consider the district's placement, the parents' contract with MCC for the student's enrollment for the 2010-11 school year was not signed until after the father had visited the offered placement (see Tr. pp. 530-31; Parent Exs. R-T). I am not persuaded by the district's assertion that the parent's preference for 1:1 instruction evidenced an intent to refuse any public school placement (see Application of a Child with a Disability, Appeal No. 06-041). I therefore find that the district's arguments—set forth above—with respect to equitable considerations do not in this instance warrant limitation or denial of the parents' request for reimbursement for MCC.

### **Reimbursement Relief**

With regard to fashioning relief, the parents assert that the impartial hearing officer erred in failing to order the district to reimburse them for the entirety of the home-based services they

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<sup>18</sup> June 18, 2010 was ten business days prior to July 2, 2010 and June 24, 2010 was ten business days prior to July 8, 2011. Absent any indication in the record as to when the 2010-11 school years at MCC or district schools commenced, other than the father's testimony that the MCC 2010-11 school year began "after July 4th" (Tr. pp. 554-55), I decline the district's invitation to deny the parents' request for reimbursement on this basis (cf. Application of the Bd. of Educ., Appeal No. 10-099).

acquired for the student.<sup>19</sup> Initially, they contend that the district raised no arguments against the amount of home-based services the student was receiving, so that the issue was not properly before the impartial hearing officer in the first instance. With respect to the home-based speech-language therapy and OT, the parents argue that it was improper for the impartial hearing officer to rely on the IEP which he found failed to offer the student a FAPE in awarding reimbursement for the home-based related services. With respect to the student's home-based ABA programming, the parents argue that the evidence in the record establishes that the student would regress with less than 10 hours per week of home-based ABA programming. I address each in turn.

### **The Student's Home-Based Speech-language and Occupational Therapies**

I agree with the parents that the impartial hearing officer erred in relying on the IEP to establish the level of reimbursement for the student's home-based therapies, rather than the student's needs, as illustrated through documentary and testimonial evidence. As the district did not contest the amount of home-based speech-language therapy the student was receiving, I will annul the portion of the impartial hearing officer's decision that ordered the parents to be reimbursed for one session of home-based speech-language therapy per week. However, while the parents requested reimbursement for three 45-minute sessions of speech-language therapy per week (Dist. Ex. 1 at p. 2), the hearing record clearly establishes that the student never received more than two 45-minute sessions per week during the relevant time period (Tr. pp. 452-53, 484, 493-94).<sup>20</sup> I therefore order the district to reimburse the parents for two 45-minute sessions weekly of home-based individual speech-language therapy.

Furthermore, although the impartial hearing officer granted reimbursement for three 30-minute sessions weekly of OT, I note that the parents sought reimbursement for two home-based OT sessions (Dist. Ex. 1 at p. 2) and no testimony was adduced that the student required additional sessions to complement the two sessions per week he received at MCC (see Tr. pp. 399-400, 425, 433, 691). I also annul that part of the impartial hearing officer's decision that granted reimbursement for three weekly sessions of home-based OT. As the district raises no challenge to the propriety of the amount of the home-based OT the student was actually receiving, I am constrained to award the parents that amount, despite that they presented no testimony from any of the student's home-based occupational therapists as to the necessity of such services; I also note that the student was without home-based OT for more than a month in fall 2010 and there was no testimony that the student was negatively affected as a result (Tr. pp. 419-25, 505-06, 542-43, 707-08). Accordingly, I order the district to reimburse the parents for two 30-minute sessions weekly of home-based individual OT.

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<sup>19</sup> The district does not argue that the total cost of reimbursement was unreasonable (see Carter, 510 U.S. at 16), nor does it raise objections to reimbursement other than as discussed above, so I do not address reimbursement for the student's home-based related services other than to the extent the impartial hearing officer did not grant the parents the full amount of reimbursement that they sought.

<sup>20</sup> I also note that the student's home-based speech-language pathologist testified "that the two times 45, at home, is definitely enough to . . . help him to generalize" (Tr. p. 493). She also testified that the student received the same amount of home-based speech-language therapy, although from a different provider, during the 2009-10 school year (Tr. p. 504).

## The Student's Home-Based ABA Programming

The impartial hearing officer found that the parents' assertions that the student would regress unless he received ten hours of ABA programming and two hours of ABA parent training and supervision were not supported by the evidence (IHO Decision at p. 13). He ordered the parents to be reimbursed for five hours of home-based ABA, finding that amount to be sufficient to allow the student to receive an educational benefit, considering the intensity of the ABA services already provided to the student by MCC and the availability of parent training from MCC (*id.* at pp. 13, 15). The impartial hearing officer also noted that the student "did not appear to regress in any substantial way" during the period that he was receiving less than the full complement of ABA services (*id.* at p. 13). I find the impartial hearing officer's decision in this respect to be fully supported by the hearing record. The student's lead teacher testified that "having a home[-based ABA] program can only benefit" the student, who needed "as much access to instruction as possible" (Tr. pp. 610-11). However, she also testified that the home-based ABA services were not necessary for the student to receive an appropriate education from MCC (Tr. pp. 636-37).

