



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 11-101

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

### **Appearances:**

Educational Advocacy Services, attorneys for petitioner, Jennifer A. Tazzi, Esq., of counsel

Michael Best, Special Assistant Corporation Counsel, attorney for respondent, G. Christopher Harriss, Esq., of counsel

### **DECISION**

Petitioner (the parent) appeals from the decision of an impartial hearing officer which denied her request to be reimbursed for the costs of her son's tuition at the Reach for the Stars Learning Center (RFTS) for the 2010-11 school year. Respondent (the district) cross-appeals from those portions of the impartial hearing officer's decision which found that RFTS was appropriate to meet the student's needs and that equitable considerations did not preclude an award of tuition reimbursement. The appeal must be sustained. The cross-appeal must be dismissed.

### **Background**

According to the hearing record, the student has been reportedly diagnosed as having arthrogyrosis, hypotonic cerebral palsy, strabismus of the eyes, a seizure disorder treated with medication, and an autism spectrum disorder (Tr. pp. 60-61, 355, 358; Dist. Ex. 3 at pp. 1-2; Parent Ex. G at p. 1). The student presents with severe motor and cognitive deficits; limited communication and unintelligible speech production; difficulty sustaining attention; an inability to ambulate independently; "self-harm maladaptive behaviors (i.e. head banging, severe head thrusts, hitting chest and banging his ears with fists) to call attention, when receiving a 'no' response for a toy/activity, when waiting, or in response to challenging demands placed on him;" inappropriate behaviors ("throwing objects and swiping stimuli off the table," "yelling, hitting himself, hand waving, and flapping"); and at times, uncontrollable head, arm, and hand movements

(Tr. pp. 142-43, 162-63; Dist. Exs. 2 at p. 1; 5 at p. 1; 6 at pp. 1-2).<sup>1</sup> Although the student uses a wheelchair for mobility, he also crawls on the floor "to independently ambulate when not in his wheelchair," and uses a walker with leg braces and assistance to ambulate (Dist. Ex. 6 at pp. 2-4; see Tr. pp. 185, 216; Dist. Ex. 2 at p. 1). The student exhibits significant delays in sensory processing, gross motor skills, fine motor skills, and self-care skills (Dist. Exs. 5-6; see Dist. Ex. 2 at pp. 1-2).

With regard to speech-language skills, the student exhibits "severe delays" in expressive, receptive, and pragmatic language, as well as in speech production (Dist. Ex. 5 at pp. 1-5; see Tr. pp. 182-83). Given the student's significant language deficits, he communicates through a "combination of gestures, body language, vocalizations, a communication wallet comprised of static boards, and a high-tech electronic voice output device" (Dist. Ex. 5 at p. 4; see Tr. pp. 183-85). The student also exhibits "significant oral-motor and feeding difficulties" (Dist. Ex. 5 at pp. 5-6; see Tr. p. 188).

At the time of the impartial hearing, the student was attending RFTS, where he has continuously attended school since 2005 (Tr. pp. 249-50, 311; see generally Parent Ex. G at p. 1). The Commissioner of Education has not approved RFTS 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 programs and related services as a student with multiple disabilities is not in dispute in this proceeding (see 34 C.F.R. § 300.8[7]; 8 NYCRR 200.1[zz][8]; Pet. ¶ 4).

In this case, the Committee on Special Education (CSE) convened on March 2, 2010, to conduct the student's annual review and to develop his individualized education program (IEP) for the 2010-11 school year (Parent Ex. Q at pp. 1-2; see Dist. Exs. 10-11). The following individuals attended the meeting: a district school psychologist, school social worker, and special education teacher (who also acted as the district representative); an additional parent member; the student's then-current teacher at RFTS via telephone; an assistant director of RFTS via telephone; the parent via telephone; and the parent's advocate via telephone (Parent Ex. Q at p. 2; see Tr. pp. 18-21, 362-64).<sup>2</sup>

In developing the student's 2010-11 IEP, the CSE incorporated descriptions of the student's present levels of performance in the areas of academic performance and learning characteristics,

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<sup>1</sup> In May 2008, the district conducted a psychoeducational evaluation of the student (Dist. Ex. 4 at p. 1). At that time, the student could not respond to formal cognitive assessments; therefore, the evaluator could not obtain IQ scores (id. at pp. 2-3). However, the parent's responses to the Vineland Adaptive Behavior Scales and Survey—Interview Form had yielded an adaptive behavior composite standard score of 58 (low range of functioning) (id. at p. 2).

