



The University of the State of New York

The State Education Department

State Review Officer

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No. 11-079

Application of the BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF NEW ROCHELLE for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:

Kehl, Katzive & Simon, LLP, attorneys for petitioner, Andrea Green, Esq., of counsel

Law Offices of Regina Skyer & Associates, attorneys for respondents, Jaime Chlupsa, Esq., of counsel

DECISION

Petitioner (the district) appeals from the decision of an impartial hearing officer which found that it failed to offer an appropriate educational program to respondents' (the parents') son and ordered it to reimburse the parents for the costs of the student's tuition at the Manhattan Children's Center (MCC) for the 2010-11 school year. The appeal must be sustained in part.

At the time of the impartial hearing, the student was attending MCC in a 6:1+6 classroom and received related services of occupational therapy (OT) and three 30-minute sessions per week of individual speech-language therapy (Tr. pp. 521-22, 554-55, 595-97; Parent Exs. S-T).¹ The Commissioner of Education has not approved MCC as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d]; 200.7). The student's eligibility for special education and related services as a student with autism is not in dispute in this proceeding (see 34 C.F.R. § 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

¹ The student's classroom at MCC during the 2010-11 school year included one lead teacher and six applied behavior analysis (ABA) instructors (Tr. pp. 521-22, 586-88). At MCC, the student received two of the three speech-language therapy sessions in a "co-treatment model" (Tr. pp. 522, 554-55). The hearing record does not indicate the frequency or duration of the OT services provided to the student at MCC (see Tr. pp. 555-56).

Background

In this case, a subcommittee of the Committee on Special Education (CSE) convened on June 17 and August 13, 2010 to conduct the student's annual review and to develop his individualized education program (IEP) for the 2010-11 school year (Dist. Exs. 13 at pp. 1, 6-7; 18 at pp. 1-3; see Tr. pp. 46-83).^{2, 3} At the June meeting, the CSE subcommittee reviewed the available information and recommended a special education program and related services for summer 2010 (see Tr. pp. 46-54; Dist. Exs. 13 at pp. 2, 6; 18 at pp. 1-2). Specifically, the June CSE subcommittee recommended placing the student in the same 8:1+2 special class he had attended during the 2009-10 school year with the same special education teacher and with the services of a full-time, 1:1 aide;⁴ related services of speech-language therapy and OT; and home-based ABA services (Tr. pp. 46-54; Dist. Exs. 13 at pp. 2, 6; 18 at pp. 1, 3).⁵ At the June meeting, the parents indicated that they had privately obtained an updated psychological evaluation of the student, and the CSE subcommittee agreed to reconvene after receiving a copy of the evaluation report to continue planning for the remainder of the student's 2010-11 school year (Tr. pp. 53-55; see Dist. Exs. 13 at p. 6; 18 at p. 1).

On August 13, 2010, a CSE subcommittee reconvened (Dist. Ex. 13 at pp. 1-2; see Tr. pp. 55-56).⁶ After reviewing, among other things, the parents' updated psychological evaluation report and a summer 2010 updated progress report, the August CSE subcommittee recommended placing the student in a district 6:1+2 special class with the services of the full-time 1:1 aide who worked with the student during summer 2010, and in addition, recommended a home-based program consisting of 10 hours per week of 1:1 ABA services (Tr. pp. 56-85; Dist. Ex. 13 at pp. 1, 6-7; 15

² The district's director of special and alternative education (director) testified that planning for the student's 2010-11 school year began in spring 2010 (Tr. pp. 33-34, 41-45; see Dist. Ex. 26). The director acted as the CSE subcommittee chairperson at both the June and August 2010 meetings (Dist. Exs. 15 at p. 1; 18 at p. 1). The director testified that she has been involved in special education for 35 years; she has been employed as the district's director for 20 years; her Masters degree in special education focused on the "education of children with behavioral disorders and autism;" and she completed a doctoral course in special education and curriculum development (Tr. pp. 33-36). She also testified that as part of her Masters and doctoral programs, she completed "extensive course work" in the principles of ABA, and that the district—in collaboration with a university—has been offering "ABA classes for children with autism" for approximately 18 years (Tr. p. 37). The director is a certified special education teacher and an adjunct professor (Tr. pp. 36-37).

³ The June CSE subcommittee convened for approximately two hours (Tr. p. 86).

⁴ The student's special education teacher during the 2009-10 school year and summer 2010—in addition to being a certified special education teacher—was a Board Certified Behavior Analyst-Doctoral (BCBA-D) and had received a Ph.D (see Dist. Exs. 16 at p. 2; 20 at p. 12-13; see also Dist. Ex. 30). The special education teacher attended both the June and August 2010 CSE subcommittee meetings (Dist. Exs. 15 at p. 1; 18 at p. 1).

⁵ For summer 2010, the district transitioned a 1:1 aide employed by the district into the full-time position for the student, as opposed to continuing with a 1:1 aide who had been employed through a contract with an outside agency (Tr. pp. 43-45, 53-54). The director testified that the district 1:1 aide assigned to the student during summer 2010 had worked in "ABA classrooms throughout her career of approximately 12 years, perhaps longer, and had been working exclusively in classrooms with ABA trained staff" (Tr. p. 84; see Tr. p. 278).

⁶ The August CSE subcommittee convened for approximately two hours (Tr. p. 86).

at pp. 1-3; 16; 21; see Tr. pp. 60-62).⁷ The August CSE subcommittee also recommended the following related services: one 60-minute session per month of indirect behavior intervention consultation; two 30-minute sessions per week of individual OT; one 30-minute session per week of OT consultation; four 60-minute sessions per month of indirect parent counseling and training; two 30-minute sessions per week of individual (PROMPT) speech-language therapy; two 30-minute sessions per week of individual speech-language therapy; and one 30-minute session per week of small group (2:1) speech-language therapy (Dist. Ex. 13 at pp. 1-2).⁸ The student's IEP also included special transportation; program modifications, accommodations, supplementary aids and services; assistive technology devices/support; support for school personnel, including a behavior intervention plan (BIP); testing accommodations; and 57 annual goals to address the student's identified needs in the areas of waiting, attending, following routines and directions, transitioning, oral motor function, receptive and expressive language, greetings, requesting, play, sensory integration, social interaction, imitation, fine motor skills, and activities of daily living (id. at pp. 1-3, 7-16).⁹

By letter dated August 24, 2010, the parents notified the district of their rejection of the IEP offered by the district and their intent to unilaterally place the student at MCC for the 2010-11 school year and to seek reimbursement from the district (Dist. Ex. 12 at pp. 1-2). The parents asserted that the August CSE subcommittee continued to recommend a classroom setting for the remainder of the 2010-11 school year despite the student's "documented difficulties functioning in his current 8:1+2 classroom with a 1:1 aide" (id. at p. 1). The parents also asserted that the recommended 6:1+2 special class for the 2010-11 school year was not appropriate based upon their observation of a 6:1+2 special class during the 2009-10 school year, noting that the student would not be appropriately grouped and the staff could not properly "manage the needs of the children in the class" (id. at pp. 1-2; see generally Tr. pp. 460-62; Parent Ex. M).¹⁰ The parents acknowledged that they were informed at the August CSE subcommittee meeting that a new teacher had been hired for the recommended 6:1+2 special class for the 2010-11 school year, and they confirmed plans to meet with the newly hired teacher to discuss the program and the upcoming school year (Dist. Ex. 12 at p. 2).¹¹ The parents also noted that "as discussed" at the August CSE

⁷ The director testified that during summer 2010, the student "made a very good transition" to the district 1:1 aide, that the student had "responded very well to her," and that the 1:1 aide had been able to "run [the student's] instructional programs successfully over the summer" (Tr. p. 84).

⁸ PROMPT is an acronym for "Prompts for Restructuring Oral Muscular Phonetic Targets" and is defined as a "tactile-based therapy technique used for reshaping individual and connected sounds and sound sequences" (Parent Ex. J at p. 2).

⁹ At the August CSE subcommittee meeting, the district advised the parents that a new special education teacher had been hired for the student's recommended 6:1+2 special class (Tr. pp. 83-84, 463-65, 489).

¹⁰ The parents' observation of the 6:1+2 special class referred to in the August 24, 2010 letter occurred in May or June 2009, when the student was transitioning from a preschool setting to a school-age setting (see Tr. pp. 459-62, 501-04; Parent Ex. M; see also Tr. pp. 174-76).

¹¹ The newly hired special education teacher for the recommended 6:1+2 special class met with the student's mother and the district's assistant director of special education prior to the start of the 2010-11 school year, and the student's mother inquired about her experience and qualifications (Tr. pp. 274-75, 473-65; see Tr. pp. 83-84). The student's mother also asked at the meeting whether the student could be excused from participating in "extracurricular activities" so that he could "just do ABA in the classroom" (Tr. pp. 275-76). The newly hired special education teacher, in addition to an undergraduate degree, possessed a Masters degree in education and

subcommittee meeting, the student had not made "appropriate progress in his classroom setting," and he required "1:1 ABA instruction all day," which the district could not provide, and further, that the student required a "full-time 1:1 ABA program" (id.).