The student's home-based ABA supervisor testified that the student should continue receiving ten hours of ABA therapy at home, to avoid the possibility of regression, both educationally and behaviorally (Tr. pp. 669-70, 678). The student had received between six and ten hours per week of home-based ABA programming from June to September 2010, during which time the student's ABA sessions were "not as fluid" (Tr. pp. 681-82, 692-93, 695-96). The ABA supervisor admitted that any loss of skills due to the reduction in services was temporary (Tr. pp. 694-95), and did not specify how the student's ability to attain educational benefit from MCC was compromised during this time, nor did the student's MCC lead teacher testify as to any extraordinary difficulties the student experienced during that time. I find that the impartial hearing officer properly found that the parents had failed to show the necessity of the entirety of the home-based ABA services for which they sought reimbursement, as there was no testimony that the student required the entirety of the unilateral placement's home-based ABA programming to benefit from instruction at MCC (see Application of the Dep't of Educ., Appeal No. 09-071). The ABA supervisor did not testify as to the necessity of the parent training, and I find that the impartial hearing officer properly did not order the district to reimburse the parents for that component of the student's home-based ABA services, in light of the extensive parental training options available through MCC (see Tr. pp. 237-38, 243-44, 345-47).

While parents are entitled to reimbursement for the cost of an appropriate private placement when a district has failed to offer their child a FAPE, it does not follow they may take advantage of deficiencies in the district's offered placement to obtain maximization of their child's potential at the expense of the public fisc, as such results do not achieve the purpose of the IDEA. To the contrary, "[r]eimbursement 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 [emphasis added]; see 20 U.S.C. § 1412[a][10][C][ii]; 34 C.F.R. § 300.148). As one circuit court recently explained, "[e]quity surely would permit a reduction from full reimbursement if [a unilateral private placement] provides too much (services beyond required educational needs)" (C.B. v. Garden Grove Unified Sch. Dist., 635 F.3d 1155, 1160 [9th Cir. 2011]). Similarly, "a finding that a particular private placement is appropriate under IDEA does not mean that all treatments received there are per se [reimbursable]; rather, reimbursement is permitted only for treatments that are related services as defined by the IDEA" (Richardson Indep. Sch. Dist. v. Michael Z., 580 F.3d 286, 301 [5th Cir. 2009]). "Related services" is defined

by the IDEA as "such developmental, corrective, and other supportive services . . . as may be required to assist a child with a disability to benefit from special education" (20 U.S.C. § 1401[26][A] [emphasis added]; see 34 C.F.R. § 300.34[a]).

Returning to the facts of this case, to the extent that the evidence does not support the conclusion that more than the five hours of home-based ABA programming awarded by the impartial hearing officer was required to assist the student to benefit from special education, I find that the appropriate remedy does not require the district to reimburse the parents (see L.B. v. Nebo Sch. Dist., 379 F.3d 966, 979 n.18 [10th Cir. 2004] [whether the student required the entirety of the home-based services to succeed in the private placement is an appropriate equitable consideration]; Still v. DeBuono, 101 F.3d 888, 893 [2d Cir. 1996] ["The appropriate amount (of reimbursement) thus bears a relationship to the quantum of services that the state would have been required to furnish"] [emphasis added]; J.P. v County Sch. Bd., 447 F. Supp. 2d 553, 591 [E.D. Va. 2006], rev'd on other grounds 516 F.3d 254 [4th Cir. 2008] [the district "must reimburse the parents for the reasonable costs of educating (the student) at the (private school) and any related services and accommodations that would have been covered under the IDEA had (the district) provided (the student) with an appropriate education"] [emphasis added]).<sup>21</sup>

## **Conclusion**

The hearing record supports the impartial hearing officer's determinations that the district failed to offer the student a FAPE, that the parents' unilateral private placement—to the extent appealed—was appropriate, and that the parents' failure to show that the student required more than five hours per week of home-based ABA programming precluded reimbursement above that amount. However, the impartial hearing officer improperly reimbursed the parents for the student's home-based speech-language therapy and OT by relying on the challenged IEP, rather than the student's educational needs and the services he actually received. Accordingly, I annul so much of the impartial hearing officer's decision as reimbursed the parents for the student's home-based speech-language therapy and OT, and otherwise affirm. I have considered the parties' remaining contentions and find them to be without merit or unnecessary to the disposition of this appeal.

**THE APPEAL IS DISMISSED.**

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

**IT IS ORDERED THAT** the portion of the impartial hearing officer's decision, dated February 14, 2011, that ordered reimbursement to the parents for the student's home-based speech-language therapy and OT is annulled; and

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<sup>21</sup> This is not to imply that, in every instance in which a parent provides services which are not strictly necessary for the student to attain educational benefit, reimbursement will be improper (see Bd. of Educ. v. Gustafson, 2002 WL 313798, at \*6 [S.D.N.Y. 2002] ["Receiving more services than required does not automatically mean that full tuition reimbursement should be denied."]). Here, however, I find that the impartial hearing officer's carefully reasoned decision is supported by the weight of the evidence in the hearing record; indeed, the lead teacher testified that the student required none of the home-based ABA therapy to benefit from his education at MCC (Tr. p. 637), such that it was reasonable for the impartial hearing officer to conclude that a reduction from the requested reimbursement would not negatively affect the student's ability to make educational progress and receive meaningful educational benefits.

**IT IS FURTHER ORDERED THAT** the district shall reimburse the parents for two 45-minute individual sessions of home-based speech-language therapy weekly and two 30-minute individual sessions of home-based OT weekly upon the submission of proof of payment by the parents.

**Dated:**           **Albany, New York**  
                          **June 17, 2011**

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**JUSTYN P. BATES**  
**STATE REVIEW OFFICER**