<sup>2</sup> The hearing record indicates that the CSE had the student's "school file" available for review, which included a classroom observation report, a psychoeducational evaluation report, medical information, an RFTS occupational therapy (OT) report, an RFTS speech-language therapy report, and RFTS educational reports (Tr. pp. 22, 58-59, 133-34; see Dist. Exs. 2-6). In January 2010, the district social worker who attended the March 2010 CSE meeting conducted a classroom observation of the student at RFTS, which she summarized in a report (compare Dist. Ex. 2 at p. 1, with Parent Ex. Q at p. 2). The social worker noted in the report that the "teacher prompted [the student] to express his needs and to decrease inappropriate behaviors, such as yelling, hitting himself, hand waving, and flapping," and that RFTS used a "token system" to "decrease inappropriate behaviors and to reward attention to tasks" (Dist. Ex. 2 at p. 1).

social/emotional performance, and health and physical development that had been drafted by staff and related services providers from RFTS (Parent Ex. Q at pp. 1-5, 7; see Tr. pp. 22-26, 30, 40-50, 130, 132-34, 139, 155-59, 162). In the area of academic performance and learning characteristics, the IEP indicated that the student attended RFTS where he received "1:1 services for the entire day," "1:1 therapy using the methodology of applied behavior analysis [(ABA)]," "1:1 sessions of special education which include[d] discrete trials of verbal behavior," 1:1 speech-language therapy, 1:1 OT, music therapy, and "fast paced instructions with a high ratio of reinforcement" (Parent Ex. Q at p. 3; see Tr. pp. 28-30, 44-47).<sup>3</sup> In addition, the IEP indicated that the student presented with "maladaptive behaviors including hitting himself, head jerks, vocalizations, swiping, throwing, and flopping," and further, that the student's behaviors were "escape and avoidance based as well as attention seeking in nature" (Parent Ex. Q at p. 4).<sup>4</sup> According to the IEP, several strategies were used—such as "fast paced instruction, re-direction, token economies, and frequent reinforcement"—to "eliminate off task behaviors and to re-direct [the student] to tasks at hand" (id.). The IEP also described the student's cognitive skills, visual performance skills, speech-language skills, and overall academic skills (id. at pp. 3-4; see Tr. pp. 46-47). At the meeting, the CSE reviewed the information provided by RFTS; added teacher estimates of the student's skills in the areas of decoding, reading comprehension, listening comprehension, writing, mathematical computation, and mathematical problem solving; and recommended repetition and rephrasing, speech-language therapy, and positive reinforcement as academic management needs to address the student's identified needs (Tr. pp. 20-26, 28-30, 44; Parent Ex. Q at pp. 3-4).<sup>5</sup>

In the area of social/emotional performance, the IEP indicated that the student exhibited "many behaviors that dramatically affect[ed] his learning" (Parent Ex. Q at p. 5; see Tr. pp. 47-48). In particular, the IEP noted that the student demonstrated many "self injurious behaviors,

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<sup>3</sup> At the impartial hearing, the district special education teacher who attended the March 2010 CSE meeting clarified that the information drafted by RFTS describing the student's present levels of performance in the IEP reflected the student's "present performance at [RFTS]" (Tr. pp. 20-30). For example, she testified that although the IEP noted that the student received instruction using ABA methodology, the CSE "left [the reference to ABA methodology] there because this [was] how [the student] was being instructed" at RFTS (Tr. pp. 28-29; see Parent Ex. Q at p. 3). She also testified, however, that the CSE does not "recommend an exact methodology" (Tr. pp. 28-30). Similarly, the district's special education teacher testified that although the IEP noted the use of "fast-paced instruction" with the student at RFTS to "eliminate adverse behaviors and keep him on task," the CSE did not agree that fast-paced instruction was appropriate for the student (Tr. pp. 45-46, 61-62; see Parent Ex. Q at pp. 3-4).

<sup>4</sup> An RFTS speech-language therapy provider drafted the information in this portion of the student's present levels of performance (Tr. p. 24; compare Parent Ex. Q at p. 4, with Dist. Ex. 5 at pp. 1-6). In the behavioral observation section of an RFTS 2009 speech-language annual evaluation report, an evaluator noted that the student "required frequent redirection to remain on task during structured an unstructured activities;" the evaluator provided "frequent breaks" to increase the student's attention to stimuli; during the evaluation, the student displayed "self injurious behaviors (i.e. head hitting, head thrusting) as well as inappropriate behaviors such as throwing objects and swiping stimuli off the table," which the student's 1:1 paraprofessional "blocked;" and that to "decrease his self injurious behaviors and encourage appropriate on-task behavior, [the student] utilize[d] a quiet hands/token economy reinforcement system and ha[d] recently been provided with a daily sensory diet" (Dist. Ex. 5 at p. 1). Sensory diet techniques included "deep pressure massage, brushing, and therapeutic listening" (id.).