To address the parents' concerns, the parties reconvened at a CSE meeting on September 8, 2010 (Dist. Exs. 7 at pp. 1, 6-7; 8-9; 58 at pp. 25-26; see Tr. pp. 86-88).¹² At the meeting, the parents expressed that the student required 1:1 discrete trials in an "ABA model," their belief that the recommended program could not "provide for his needs," and they questioned whether the student had made progress during the 2009-10 school year in the 8:1+2 special class (Dist. Exs. 7 at p. 6; 9 at pp. 1-2). The CSE reviewed the annual goals in the IEP with "input from the parents," and allowed the parents time to "review the IEP and consult with their attorney" (Dist. Ex. 7 at p. 6; see Tr. pp. 86-87). As a result of the meeting, the CSE continued to recommend the special education programs, related services, and home-based program as set forth in the August 2010-11 IEP (Dist. Exs. 7 at pp. 1-2, 6-7; 9 at pp. 1-2).

Due Process Complaint Notice

By due process complaint notice, dated November 17, 2010, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2010-11 school year, noting "procedural flaws in the development of the IEP" and the substantive inappropriateness of the recommended program (Dist. Ex. 3 at pp. 1-4). The parents asserted that the CSE subcommittee's recommended placement in a 6:1+2 special class was based upon district availability and not upon the student's needs (id. at p. 2). The parents also asserted that based upon their observation of a 6:1+2 special class during the 2009-10 school year, the proposed special class failed to offer an appropriate functional peer group for instructional and social/emotional purposes, and further, that the staff and classroom teacher were unable to address the behavioral needs of the students in the observed class (id.).¹³ In addition, the parents noted that although they advised the August CSE subcommittee about their concerns regarding the 6:1+2 special class previously observed and that the student required 1:1 discrete trial teaching throughout the entire academic day to gain meaningful benefit, the district indicated that it could not offer such a program, and further, that the district could not provide the parents with the "level of training of the aide or classroom teacher as they related" to the student's needs (id.).

The parents also alleged that the annual goals and short-term objectives in the IEP were generic, vague, and not measurable (Dist. Ex. 3 at pp. 2-3). Alternatively, the parents asserted that the IEP failed to contain short-term objectives and failed to contain "SMART" goals (id. at p. 3). Next, the parents alleged that the proposed program could not address the student's "cognitive, academic, behavioral, sensory and language needs" and that the CSE subcommittee failed to

certifications in childhood elementary education and childhood elementary education for students with disabilities (Tr. pp. 263-64). She also had experience working in an ABA school, and had received training in CABAS, and in verbal behavior ABA through the Carbone Clinic (see Tr. pp. 264-70).

¹² The newly hired special education teacher for the recommended 6:1+2 special class attended the September 2010 CSE meeting (compare Dist. Ex. 8, with Tr. pp. 261-63).

¹³ The parents did not observe the 6:1+2 special class recommended for the student's 2010-11 school year (Tr. pp. 489-90, 653-55).

"consider and provide for all" of the student's special education needs (id.). In addition, the parents noted that the recommended special class used an inappropriate "eclectic" methodology and that the student required a "consistent 1:1 ABA approach" (id.). Finally, the parents indicated that MCC was an appropriate placement and addressed the student's "academic and social/emotional needs" and that equitable considerations did not preclude an award of tuition reimbursement (id.).

Impartial Hearing Officer Decision

On March 21, 22, 23, and 25, 2011, the impartial hearing officer conducted an impartial hearing in this matter (Tr. pp. 1, 509). By decision dated May 31, 2011, the impartial hearing officer determined that the district failed to offer the student a FAPE for the 2010-11 school year and that MCC was appropriate to meet the student's needs (IHO Decision at pp. 11-18). As relief, he directed the district to reimburse the parents for the costs of the student's tuition at MCC for the 2010-11 school year (id. at p. 18).

Specifically, the impartial hearing officer found that the parents timely notified the district of their intention to unilaterally place the student at MCC for the 2010-11 school year; the 1:1 aide assigned to the student for the 2010-11 school year was neither educationally qualified nor adequately trained in ABA to "impart educational instruction through the use of ABA," and further, that the evidence suggested that the 1:1 aide would not "do any thing more than physically restrain the child during the course of the school day" (IHO Decision at pp. 11-15). The impartial hearing officer also concluded that the district's recommended program failed to provide 1:1 ABA instruction throughout the day; the annual goals in the 2010-11 IEP were not appropriate to meet the student's needs, noting that the district's June 2010 educational evaluation report contained "serious misstatements" about the student's skills; and the CSE subcommittee improperly recommended a 6:1+2 special class for the student despite having reviewed the parents' privately obtained psychological evaluation report of the student, which rejected the "appropriateness of the proposed 6:1+2 special education program and class" (id.). The impartial hearing officer determined, therefore, that the student's August 2010-11 IEP had been "inappropriately written and [was] not reasonably calculated to confer educational benefits" upon the student and failed to offer the student a FAPE (id. at p. 15).

With regard to finding MCC appropriate, the impartial hearing officer supported his determination with the following findings: the student required 1:1 support from a "trained educator" due to his pre-K level skills; MCC provided 1:1 ABA services in a closely supervised and closely monitored program; the student's MCC class consisted of one lead teacher and six ABA instructors, who all had college degrees and some of whom had Masters degrees; the student was grouped at MCC with students who were "suitable and compatible with one another;" any lack of "progress" or "regression" at MCC, as argued by the district, was without merit because the student had never demonstrated certain skills; MCC was not unduly restrictive, since the student did not have the ability to meaningfully interact with nondisabled peers; given MCC's intensive program and parent training, the student did not require a home-based program during the 2010-11 school year to generalize skills or to gain educational benefit while attending MCC; and finally, the student made progress at MCC (IHO Decision at pp. 15-17). Finally, the impartial hearing officer found that the parents cooperated throughout the development of the student's 2010-11 IEP, and thus, they were entitled to reimbursement for the costs of the student's tuition at MCC for the 2010-11 school year (id. at pp. 17-18).

Appeal for State-Level Review

The district appeals, and contends that the impartial hearing officer's determination that the district failed to offer the student a FAPE was not based upon substantive grounds. In particular, the district asserts that the impartial hearing officer failed to consider the evaluative data and information reviewed and considered by the CSE subcommittees in developing the student's IEP, and further, that the impartial hearing officer failed to consider evidence demonstrating that the student's annual goals in the 2010-11 IEP were appropriate. The district also argues that the impartial hearing officer improperly weighed testimony regarding the appropriateness of the annual goals, which characterized 6 of the 57 annual goals in the student's IEP as "a couple of steps ahead" of the student's current abilities, and further notes that MCC relied upon the annual goals in the student's 2010-11 IEP to develop his MCC program book.

Next, the district asserts that the impartial hearing officer's determination that the student could not benefit from exposure to his nondisabled peers was not supported by the evidence, and that the impartial hearing officer erroneously characterized a full-time ABA program as consisting of the provision of five hours per day of 1:1 discrete trial teaching. In addition, the district contends that the impartial hearing officer erred in concluding that the student would not benefit from small group instruction and that discrete trial teaching could not be provided in a dyad. The district also argues that the impartial hearing officer improperly compared the district program with the MCC program regarding whether the district's program would meet the student's needs, and in particular, improperly compared the district staffs' training and education with the training and education of the MCC providers.

Finally, the district argues that the impartial hearing officer erred in finding MCC appropriate to meet the student's special education needs because the student is not appropriately grouped in a classroom with students of similar needs; the student did not make progress at MCC and may have regressed; MCC offers the student no access to typically developing peers; and that due to the length of his school day and the distance to and from the student's home to MCC, the student cannot receive the home-based program recommended by both the parents' private evaluator and the district. The district also argues that equitable considerations preclude an award of tuition reimbursement in this case because the parents did not visit or observe the recommended 6:1+2 special class, the parents removed the student from the district prior to the CSE subcommittee meetings, and they did not inform the district of their decision until their notice of unilateral placement.

In their answer, the parents respond to the district's allegations with general admissions and denials, and seek to uphold the impartial hearing officer's decision in its entirety. In addition, the parents attach additional documentary evidence for consideration upon review. The district prepared a reply to the parents' answer objecting to the consideration of the parents' additional documentary evidence.

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]-[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]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; A.H. v. Dep't of Educ., 2010 WL 3242234, at *2 [2d Cir. Aug. 16, 2010]; 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]).

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).

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 v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "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

In its petition, the district contends that the impartial hearing officer failed to rely upon the evaluative data and information considered by the CSE subcommittees in developing the student's IEP for the 2010-11 school year to determine whether the district offered the student a FAPE, and therefore, the impartial hearing officer's conclusion that the district failed to offer the student a FAPE was not made upon substantive grounds as required by the IDEA and must be reversed (see 20 U.S.C. § 1415[f][3][E][i]). In addition, the district generally argues that the impartial hearing officer improperly weighed or ignored evidence in reaching his findings and determinations regarding the appropriateness of the annual goals, whether the student could benefit from exposure to typically developing peers, and whether the district's program allowed the student meaningful access to the general education curriculum. Moreover, the district argues that the impartial hearing officer confused the distinction between a full-time ABA program with the provision of 1:1 discrete trial teaching and that the weight of the evidence does not support the impartial hearing officer's decision. Upon due consideration of the evidence and as discussed more fully below, I agree with the district's arguments and find that the district's August 2010-11 IEP offered the student a FAPE for the 2010-11 school year.

Information Considered by the 2010 CSE Subcommittees

In this case, the evidence indicates that the CSE subcommittees reviewed and considered both verbal and written reports related to the student's 2009-10 school year to determine the student's continuing needs and to develop his August 2010-11 IEP. In particular, the CSE subcommittees reviewed and considered the following: a 16-page educational evaluation and progress summary, dated June 13, 2010 (June 2010 report) prepared by the student's special education teacher during the 2009-10 school year, which included data resulting from an administration of the Assessment of Basic Language and Learning Skills—Revised (ABLLS-R) to the student;¹⁴ a March 2010 speech-language annual report; a March 2010 OT annual review report; a June 2010 independent skills plan and resultant data; a June 2010 home program annual progress note; data related to the student's toilet training program; the student's BIP and resultant data specifically related to biting; an August 2010 progress report related to the student's summer 2010 program; and the parents' privately obtained June 2010 psychological evaluation update (June 2010 updated report) (Tr. pp. 46-53; Dist. Exs. 13 at pp. 4-7; see Dist. Exs. 15 at pp. 1-3; 16; 18 at pp. 1-3; 20-21; 23-24; 27; see also Dist. Exs. 22; 33-37).¹⁵

At the CSE subcommittee meetings, the student's 2009-10 special education teacher (special education teacher) reviewed the June 2010 report, the data related to the student's programs, the 2009-10 IEP annual goals mastered by the student, and the 2009-10 IEP annual goals the student continued to work toward mastering (Dist. Exs. 13 at pp. 1, 6-7; 15 at pp. 1-3; 18 at pp. 1-2; see Tr. pp. 49-52; Dist. Ex. 20). In the June 2010 report, the special education teacher described the student's 8:1+2 special class during the 2009-10 school year as being "designed and organized according to the science" of ABA, which incorporated "published curricula and evidence-based teaching tactics" including, but not limited to, discrete trial teaching, natural environment teaching, the Picture Exchange Communication System (PECS), and verbal behavior analysis (Dist. Ex. 20 at p. 1).

Significantly, the June 2010 report included a detailed narrative about the student's performance on each of the domains administered in the ABLLS-R (Dist. Ex. 20 at pp. 2-5). For example, in the domain of cooperation and reinforcer effectiveness, the June 2010 report noted that the student usually scanned items before responding, but sometimes responded too quickly; the student was motivated to work for generalized reinforcers that he could trade for edibles and activities; and he enjoyed adult approval for task completion (id. at p. 2). In the domain of requests, the student could indicate what he wanted to an adult; the student could name desired items when asked, as well as when not specifically asked to do so; he could request help in one or two

¹⁴ The ABLLS-R is a criterion-referenced assessment that provides "specific information on functional language and learning skills" for "children with autism and other associated . . . developmental delays" (Tr. p. 59; Dist. Ex. 20 at p. 2). The ABLLS-R consists of 544 items across the following 25 domains: cooperation and reinforcer effectiveness, visual performance, receptive language, motor imitation, vocal imitation, requests, labeling, intraverbals, spontaneous vocalizations, syntax and grammar, play and leisure, social interaction, group instruction, classroom routines, generalized responding, reading, mathematics, writing, spelling, dressing, eating, grooming, toileting, gross motor, and fine motor (Dist. Ex. 20 at pp. 2-5). The March 2010 administration of the ABLLS-R to the student did not include the gross motor or fine motor domains (id. at p. 2).

¹⁵ The director testified that the CSE subcommittees also reviewed a speech-language evaluation dated "6/17 or 6/13/2010;" however, the hearing record does not include a document matching this description (Tr. p. 58).

situations; he almost always made eye contact when making a request; he could ask to stop an activity; he did not use full sentences to make a request; and he could request tangible items, but could not request information (*id.* at p. 3). In the domain of group instruction, the student could sit appropriately in a group of two students for 10 minutes with access to preferred toys and adult attention; he could not, however, sit appropriately in a large group without prompting; and although the student did not follow group instructions, he was beginning to attend to other students in the group (*id.* at p. 4).

The June 2010 report also contained summaries of the student's progress toward 18 IEP annual goals (Dist. Ex. 20 at pp. 5-10).¹⁶ Each of the 18 annual goal progress summaries included definitions of the short-term objectives and the specific conditions used to evaluate the student's responses (*id.*). For example, the narrative related to the student's annual goal of "identify[ing] his own name when printed in isolation and among other names" indicated that the student was learning to follow the instructions "Show me [student's name]" or "Find [student's name]" when shown a card with his name on it, along with the names of two other students (*id.* at p. 6). At that time, the student performed this skill with 89 percent accuracy (*id.*). The narrative further indicated that "the printed card used in this program matche[d] the card that [the student] use[d] to "sign in" and "sign out" of his classroom" (*id.*). In addition, the narrative indicated that a "comparison stimulus" for this particular annual goal had been posted on the student's classroom door along with the names of his classmates and that another comparison stimulus had been placed on the student's desk (*id.*). According to the report, the student used the card with his name on it to match it either to the comparison stimulus placed on his desk or to the comparison stimulus posted on the classroom door, depending upon whether the student was entering or exiting the classroom (*id.*). In addition, the narrative reflects that the student could find and match his name independently in this context (*id.*).

In a similar manner, the June 2010 report detailed how the student demonstrated progress toward his remaining 2009-10 IEP annual goals, and included narrative summaries regarding the student's progress related to the following daily skills: mand training; toilet training; walking and waiting in the hall; acquiring prerequisites for the Edmark reading program; sitting, attending, and responding during a whole-class lesson; generalized reinforcers; and motor imitation (Dist. Ex. 20 at pp. 5-11). The June 2010 report also reflected that the student had added to his repertoire of mands and that he could echo models of five additional words, although not clearly (*id.* at p. 10). At that time, the student could walk independently alongside an adult for five steps with 89 percent accuracy, and he could wait independently for five seconds in 40 percent of opportunities; he had mastered matching two sets of pictures, and achieved 89 percent accuracy with a third set of pictures; he could select several items on the SmartBoard during morning circle time, and looked up when his name was called; the student could remain seated for 15 minutes during morning circle time with his 1:1 aide at an arm's length distance; he could exchange 10 tokens independently; and he had mastered the following five gross motor imitations: touching his head, tapping his stomach, clapping his hands, putting his hand out with the palm up, and touching the table (*id.* at pp. 10-11).

¹⁶ The report defined mastery of any short-term objective as demonstrating accuracy of 90 percent or higher across two consecutive sessions (Dist. Ex. 20 at p. 5).

At the impartial hearing, the director testified that based upon reports by the special education teacher at the CSE subcommittee meetings that although the student continued to exhibit significant deficits in his attending skills and required continual redirection and reinforcement, the student made "very, very substantial progress" in his ability to follow classroom routines and in generalizing some of those routines to the broader school (see Tr. p. 50). She also testified that the student demonstrated the ability and willingness to participate in a dyad and in group activities with support (Tr. pp. 50-51). According to the director, the student's speech-language pathologist indicated to the CSE subcommittees that she was "quite pleased with the progress [the student] was making" (Tr. pp. 52-53; see Dist. Ex. 18 at p. 3). The director also testified that upon report, the student followed simple instructional commands, requested preferred items with greater clarity, demonstrated an emerging ability to express his preferences through two-word utterances, and that he had "significantly improve[d]" his verbal expression of targeted nouns and verbs (see Tr. pp. 51, 53; Dist. Ex. 18 at p. 3).

Next, according to a March 2010 annual report completed by the student's speech-language pathologist, the student's therapy goals focused on improving his overall speech-language skills and social interactive skills (Dist. Ex. 27 at p. 1). At the time of the report, the student's skills included attending to session tasks for five minutes with maximal assistance and approximating target words upon command (id.). The student did not initiate or spontaneously greet or bid farewell (id. at p. 2). The speech-language pathologist reported that since beginning to work with the student in October 2009, he had gained more control over his motor movements and his productions had become more precise and clear during structured session activities (id.). In addition, she noted that the student exhibited more consistency with his productions and demonstrated retention of skills from session to session (id.). To assess the facets of the student's motor speech movement, the speech-language pathologist conducted clinical observations and administered the System Analysis Observation (id. at pp. 2-4). In summary, the speech-language pathologist indicated that although the student demonstrated a limited desire to communicate and interact with her, the student's behavior and attention often dictated how he would perform during a session (id. at p. 4). Moreover, the student did not regularly use gestures or signs to communicate or to have his needs met, and he required maximal physical prompting to maintain focus and attend to an activity (id.). The speech-language pathologist opined that because the student did not appear to have an understanding of the words he was trying to produce in therapy, a critical part of intervention included "associative mapping in the information by giving tactile kinesthetic information while linking it to an appropriate linguistic/cognitive concept" (id.). The speech-language pathologist also indicated that the student had become more consistent in verbally responding and verbal modeling, and had demonstrated the ability to imitate specific phonemes and was more consistent in filling in carrier phrases (id.).