<sup>5</sup> Based upon teacher estimates provided by the student's then-current teacher at RFTS, all of the student's academic skills fell within the prekindergarten range (see Tr. pp. 22-23, 139; Parent Ex. Q at pp. 3-4).

such as hitting his head and body, as well as head thrusting," and "self stimulatory vocalizations and vocal protests" (Parent Ex. Q at p. 5). According to the IEP, the student's behaviors served a "variety of functions, including communicative attempts, having difficulty accepting no, escaping demands, and transitioning from one activity to the next" (id.). In addition, the present levels of social/emotional performance noted that a behavior intervention plan (BIP) had been developed and implemented at RFTS that required the student's "instructors or health paraprofessional to block all of his hits and thrusts" and to remind the student "to keep his hands and body 'quiet'" in order to reduce the behaviors (id.; see Tr. pp. 151-52). The IEP also indicated that the student demonstrated "limited social and play skills," he did not appropriately play with toys, and he required a "1:1 teacher with him to reinforce appropriate behaviors during circle while blocking self injurious behaviors" (Parent Ex. Q at p. 5; see Tr. pp. 63-65). At the meeting, the CSE indicated on the IEP that although the student's behavior required "highly intensive supervision," he did not require a BIP, and the CSE recommended a small class, redirection of attention, and the support of a health paraprofessional as social/emotional management needs to address the student's identified needs (Parent Ex. Q at p. 5; see Tr. pp. 24, 47-49, 63-69, 141-44, 151-54, 162-63).<sup>6</sup>

The CSE also reviewed and incorporated the annual goals and short-term objectives into the 2010-11 IEP that had been drafted by RFTS staff and RFTS related services providers (Tr. pp. 20, 30-31, 43-45, 50-53, 55-58, 61, 132, 144-46, 158-62; Parent Ex. Q at pp. 8-15).<sup>7</sup> The CSE developed the annual goals and short-term objectives related to the student's participation in adapted physical education and school activities, as well as the services recommended to be provided by a full-time 1:1 health paraprofessional, a registered nurse, and a transportation paraprofessional (Tr. pp. 144-46; Parent Ex. Q at pp. 16-18).

Upon completing the review, the CSE recommended a 12:1+4 class special class in a specialized school for a 12-month school year with special education transportation, adapted physical education, assistive technology, and a climate controlled "lift bus" with fewer students (Parent Ex. Q at pp. 1, 19). The IEP also reflected that the student required an "accessible program" (id. at p. 7). The CSE also recommended the following related services: a full-time 1:1 health paraprofessional both in and out of the classroom; five 30-minute sessions per week of individual

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<sup>6</sup> In addition, an RFTS occupational therapist drafted the student's present levels of health and physical development describing his "present health status and physical development" (Tr. pp. 25-26, 43-44; compare Parent Ex. Q at p. 7, with Dist. Ex. 6 at pp. 1-5). In an RFTS 2009 OT annual evaluation report, an evaluator noted that the student displayed "self-harm maladaptive behaviors (i.e. head banging, severe head thrusts, hitting chest and banging his ears with fists) to call attention, when receiving a 'no' response for a toy/activity, when waiting, or in response to challenging demands placed on him," and that the student required "supervision at all times" (Dist. Ex. 6 at p. 1-2). The evaluator also noted that due to his "significant physical and cognitive delays, [the student] require[d] a health paraprofessional (shadow) to assist with hygiene, self-care activities, and to facilitate learning and obtain educational goals during school hours" (id.). According to the evaluation report, the student received medication to "decrease self-injurious maladaptive behaviors" (id. at p. 2). During the evaluation, the student was provided with "frequent sensory and rest breaks to minimize stress and aversive behaviors" (id.). In addition, the evaluator provided "[p]ositive reinforcement and preferred toys . . . for following directions and sustaining attention" (id.). Generally, the student could "comprehend instructions and follow one simple step direction[s] and transition between tasks with minimal behavioral over-reactions" when provided with "verbal and tactile prompts" (id.).

<sup>7</sup> At the impartial hearing, district witnesses testified that the OT annual goals drafted by RFTS also addressed the student's physical therapy (PT) needs (Tr. pp. 42-44, 145-46).

OT; five 60-minute sessions per week of individual physical therapy (PT); five 45-minute sessions per week of individual speech-language therapy; a transportation paraprofessional; and the services of a registered nurse (Parent Ex. Q at p. 20).