According to a March 2010 OT annual review report, the student's therapy focused on improving his sensory processing, attention, reciprocal interaction, activities of daily living (ADL), fine motor skills, and visual motor skills (Dist. Ex. 24 at p. 1). Although the student "eagerly" transitioned to therapy, he often exhibited excitement or frustration through increased sensory seeking behaviors, such as biting (id.). Based upon clinical observations and an administration of the Peabody Developmental Motor Scales, Second Edition (PDMS-2), the occupational therapist opined that the student made progress toward meeting his IEP objectives (id.). Regarding the student's sensory motor development, the student continually sought various forms of sensory input including vestibular, tactile, oral, and visual, which the student manifested by heavy walking

and touching, licking, and biting objects (id.). According to the report, the student required redirection to stay on task and utilized a weighted lap pad and various forms of tactile input to increase the time he remained seated during circle time (id.). The OT annual report also indicated that the occupational therapist provided consultation to the student's classroom staff regarding the implementation of his sensory diet, which included jumping, joint compression, oral input, rolling, deep pressure input, a "move in sit cushion," and a weighted blanket (id. at pp. 1-2). Based upon the occupational therapist's clinical observations, the student could stack six blocks, complete a form board, snip with scissors with set up, and point to various body parts (id. at p. 2). The student also demonstrated improvement in crossing midline and improvement in his "visual regard of the tasks" he was completing (id.). The OT annual review report noted that although the student made some progress toward all of his OT goals, he continued to exhibit significant deficits in fine motor control, sensory processing, participation in age-appropriate educational and play activities, and ADL skills (id.).

With respect to the June 2010 independent skills plan reviewed by the CSE subcommittees, the director testified that the district develops such a plan for every student with a 1:1 aide (see Tr. p. 79). The plan focused on developing the student's independent skills in an identified activity throughout the school day, and district staff would record data daily on the short-term objectives and summarize the data on a weekly basis (see Tr. pp. 79-80). The director testified that in her experience and as supported by research, students become "overly dependent" on a 1:1 aide when only provided with opportunities for 1:1 instruction throughout the school day, and therefore, the district develops an independent skills plan as soon as a 1:1 aide was recommended for a student (see Tr. pp. 93-94). In this case, the student's plan identified 15 specific activities that required direct intervention by his 1:1 aide (see Dist. Ex. 23). The plan operationally identified the goal behavior to indicate the student's independent mastery of the skill; described the student's short-term objectives for the skill, which included generalization across faculty unless otherwise noted; included specific prompts to be used by the 1:1 aide with the student in order to implement the short-term objectives; and provided for weekly progress data recording for each skill area (see id. at pp. 1-8). The activities selected for the student's independent skills plan included, but were not limited to, the following: waiting; transitioning; packing or unpacking his backpack; participating in circle, group, or specials; having lunch; and toileting (id.). According to the district's behavior consultant, the student made progress toward independence in the activities identified in his plan (Tr. pp. 181-82).¹⁷ Specifically, she noted that by the end of the 2009-10 school year the student could walk independently in the hall without holding a person's hand, and the person could walk behind or slightly away from student (id.). The student could also sit for short periods of time at a table to have snack with a person a few steps behind him instead of right next to him (id.).

¹⁷ The district's behavior consultant—who is also a certified special education teacher—testified that she held her current behavior consultant position with the district for eight years, and prior to that, she taught in the district's 8:1+2 special class for seven years (Tr. pp. 155-56). In addition to her undergraduate degree, the behavior consultant completed a Masters degree in behavior disorders, behavior analysis, and special education, and completed a Masters degree in early childhood education (Tr. pp. 156-57). At the time of the impartial hearing, the behavior consultant had also completed 30 credits toward her doctorate in behavior analysis, and was a Board Certified Behavior Analyst (BCBA) (Tr. p. 157). As part of her responsibilities as the district's behavior consultant, she coordinated home-based programs and conducted "monthly collaborative and facilitative meetings with all of [the district's] ABA teachers . . . for the purposes of training and collaborating with each other" (Tr. p. 163).

The CSE subcommittees also reviewed the student's home-based program and data related to the 2009-10 school year (Dist. Ex. 15 at pp. 1-2; see Dist. Ex. 22 at pp. 1-4). The student's home program consisted of 10 hours per week of 1:1 discrete trial instruction to supplement and support his school-based program, to provide the student with more learning opportunities, and to provide generalization of the learning and goals addressed in school to the student's home environment (Tr. pp. 169-72, 203, 213; Dist. Ex. 22 at p. 1). According to the June 2010 home program annual progress note, the home-based providers regularly consulted with the student's classroom staff throughout the year to ensure consistency and generalization across settings (Dist. Ex. 22 at p. 1). At times, additional meetings occurred to review the student's progress and to allow for collaboration between the providers, and included the participation of the student's private speech-language provider and his parents (id.).

During home-based instruction, the student worked on a variety of programs across all developmental areas with a focus on increasing his time attending to task, improving the quality of his responses, and improving instructional control (Dist. Ex. 22 at p. 1). Overall, the student demonstrated improvement in sitting at a table for increased periods of time with fewer physical prompts, and he worked consistently under a variable reinforcement schedule that included sensory input, musical toys, edibles, and social reinforcement (id.). In the area of academic skills, the June 2010 home program annual progress report indicated that the student could tact the letters "A," "J," and "D;" he could independently identify his name from a field of four; and he could match a variety of pictures and objects, including colors, pictures of household locations, and body parts (id.). In addition, the student could correctly respond to "give me one" when presented with up to three objects (id.).

With respect to mands, the student verbalized identifiable approximations of seven requests, pointed to what he wanted across a much wider variety of things, and made his needs known by gesturing and vocalizing (Dist. Ex. 22 at p. 2). According to the June 2010 home program annual progress report, the student made repeated attempts to vocalize his needs without exhibiting frustration and tried hard to be understood (id.). Although the home-based providers attempted to use PECS with the student, he demonstrated inconsistent results (id.). The progress report further noted that the student followed approximately 10 simple, one-step directions in both discrete trial format, as well as those occurring in the natural environment, as part of the routine (id.). The student could focus on a toy or book for up to 30 to 40 seconds, but required prompts to engage with the materials appropriately rather than engaging in stereotypic behaviors (id.). In addition, the student reliably indicated his preference between two reinforcers by pointing and attempting to vocalize, and he continued to work on choosing between activities (id. at p. 3).

In the area of social engagement and joint attention, the June 2010 home program annual progress report described the student's strength in social engagement, referencing his frequent eye contact with the providers; seeking physical contact; and enjoyment of hugs, tickles, and other forms of attention (Dist. Ex. 22 at p. 2). The student's joint attention with preferred activities, especially sensory activities, had reportedly improved as evidenced by his sustained eye contact of up to five seconds during these activities (id.).

At the time of the June 2010 home program annual progress report, the student participated in a 30-minute toileting schedule at home (Dist. Ex. 22 at p. 2). According to the report, he had previously been consistently dry on a 20-minute schedule, but had less consistent success on the

30-minute schedule (id.). The report indicated that the student frequently urinated in the toilet, could pull his pants down and up and required help with snaps and buttons, and washed his hands with minimal prompting although he required redirection and monitoring to refrain from splashing water and unnecessary flushing (id.).

The student's home program included frequent activities involving sensory input, which were further increased in April 2010 as part of the student's BIP to decrease biting (Dist. Ex. 22 at pp. 2-3). The June 2010 home program annual progress report reflected that since increasing activities for sensory input, the student exhibited a significant decrease in biting (id.).¹⁸

Consistent with the June 2010 home program annual progress report, the behavior consultant reported to the CSE subcommittees that although the student made progress, he continued to require a "great deal of programming to be introduced in a 1:1 setting" (Dist. Ex. 15 at p. 2; see Tr. pp. 183-84; Dist. Ex. 22 at p. 3). She testified that the student increased the amount of time he could independently interact with a toy; increased the number of one-step directions he could consistently follow with prompting; and progressed to a 30-minute toileting schedule, because he had been able to consistently remain dry on the previous 20-minute toileting schedule (Tr. p. 184; see Dist. Ex. 34 at p. 4). In addition, the student demonstrated more mands (demands for particular things) that were clearer (Tr. p. 184). According to the behavior consultant, the student also decreased his stereotypic behavior, such as spinning objects or tapping (Tr. p. 189).

In reference to the student's interfering behaviors, the behavior consultant testified at the impartial hearing that she and the special education teacher collaborated to conduct a functional behavior assessment (FBA) and to develop a BIP to specifically address the student's biting behavior both at school and at home (Tr. pp. 189-95; see Dist. Exs. 33-36). She explained that the student would bite other people, or occasionally bite himself, and the behavior occurred in all settings (Tr. p. 190). The behavior consultant indicated that she and the special education teacher initially hypothesized that the student exhibited the biting behavior to escape demands or to get attention; however, as a result of analyzing data throughout the year, they concluded that the biting was a "sensory motivated" behavior (Tr. p. 191; see Dist. Exs. 34 at p. 1; 35 at p. 1; 36 at p. 1). Consistent with a review of the data, the behavior consultant testified that the student's biting behavior decreased following an increase in food and sensory activities (Tr. pp. 192-94; Dist. Ex. 35 at p. 4).

Next, the special education teacher reported to the CSE subcommittees about the student's participation and progress in the recommended summer 2010 program (see Dist. Exs. 13 at p. 6; 15 at p. 2; 16 at pp. 1-3). During summer 2010, the student attended an 8:1+2 special class accompanied by a 1:1 aide for five and one-half hours per day (Dist. Ex. 16 at p. 1). The special education teacher reported that the student continued to work on visual-visual matching and auditory-visual matching programs, such as identifying pictures of faculty, matching letters of the alphabet, and gross motor imitation, and further, that the student generalized these skills to new faculty in the classroom (id. at p. 1).

¹⁸ At the time of the report, the student engaged in a 2 to 3 minute sensory activity between every discrete trial program implemented in the home program (Dist. Ex. 22 at p. 3).

Regarding transitions, the student progressed to walking between locations in the school without having his hand held by an adult (Dist. Ex. 16 at p. 1). The student could walk back to the classroom from the bathroom with an adult nearby, and walk throughout the school with praise and reminders to stay with the teacher approximately every five feet (id.). Although the student did not initiate interaction with his peers, the special education teacher reported that he began demonstrating more awareness of his peers and began to initiate some interaction with adults, frequently verbalizing "up" to be picked up, and on several occasions, verbalizing "hi" to get his teacher's attention (id.; see Dist. Ex. 15 at p. 2). During the summer 2010 program, the student averaged less than one toileting accident per day, and at the time of the August 2010 progress report, he had completed six consecutive days without an accident (Dist. Ex. 16 at p. 1).

Consistent with verbal reports presented to the CSE subcommittees, the student's August 2010 progress report reflected an improvement in the student's transition skills, he maintained his academic transition skills, and he demonstrated increased interactions with his teachers (Dist. Ex. 16 at p. 1). The special education teacher reported to the CSE subcommittees that the student transitioned well to the newly assigned 1:1 aide, he enjoyed working with her, and that he maintained his skills with new staff (Dist. Ex. 15 at p. 2). The parents also reported that during summer 2010, the student started eating a variety of fruit (id.).

Next, the CSE subcommittees reviewed and considered the parents' privately obtained June 2010 updated report (Dist. Exs. 13 at p. 6; 15 at p. 2; see Dist. Ex. 21). As noted by the psychologist, the parents reported "ongoing significant difficulties and minimal progress" by the student, as well as a "continued need for 1:1 direction and supervision" (Dist. Ex. 21 at p. 1).¹⁹ The private psychologist opined that "formal testing" of the student would not be "valid or informative" given the student's difficulties with language, attention, and overall regulation (id. at p. 2).²⁰ Based upon his observation of the student in his 8:1+2 special class, the psychologist reported that the student was accompanied by his 1:1 aide, who he described as providing "some direct interventions, but mostly redirecting behavior and monitoring his activity level and impulsivity" (id.). The psychologist characterized the student as "clearly the youngest child in his group," and he did not observe the student interacting with other students or observe the facilitation of communication (id.). During the observation, the student exhibited perseverative behaviors, required constant 1:1 prompting during circle time, demonstrated difficulty transitioning, and required constant monitoring to remain in his seat (id.).

According to the psychologist's clinical impression, the student required a "structured ABA program," which "must be delivered in 1:1 format for the majority of the day," and further, that

¹⁹ The psychologist also noted that since his last assessment of the student in spring 2009, the student received medical confirmation of a "microdeletion of chromosome 16" and that ongoing neurological and medical assessments were pending (Dist. Ex. 21 at p. 1; see Dist. Ex. 44 at p. 1).

²⁰ To conduct the updated psychological evaluation, the psychologist met with the student and his mother on one occasion for approximately one hour, and the student's mother reported information about the student's "progression or at that point lack of progress," "concerns . . . about his school," and "concerns she had in general about how he was doing" (Tr. pp. 391-92; see Dist. Ex. 21 at pp. 1-2). On a second date, the psychologist observed the student for approximately one hour in the 8:1+2 special class he attended during the 2009-10 school year, and he spoke with the student's special education teacher for 15 to 20 minutes (Tr. pp. 391, 406, 408). The psychologist did not speak with the newly hired special education teacher for the recommended 6:1+2 special class, and he did not visit the proposed classroom (Tr. pp. 379-80).

the "1:1, full-time ABA program" must be "data driven and delivered by an ABA educator throughout the day" (Dist. Ex. 21 at pp. 2-3). In addition, the psychologist allowed that given the student's significant regulatory concerns, language deficits, and self-direction, he had not made sufficient progress in his 8:1+2 classroom, and the student continued to lack the requisite skills to be in that setting (*id.*). The psychologist recommended placing the student in a "full-time 1:1 ABA learning environment, as part of a specialized, ABA school with related services, family training and education and 12-month services" (*id.* at p. 3). Additionally, he recommended "[c]ontinued after-school ABA hours (minimum of 10-15 hours/week)" as "necessary" for the student to "promote generalization, prevent regression and to make appropriate progress" (*id.*).²¹

Based upon the foregoing information, the CSE subcommittees recommended placing the student in a district 6:1+2 special class with the services of the full-time 1:1 aide who worked with the student during summer 2010, and in addition, recommended a home-based program consisting of 10 hours per week of 1:1 ABA services (Tr. pp. 56-85; Dist. Ex. 13 at pp. 1, 6-7; 15 at pp. 1-3; 16; 21; *see* Tr. pp. 60-62). In addition, the August 2010-11 IEP contained the following recommendations for related services: one 60-minute session per month of indirect behavior intervention consultation; two 30-minute sessions per week of individual OT; one 30-minute session per week of OT consultation; four 60-minute sessions per month of indirect parent counseling and training; two 30-minute sessions per week of individual (PROMPT) speech-language therapy; two 30-minute sessions per week of individual speech-language therapy; and one 30-minute session per week of small group (2:1) speech-language therapy (Dist. Ex. 13 at pp. 1-2). The student's August 2010-11 IEP also included special transportation; program modifications, accommodations, supplementary aids and services; assistive technology devices/support; support for school personnel (a BIP); testing accommodations; and 57 annual goals to address the student's identified needs in the areas of areas of waiting, attending, following routines and directions, transitioning, oral motor function, receptive and expressive language, greetings, requesting, play, sensory integration, social interaction, imitation, fine motor skills, and activities of daily living (*id.* at pp. 1-3, 7-16).

Adequacy of the August 2010-11 IEP

Notably, the parents did not allege in their due process complaint notice specific challenges to a majority of the information contained in the student's August 2010-11 IEP, such as the student's present levels of academic present levels of academic achievement, social development, physical development, and management needs; the recommended frequency and duration of speech-language therapy or OT; the services of a full-time 1:1 aide; or the recommended home-based program (*see* Dist. Ex. 3 at pp. 1-4). However, a review of the evidence—and in particular, the evaluative information and data unaddressed by the impartial hearing officer—demonstrates that the CSE subcommittees carefully and accurately included information in the August 2010-11 IEP reflected in the verbal and written reports available at the time of the development of the student's IEP to describe the student's present levels of present levels of academic achievement,

²¹ At the time the psychologist conducted the updated evaluation (June 12 and 15, 2010) and generated his report, he "knew that [MCC] was something [the parents] were considering" (Tr. pp. 388-89). The parents paid a deposit to MCC on June 10, 2010, prior to the June and August 2010 CSE subcommittee meetings (Tr. pp. 471-72, 478-79).

social development, physical development, and management needs (compare Dist. Ex. 13 at pp. 1-7, with Dist. Exs. 15 at pp. 1-3; 16; 18 at pp. 1-3; 20-24; 27; 33-37).

The parents did, however, allege that the annual goals and short-term objectives were generic, vague, and not measurable, and alternatively, that the August 2010-11 IEP failed to contain short-term objectives (Dist. Ex. 3 at pp. 2-3). On appeal, the district contends that the impartial hearing officer erred in concluding that the district failed to offer the student a FAPE because the annual goals in the August 2010-11 IEP were not appropriate to meet the student's needs, and argue that the impartial hearing officer improperly weighed the testimony provided by the student's lead teacher at MCC and ignored evidence that supported finding the annual goals were appropriate. Having reviewed the evidence, I agree with the district's arguments as discussed more fully below.

Annual Goals and Short-Term Objectives

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

With regard to the annual goals set forth in the August 2010-11 IEP, the CSE subcommittees recommended 57 annual goals related to the student's identified needs in the areas of waiting, attending, following routines and directions, transitioning, oral motor function, receptive and expressive language, greetings, requesting, play, sensory integration, social interaction, imitation, fine motor skills, and activities of daily living (see Dist. Ex. 13 at pp. 7-16). When asked to review the annual goals contained in the August 2010-11 IEP at the impartial hearing, the student's lead teacher at MCC testified that in her opinion, 6 of the 57 goals were "a couple of steps ahead" of the student's then-current level of functioning at the time of the impartial hearing (Tr. pp. 611-14).²² The student's lead teacher at MCC also testified that she did not believe that the student's inability in September 2010 to demonstrate certain skills identified in the district's June 2010 report resulted from regression following nearly a month-long absence from school (see Tr. pp. 628-32). Based upon this information, the impartial hearing officer concluded that the annual goals in the August 2010-11 IEP were not appropriate, noting that "there were serious misstatements in the goals . . . and in the [student's] skills" in the June 2010 report (IHO Decision at pp. 14-15).