In a notice to the parent dated March 17, 2010, the district summarized the special education programs and related services recommended for the 2010-11 school year, and advised the parent of the particular school to which the district assigned the student (Parent Ex. R). After visiting and observing the recommended 12:1+4 special class in April 2010, the parent determined that it was not appropriate for the student (Parent Ex. R; see Tr. pp. 364-70). The parent expressed her concerns about the recommended 12:1+4 special class, indicating that the class was "much too busy" for the student, contained "too many children," and the student would not be able to "focus, concentrate or learn" in the recommended class (Parent Ex. R). The parent also noted that the student required "ABA therapy to learn," and the recommended class did not offer ABA (id.). In addition, the parent advised the district that the student would be attending RFTS for the 2010-11 school year and that she would request an impartial hearing seeking tuition reimbursement (id.).<sup>8</sup> By letter dated August 18, 2010, the parent notified the district of her intent to unilaterally enroll the student at RFTS for the 2010-11 school year (Parent Ex. S).

### **Due Process Complaint Notice**

By due process complaint notice, dated September 3, 2010, the parent asserted that the district failed to offer the student a free appropriate public education (FAPE) for the 2010-11 school year (Parent Ex. A at p. 1).<sup>9</sup> Specifically, the parent alleged that the student's needs could not be met in the recommended 12:1+4 special class, and she had objected to placing the student in a 12:1+4 special class for the prior school year (2009-10) because it was too large for the student and "ABA was non existent in the recommended placement" (id. at pp. 1-2). The parent also noted that the district was aware of the student's need for "1:1 professional assistance at all times during the day" and that her concerns about the recommended placement were not considered in developing the student's recommendations (id.). In addition, the parent alleged that the student had not been evaluated in three years, and the district improperly relied on teacher estimates in making its recommendations (id. at p. 2). Next, the parent asserted that the student's classification was not consistent with information in the present levels of academic performance on the IEP, which indicated that the student had received a diagnosis of an autism spectrum disorder (id.). The parent questioned the district's recommendation to place the student in a 12:1+4 special class in light of the information in the IEP regarding the student's need for 1:1 attention and ABA (id.). The parent further questioned the "efficacy" of the district's recommended placement because the annuals goals in the IEP required a 1:1 setting in order to implement the goals (id.). In addition, the parent alleged that the annual goals were not appropriate due to the failure to include a method

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<sup>8</sup> The hearing record also contains two subsequent notices from the district, dated June 8 and June 15, 2010, identifying the same special education programs, related services, and school to which the student had been assigned as in the initial March 17, 2010 notice to the parent (compare Dist. Exs. 8-9, with Parent Ex. R). Both of the June 2010 notices included a handwritten note from the parent, dated June 24, 2010, which referred the district to an "attached final notice dated 3/17/10" as the parent's "reply to [the assigned school]" (Dist. Exs. 8-9).

<sup>9</sup> On September 12, 2010, the parent executed an enrollment contract for the student to attend RFTS for the 2010-11 school year, which obligated the parent to pay the student's tuition costs and the costs of a 1:1 paraprofessional (Tr. pp. 379-81; Parent Exs. T-V; V3-V4; Y).

of measurement, the repetition of some of the annual goals from the previous school year, and because the student's lack of progress was not discussed at the CSE meeting (*id.* at pp. 2-3). The parent questioned the district's failure to develop a BIP for the student, and alleged that the district's recommended placement failed to consider the student's safety (*id.* at p. 3). As relief, the parent requested, alternatively, either reimbursement for the costs of the student's tuition at RFTS or for the district to directly pay the student's tuition costs to RFTS for the 2010-11 school year (*id.* at pp. 3-4).

### **Impartial Hearing Officer Decision**

On December 22, 2010, the parties proceeded to an impartial hearing, and concluded on July 12, 2011 after seven nonconsecutive days of testimony (Tr. pp. 1, 401). By decision dated July 14, 2011, the impartial hearing officer concluded that the district offered the student a FAPE for the 2010-11 school year, and denied the parent's request to be reimbursed for the costs of the student's tuition at RFTS for the 2010-11 school year (IHO Decision at pp. 14-15). The impartial hearing officer further concluded that RFTS was appropriate to meet the student's special education needs and that equitable considerations supported an award of tuition reimbursement (*id.* at pp. 15-17).