²² Additionally, however, the student's lead teacher at MCC testified that the student's programs at MCC had been based upon the annual goals contained in the August 2010-11 IEP, and upon the results of her administration of the ABBLS to the student (Tr. p. 602). The student's programs at MCC included following one-step directions, matching 3D object to 2D objects, body part identification, letter identification, color identification, shape identification, toilet training, hand washing, and playing with toys appropriately (Tr. pp. 602-03).

Contrary to the testimony and the impartial hearing officer's conclusion, however, a careful review of the annual goals contained in the August 2010-11 IEP—as well as the documents considered by the CSE subcommittees when developing the IEP—demonstrates that the annual goals, as written, adequately target the student's identified needs, clearly define the criteria for mastery, and describe how the student's progress will be measured consistent with the regulations (see Dist. Ex. 13 at pp. 7-16). Here, the impartial hearing officer afforded an undue weight and inappropriately relied solely upon the MCC lead teacher's testimony to support his finding that the annual goals in the August 2010-11 IEP were not appropriate, because even if I accepted the opinion of the MCC teacher that 6 of the annual goals were not appropriate for the student as incontrovertible, such harm—within the context of a total of 57 annual goals in this case—would constitute no more than a de minimus harm and is not, alone, be sufficient to find in totality that the annual goals were not appropriate or constitute a sufficient basis to find that the district denied the student a FAPE.

Turning to the issue of short-term objectives, the impartial hearing officer failed to address this aspect of the parents' allegations related to the goals in the due process complaint notice in his decision (see IHO Decision at pp. 1-18). Here, I must note that the August 2010-11 IEP does not contain short-term objectives corresponding to the annual goals, which is not consistent with State regulations for students who are eligible for alternate assessment (see Dist. Ex. 13 at pp. 7-16). Further review of the evidence also reveals that the student's 2009-10 IEP did not contain short-term objectives (see Dist. Ex. 38 at pp. 6-10). Notably, however, the evidence does include the June 2010 report, which summarizes and reports upon the student's progress on 18 of the annual goals contained in the 2009-10 IEP, and which includes definitions of the short-term objectives and specific conditions used to evaluate the student's responses for his annual goals (compare Dist. Ex. 20 at pp. 5-10, with Dist. Ex. 38 at pp. 7-10). In addition, the student's 2009-10 independent skills plan included short-term objectives for each skill in which the student was working toward independence (Dist. Ex. 23 at pp. 1-8). Testimonial evidence further reveals that the district's ABA classrooms recorded data throughout most of the day and analyzed the data weekly (Tr. pp. 298-99, 301). Therefore, based upon the foregoing, I find that although the August 2010-11 IEP does not contain short-term objectives corresponding to the annual goals, it did not render the IEP deficient to the extent that it was no longer reasonably calculated to enable the student to receive educational benefits where as here, there is evidence upon which it can be reasonably inferred that during the 2010-11 school year, the district would implement the 2010-11 IEP and assess benchmarks of the student's progress toward his annual goals in a manner similar to its assessment of the student's progress toward his annual goals during the 2009-10 school year. As such, the failure to include short-term objectives in the August 2010-11 IEP does not rise to the level of a denial of a FAPE. However, in the event the district continues to develop IEPs for the student and finds him eligible for alternate assessment, I will direct the district to conform to the procedures regarding short-term objectives/benchmarks for the student (8 NYCRR 200.4[d][2][iv]).

1:1 Aide

In his decision, the impartial hearing officer reached his conclusion that the district failed to offer the student a FAPE based, in part, upon his determination that the 1:1 aide assigned to the student for the 2010-11 school year was neither educationally qualified nor adequately trained in ABA to "impart educational instruction through the use of ABA," and further, that the evidence suggested that the 1:1 aide would not "do any thing more than physically restrain the child during

the course of the school day" (IHO Decision at pp. 11-15). On appeal, the district argues that the impartial hearing officer improperly relied upon a comparison of the level of training of the staff in the district's program versus the MCC program and ignored evidence that the MCC staff—noting in particular the ABA instructors—had no special training in education and five of the six ABA instructors only began working at MCC in September 2010 when the student entered MCC (see Tr. pp. 523-24, 564, 585-88).

Generally, when implementing a student's IEP, school districts have discretion to assign qualified staff to students, thus, they need not honor a parent's request for a particular teacher or related service provider (Slama v. Independent Sch. Dist. No. 2580, 259 F. Supp. 2d 880, 884-85 [D. Minn. 2003]; Application of the Bd. of Educ., Appeal No. 07-007; Application of a Child with a Disability, Appeal No. 02-009; Application of a Child with a Disability, Appeal No. 98-31; Application of a Child with a Disability, Appeal No. 97-87; Application of a Child with a Disability, Appeal No. 95-50; Application of a Child with a Disability, Appeal No. 91-19; Marple Newtown Sch. Dist., 46 IDELR 295 [SEA PA 2006]). However, administrative officers have jurisdiction to review health and safety concerns that arise in the development and review of an IEP (Lillbask v. State of Conn. Dep't of Educ., 397 F.3d 77, 94 [2d Cir. 2005]; Bd. of Educ. of the Oakridge Pub. Schs., 40 IDELR 274 [SEA MI 2003]; Freeport Sch. Dist. 145, 34 IDELR 104 [SEA IL 2000]).

In this case, although the parents were not requesting a specific provider to be assigned as the student's 1:1 aide, they questioned the CSE subcommittees about the qualifications and experience of the newly hired special education teacher for the 6:1+2 special class and the 1:1 aide assigned to the student for the 2010-11 school year (see Dist. Ex. 3 at p. 2; see also Tr. pp. 83-84, 463-65, 489). According to the hearing record, the student's mother met with the newly hired special education teacher after the August CSE subcommittee meeting and directly questioned the teacher about her experience and qualifications (Tr. pp. 274-75, 473-65; see Tr. pp. 83-84). In addition, the hearing record indicates that the 1:1 aide assigned to the student for the 2010-11 school year began working with the student as part of his summer 2010 program as part of the district's decision to transition this position to a full-time, permanent district employee as opposed to continuing with a contract employee (Tr. pp. 43-45, 53-54). According to the hearing record, the 1:1 aide assigned to the student had worked throughout her career at the district in ABA classrooms—for approximately 12 or more years—and had been trained by the district's behavior consultant (Tr. p. 84; see Tr. pp. 278-79). Moreover, the hearing record indicates that during summer 2010, the student "made a very good transition" to the district 1:1 aide, that the student had "responded very well to her," and that the 1:1 aide had been able to "run [the student's] instructional programs successfully over the summer" (Tr. p. 84).

Based upon the foregoing, there is insufficient reason to speculate that the 1:1 assigned aide would not have been able to competently provide services to the student during the remainder of the 2010-11 school year, especially in light of the evidence that the 1:1 assigned aide had already been successfully providing services to the student. Additionally there is no allegation in this case that the 1:1 assigned aide lacked the requisite credentials to perform the duties of her position (see M.P.G. v. New York City Dept. of Educ., 2010 WL 3398256, at *12 [S.D.N.Y. Aug. 27, 2010]). The impartial hearing officer's finding, therefore, is hereby annulled.

6:1+2 Special Class

Next, I will turn to the crux of the parties' dispute in this matter, namely, whether the CSE subcommittees' recommendation in the August 2010-11 IEP to place the student in a 6:1+2 special class with the services of a full-time 1:1 aide was reasonably calculated to enable the student to receive educational benefits during the 2010-11 school year. Upon review and consideration of the evidence, I find that contrary to the parents' arguments that the student would not make progress and required 1:1 discrete trial teaching throughout the entire academic day and contrary to the impartial hearing officer's determination, the district's recommended placement in the 6:1+2 special class offered the student a FAPE in the LRE.

As noted above, a district complies with the IDEA and offers a student a FAPE when 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 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" (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), and 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). In other words, 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). In addition, an appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs establishes annual goals related to those needs, and provides for the use of appropriate special education services.

Here, the evidence shows that the student exhibited significant delays across all areas of development at the time the CSE subcommittees created the student's August 2010-11 IEP (see Dist. Exs. 20; 23-24; 27; 33-36). The student demonstrated delayed cognitive skills, significant weaknesses in receptive and expressive language, adaptive behavior, limited social skills, and deficits in fine motor skills and sensory processing (Dist. Exs. 24 at p. 2; 27 at pp. 1-2; 55 at p. 3). The student also manifested extreme difficulty attending, and engaged in task-avoidance and self-stimulatory behaviors that interfered with learning (Dist. Exs. 34-36). In order to successfully participate in individual or group instruction, the student required constant adult facilitation, an extensive rate of prompting, and significant amounts of reinforcement (Dist. Ex. 20 at pp. 2-5).

The evidence also reflects that the parents expressed their concerns about the student's rate of progress during the 2009-10 school year in the 8:1+2 special class to the CSE subcommittees during the development of the student's August 2010-11 IEP (Tr. pp. 60-61; Dist. Exs. 13 at pp. 6-7; see generally Dist. Exs. 7 at p. 6; 9 at pp. 1-2). Specifically, the director testified that although the parents expressed satisfaction with the staff working with the student and acknowledged that he had made progress, the parents were still concerned that the student's progress had been "slow" and that they were "very concerned" about the student's "interfering behaviors at home" (Tr. pp. 60-61). According to the director, the CSE subcommittees responded to the parents' concerns by

discussing whether the student should remain in an 8:1+2 special class or if a change in the student's program was indicated, and by further reviewing the student's proposed 2010-11 annual goals to ensure that the parents' particular concerns were addressed (Tr. pp. 61-62).

In addition, the evidence reflects that the CSE subcommittees considered several placement options, including remaining in the 8:1+2 special class and the psychologist's recommendation for a program of strictly 1:1 instruction (Tr. pp. 65-71; Dist. Ex. 13 at p. 7; see Tr. pp. 465-66). According to the director's testimony, the CSE subcommittees rejected these options because after considering the student's significant needs and the parents' expressed concerns about the rate of the student's progress during the 2009-10 school year, the CSE subcommittees determined that the student required a more intensive setting than the 8:1+2 special class (Tr. pp. 73-74). Moreover, although the CSE subcommittees recognized that the student required 1:1 instruction, the CSE subcommittees also recognized that the student required continued exposure to peers to develop joint attention and play skills, the ability to follow routines in a group, and leisure skills (Tr. pp. 73-74; Dist. Exs. 13 at pp. 1-2, 6-7; 15 at pp. 2-3). At the August CSE subcommittee meeting, the director specifically asked the parents if they wanted the subcommittee to consider additional options, but the parents declined, indicating that they were relying on the district's expertise (Tr. pp. 64-65).

Ultimately, the CSE subcommittees recommended placing the student in a 6:1+2 special class with the services of a full-time 1:1 aide and receive 10 hours per week 1:1 instruction at home for the 2010-11 school year (Dist. Ex. 13 at pp. 1-2, 6-7). According to the director's testimony, the CSE subcommittees agreed that the 6:1+2 special class constituted an appropriate balance between the student's need for 1:1 instruction and his need for continued access to his peers, and further, that the 6:1+2 special class—as a smaller classroom—offered the student a more intensive program that would result in an increased rate of progress (see Tr. pp. 60-65).

As indicated previously, the CSE subcommittees considered both written and verbal evaluative information regarding the student, including a June 2010 updated psychological evaluation report, before recommending 6:1+2 special class with a fulltime 1:1 aide, related services, and 1:1 home-based instruction. The director testified that although the recommended placement in the 6:1+2 special class was not within a segregated school for children with autism—as recommended by the student's psychologist—the 6:1+2 special class was consistent with the psychologist's recommendation that the student's setting must be data driven and delivered by a special educator throughout the day (Tr. pp. 71-72). The director characterized the recommended 6:1+2 special class placement as "more intensive" because it contained fewer students and more opportunities for higher levels of adult intervention and programming, as well as more opportunities for each student to respond (Tr. pp. 142-43). She opined that in a smaller classroom designed for students with more intensive needs, the student's rate of progress would be expected to improve (Tr. p. 65). The director also indicated that the 1:1 aide assigned to the student would provide him with 1:1 instruction, redirection, reinforcement, and opportunities for learning throughout the day (Tr. p. 70).

6:1+2 Special Class Observed by Parents

The director further testified that the specific 6:1+2 special class assigned to the student for the 2010-11 school year had been significantly changed from the 6:1+2 special class observed

by the parents during the 2009-10 school year, which the parents deemed unacceptable for the student (Tr. pp. 63, 88). In addition to assigning a newly hired special education teacher to the class, the director indicated that the district had implemented substantial curriculum and program development, provided extensive staff development to the classroom staff, and substantially invested in assistive technology and the implementation of assistive technology programs in the classroom (Tr. p. 88). In addition, the students enrolled in the assigned 6:1+2 special class were not the same students that attended the 6:1+2 special class observed by the parents during the 2009-10 school year (Tr. p. 89, 121, 176). The director testified further that as a result of these significant changes, the 6:1+2 special class program was substantially different from the program the parent had previously observed (Tr. p. 89).

The district behavior consultant also testified at the impartial hearing that she agreed with the CSE subcommittees' recommendation to place the student in a 6:1+2 special class because although he had made progress during the 2009-10 school year in the 8:1+2 special class, she believed that the more intensive 6:1+2 special class program, with a smaller student-to-staff ratio, and the expertise of the newly hired special education teacher, may have "pushed [the student's] progress faster" (Tr. pp. 174-75, 252). The behavior consultant further testified that she believed that the "very tightly controlled ABA model" used in the 6:1+2 special class—coupled with the recommended 10 hours per week of 1:1 home-based ABA instruction—would have given the student "the best opportunity to learn" during the 2010-11 school year (Tr. pp. 203-04). In addition, she testified that the student's assigned school was an early childhood magnet school, and all of the school's activities were geared toward younger children (*id.*).

ABA Principles and Tactics

With regard to the impartial hearing officer's finding that the district's recommended 6:1+2 special class failed to provide 1:1 ABA instruction throughout the day, the evidence reflects that similar to the student's placement in the 8:1+2 special class during the 2009-10 school year, the 6:1+2 special class for the 2010-11 school year applied the principles of ABA to teaching throughout the school day (Tr. pp. 169, 304, 169, 651-52). All of the classroom staff in the recommended 6:1+2 special class has been trained to provide discrete trial instruction and to record data throughout most of the school day (Tr. pp. 301, 304). As described by the MCC education coordinator, ABA is "not a teaching methodology, it is a philosophy" (Tr. pp. 514, 521). Similar to the philosophy expressed by the MCC education coordinator, the evidence indicates that the district's ABA classrooms use a variety of evidence-based teaching tactics or strategies from the field of ABA, including, but not limited to, discrete trial teaching (*see* Tr. pp. 521-22; Dist. Exs. 20 at p. 1; 57). According to the district's behavior consultant, an ABA classroom does not mean 1:1 discrete trial programming all day (*see* Tr. p. 207). She testified that during discrete trial teaching, a student receives specific instruction in a 1:1 setting, and the instruction is "broken down into small increments with clear antecedents, clear behaviors, and consequences" for that student; at that times, discrete trial teaching may occur in a "dyad" (Tr. pp. 165-67; *see* Tr. pp. 298-99). She explained that an "individual discrete trial" consists of "one unit of learning between a teacher and a student," and further, a student's "program" may involve "10 to 20 individual trials of learning one program," which are specifically designed for a student, and data is taken following presentation of the trials (Tr. pp. 165-66). The behavior consultant indicated that a class still follows the principles of ABA when students are engaged in a group activity, rather than 1:1 discrete trial instruction (Tr. pp. 167-68). She also testified that ABA tactics other than 1:1 discrete

trial instruction include, for example, staff reinforcing students for appropriate responding with a toy, modeling appropriate responding with a toy for students, or facilitating interactions among peers (*id.*). During group activities, classroom staff records data and analyzes the quality of the interactions to determine if "fading" or "chaining" is needed (*id.*).²³

Consideration of Progress During 2009-10 School Year

Next, a review of the evidence indicates the parents' allegations that the recommended placement in a 6:1+2 special class was not appropriate to meet the student's needs because the student did not make adequate progress during the 2009-10 school year in a similar 8:1+2 special class are without merit and are not supported by the weight of the evidence.

According to the hearing record, verbal and written reports considered by the CSE subcommittees indicate that the student had demonstrated slow but steady progress throughout the 2009-10 school year and summer 2010 in his ability to attend to instruction, identify his own name, make requests, wait, follow one-step directions, follow and generalize classroom routines, request preferred items/activities, match pictures, imitate vocal and gross motor models, play with toys, and interact socially (Tr. pp. 50, 107, 143, 185; Dist. Exs. 15 at pp. 1-3; 16; 18 at pp. 1-3; 20-24; 27; 33-37). The student also demonstrated success in his toilet training program by remaining dry for longer amounts of time, and exhibited generally decreased incidents of biting during the school day and during 1:1 instruction at home (Dist. Ex. 22 at pp. 2-3). Although the providers' reports reflected some inconsistencies in the student's abilities in some areas, each of the teachers and clinicians who worked with the student reported that he had made progress toward his 2009-10 IEP goals (Dist. Exs. 16 at pp. 1, 2; 20 at 3, 6-12; 22 at pp. 1-3; 24 at pp. 2, 3; 27 at pp. 1-2, 4, 5; 58 at p. 4).²⁴

In addition, contrary to the MCC lead teacher's testimony that she did not believe that the student exhibited regression in his skills from the prior year when he entered MCC in September 2010, the hearing record repeatedly reflects that the student exhibits regression following school breaks or illness (compare Tr. p. 631, with Tr. pp. 186-89; see, e.g., Dist. Exs. 20 at p. 12; 22 at p. 3; 41 at p. 3; 42 at p. 2). According to the district's behavior consultant, following school breaks the student would need to relearn or be reminded of how to sit at the table, and she had observed that his tolerance for instruction would "go down" (Tr. p. 186). She further indicated that while the student's skills "could be brought back up," a "longer break" would often correspond to "more regression" (*id.*). In particular, the behavior consultant indicated that after a school break, she would observe a reduction in the student's ability to "follow a direction given by a teacher, to sit down and start work," and to use language, as well observing an increase in the student's task avoidance and stereotypic behaviors (Tr. pp. 186-88). Comparatively, prior to periods of regression, the behavior consultant testified that the student exhibited progress in his ability to "sit and sustain work and instruction, "to use language on command, follow directions given by a teacher, follow classroom routines," imitate and use language "to indicate wants and preferences,"

²³ The hearing record defines fading as a process for reducing a reinforcement schedule; the hearing record does not define chaining (Tr. pp. 75-76).

²⁴ A review of evaluative information from prior school years contained in the hearing record similarly reflects inconsistencies in the student's reported abilities and progress from provider to provider (see, e. g., Parent Exs. G, H, J; Dist. Exs. 42; 43; 45; 47).

and a "decrease of stereotypic behavior such as spinning things or tapping" (Tr. pp. 188-89). The student's significant inability to maintain learned skills was corroborated by testimony provided by the MCC lead teacher and by the MCC education coordinator, who indicated that as soon as a new skill was added, the student lost something that he had already learned, stating "[w]hen you put in a new skill something falls out the other end" (Tr. pp. 552, 598-99). In summary, the evidence does not support the contention that the August 2010-11 IEP was improperly designed because it had similar elements to the student's previous IEP or because the student failed to achieve a particular rate of progress during the 2009-10 school year.

Least Restrictive Environment

Turning to the parents' and the private psychologist's argument that the student is not capable of receiving any educational benefit from exposure to typically developing peers, I find that the weight of the evidence does not support this contention (Tr. pp. 378, 411-14, 477; Dist. Ex. 3 at p. 3). On the one hand, the psychologist opined in the student's February 2009 psychological evaluation report that the student's "[p]lacement should also include other children who [were] interactive and c[ould] model and promote good social behavior" (Dist. Ex. 44 at p. 5). In this case, the evidence reveals that the recommended 6:1+2 special class includes students that are verbal and can work independently, consistent with the psychologist's recommendation (see Tr. pp. 285-86, 342-43; Dist. Ex. 55).

During the impartial hearing, the psychologist attempted to clarify that in his evaluation report he did not mean a placement with mainstream students, but rather a placement with autistic students in a special education class "who could be worked with in a dyad" or provide social or communication models (Tr. pp. 384-85). However, I find that the private psychologist's testimony was equivocal with respect to this issue. The student's psychologist also testified that he no longer believed the student needed home-based services due to the intensity of the MCC program, and that his recommendation in the June 2010 updated report for a minimum of 10 to 15 hours per week of home-based ABA services to promote generalization, prevent regression, and to make appropriate progress was contingent upon the student attending a district program (Tr. pp. 385-88, 418; see Tr. pp. 389-91). Although there is no dispute that the student required special class placement, I find that the district appropriately recommended that the student be placed in the district's early childhood magnet school to ensure that the student received other opportunities to interact with nondisabled students to the maximum extent appropriate (Newington, 546 F.3d at 120).

6:1+2 Special Class Placement

Testimonial evidence in the hearing record also shows that the recommendation in the August 2010-11 IEP for a 6:1+2 special class placement was appropriate to address his needs. According to the evidence, the newly hired special education teacher reviewed and described the daily schedule and routines within the 6:1+2 special class, as well as the skills addressed in each activity (Tr. pp. 295-304; see Dist. Ex. 56).²⁵ Daily, the students participate in an instructional

²⁵ A review of the student's daily schedule at MCC for the 2010-11 school year reflects virtually identical routines and group activities within similar timeframes as in the district's recommended 6:1+2 special class (compare Parent Ex. V, with Dist. Ex. 56).

breakfast in the classroom during which time they work on requesting items, making choices, and feeding skills, and are facilitated in communications and interactions with each other (Tr. pp. 295-96; Dist. Ex. 56). During daily circle time, students work on greeting each other, identifying themselves and their classmates through pictures, and are exposed to calendar skills, including counting the days of the week, and weather (Tr. pp. 296-97; Dist. Ex. 56). A group activity also occurs daily, and may include "centers," looking at books, or play activities during which students work on parallel play and playing appropriately with toys (Tr. p. 297; Dist. Ex. 56). Snack is instructional as well (Tr. p. 298). The newly hired special education teacher testified that data is recorded during each of the activities in the classroom, and the data recorded is based upon each student's individual instructional needs and goals (Tr. pp. 298, 301). She also testified that discrete trial instruction occurs for approximately one to two hours every day (Tr. pp. 299, 324). The newly hired special education teacher then described in her testimony the skills addressed during instructional lunch (self-help skills, requesting, and making choices), recess (gross motor skills), and at dismissal (independence and self-help skills) (Tr. pp. 300-03; see Dist. Ex. 56). I find that the evidence above demonstrates that the activities and routines of a 6:1+2 special class placement were aligned with the needs, goals, and accommodations set forth in the student's August 2010-11 IEP.²⁶

The students also attend a variety of "specials" each week, including art, library, adapted physical education, music, and computer lab (see Dist. Ex. 56). According to the newly hired 6:1+2 special education teacher, although the teachers of the "specials" are not ABA trained and data is not typically recorded during these classes, principles of ABA are maintained during the "specials" through the use of reinforcers (Tr. pp. 275-76, 280-81, 303-04). In addition, data can be recorded during "specials" if there is a need for a particular student (Tr. pp. 275-76). The newly hired special education teacher also testified that in addition to one to two hours per day of discrete trial instruction, students receive 1:1 instruction within the groups described above, and often receive additional 1:1 instruction when other students are attending their related services outside of the classroom and there are fewer students remaining in the classroom (Tr. pp. 324-31).²⁷

²⁶ As noted previously, the particular 6:1+2 class was redesigned between the 2009-10 and 2010-11 school year. A classroom profile for the 2010-11 school year described the cognitive/adaptive levels, levels of academic achievement in mathematics and reading, social skills and development, physical development, and management and behavioral needs of the students in the assigned 6:1+2 special class, including the student who is the subject of this appeal (see Dist. Ex. 55 at pp. 1-3). According to the class profile, the students in the class were aged between five and eight years, similar to the student (id.). Similarly, the profile reveals that the cognitive/adaptive levels of all the students, including this student, were below the first percentile (id.). Regarding the remaining skills levels described, the profile—as well as the testimony of the newly hired 6:1+2 special education teacher—indicate that the student's abilities are commensurate with the abilities of the other students in the proposed class, with some students functioning slightly above, and others slightly below, the student's functional levels (Tr. pp. 281-89, 332-38); Dist. Ex. 55 at pp. 1-3).

²⁷ Had the student attended the district's program recommended in the August 2010-11 IEP, the evidence shows that the district intended to implement a total of three to four hours per day of 1:1 discrete trial teaching between the hours provided in the 6:1+2 special class and the home-based program consisting of 10 hours per week of individual instruction (compare Tr. pp. 324-31, with Dist. Ex. 13 at p. 1).

Conclusion

Based upon the evidence in the hearing record, the district's recommended placement in the 6:1+2 special class, as well as the special education programs, related services, and home-based program in the August 2010-11 IEP, were reasonably calculated to enable the student to receive educational benefits during the 2010-11 school year. The hearing record indicates that the CSE subcommittees carefully reviewed and considered a significant amount of information about the student, including a privately obtained 2010 updated psychological evaluation, in developing the student's August 2010-11 IEP, and accurately incorporated that information into the IEP. In addition, the hearing record indicates that the recommendation to place the student in the 6:1+2 special class, which followed the principles of ABA throughout the school day and implemented daily, 1:1 discrete trial teaching, was based upon thorough and meaningful discussions with the parents, who were provided with the opportunity to express their concerns about the student's IEP and placement prior to making the recommendation.

Therefore, having determined that the evidence in the hearing record establishes that the district sustained its burden to establish that it offered the student a FAPE in the LRE for the 2010-11 school year, the necessary inquiry is at an end and there is no need to reach the issue of whether the student's unilateral placement at MCC was appropriate to meet the student's needs (Burlington, 471 U.S. at 370; M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134; Application of a Child with a Disability, Appeal No. 08-158; Application of a Child with a Disability, Appeal No. 05-038).²⁸

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the impartial hearing officer's finding that the district failed to offer the student a FAPE for the 2010-11 school year in his decision, dated May 31, 2011, is hereby annulled; and,

IT IS FURTHER ORDERED that the impartial hearing officer's order directing the district to reimburse the parents for the costs of the student's tuition at MCC for the 2010-11 school year in his decision, dated May 31, 2011, is hereby annulled; and,

IT IS FURTHER ORDERED that the district shall conform to the procedures regarding the formulation of short-term objectives/benchmarks in the student's IEP as required by State regulations.

Dated: Albany, New York
September 6, 2011

JUSTYN P. BATES
STATE REVIEW OFFICER

²⁸ Accordingly there is no need to resolve the parties' dispute over whether additional evidence in support of the parent's unilateral placement at MCC that post-dates the impartial hearing officer's decision should be considered for the first time on appeal.