According to the impartial hearing officer, the district sustained its burden to establish that the IEP accurately described the student's then-current levels of performance and identified his special education needs (IHO Decision at p. 14). She found that the IEP included annual goals that addressed the student's "undisputed areas of need," such as "receptive and expressive language, oral-motor skills, play skills, fine and gross motor skills, activities of daily living, pre-academic skills, [and] social and leisure skills" (*id.*). The impartial hearing officer then examined whether the IEP recommended a program that sufficiently addressed the student's special education needs (*id.* at pp. 14-15). Weighing the evidence, she concluded that the recommended 12:1+4 special class—with the supports and services of a "1:1 health paraprofessional, nursing services and extensive related services"—provided "adult support sufficient to address [the student's] health, [activities of daily living] ADL, mobility, behavioral, learning and communication needs and for redirection and positive reinforcement to address [the student's] distractibility and maladaptive behaviors in order to enable him to make meaningful progress" (*id.* at p. 15). The impartial hearing officer explained that while the parent may desire a "greater level of adult support in a setting with fewer students" to "optimize [the student's] progress," that level of support was not required (*id.*). The impartial hearing officer also determined that regardless of the underlying reason for the student's maladaptive behaviors, the district "presented a special education plan to address these behaviors in the classroom in a manner to enable [the student] to benefit from instruction in his areas of need" (*id.*). Based upon her findings, the impartial hearing officer concluded that the district offered the student a FAPE for the 2010-11 school year (*id.*).

Turning to the appropriateness of RFTS, the impartial hearing officer concluded that the parent sustained her burden to establish that the program at RFTS provided the student with an individualized program and related services that addressed his special education needs (IHO Decision at pp. 15-16). She found that witness testimony described "in detail the methods and strategies" used by staff to address the student's areas of need, and that the student had made "slow progress in the areas of receptive language, matching skills, attention, ADL and play skills" (*id.* at p. 16). Next, the impartial hearing officer determined that because the parent "cooperated with the

CSE by attending the CSE meeting, visiting the proposed placement and then communicating [her] concerns to the CSE," equitable considerations did not preclude an award of tuition reimbursement (*id.* at pp. 16-17). However, based upon her determination that the district offered the student a FAPE for the 2010-11 school year, she denied the parent's request for reimbursement for the costs of the student's tuition at RFTS for the 2010-11 school year (*id.* at p. 17).

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

The parent appeals, and contends that the impartial hearing officer erred in concluding that the district offered the student a FAPE for the 2010-11 school year and in denying her request to be reimbursed for the costs of the student's tuition at RFTS. The parent argues that the CSE failed to consider the student's need for 1:1 ABA instruction in developing the student's program, that the recommended placement could not provide the student's related services as required in his IEP, that the district failed to develop a BIP for the student, and that the recommended 1:1 health paraprofessional was not an appropriate substitute for a BIP, and therefore, the recommended placement was not reasonably calculated to enable the student to receive educational benefits. Based upon the foregoing, the parent seeks to reverse and nullify the impartial hearing officer's determinations that the district offered the student a FAPE and that she was not entitled to an award of tuition reimbursement.

In its answer, the district responds to the parent's allegations with general admissions and denials, and in addition, cross-appeals those portions of the impartial hearing officer's decision that found RFTS appropriate to meet the student's needs and that equitable considerations supported an award of tuition reimbursement. In her answer to the district's cross-appeal, the parent responds to the district's allegations with general admissions and denials. The parent also submits additional evidence for consideration on appeal. In a reply to the parent's answer, the district argues that a respondent may assert defenses for the first time on appeal, and affirmatively notes no objections to the consideration of the additional evidence submitted by the parent.

### **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]).

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

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).

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**

Turning to the merits of the appeal, the parent asserts that the impartial hearing officer erred in concluding that the district offered the student a FAPE for the 2010-11 school year. Among other things, the parent argues that the weight of the evidence does not support the impartial hearing officer's determination that the district "presented a special educational plan to address" the student's behaviors regardless of the underlying reasons for the behaviors. The parent also argues that the weight of the evidence does not support the CSE's determination that the student did not require a BIP because, as the district contends, the student's behaviors were "mostly neurological" and a 1:1 health paraprofessional could appropriately address the behaviors. Upon an independent review and due consideration of the hearing record, I find that the parent properly argues that the weight of the evidence supports a conclusion that the CSE's failure to recommend or develop a BIP for the student, or alternatively, to otherwise appropriately address the student's behaviors that impeded his learning within the IEP, constituted a denial of a FAPE for the 2010-11 school year.<sup>10</sup>

### **Development of the IEP—Special Factors and Interfering Behaviors**

Under the IDEA, a CSE may be required to consider special factors in the development of a student's IEP (see 20 U.S.C. § 1414[d][3][B]). Among the special factors in the case of a student whose behavior impedes his or her learning or that of others, the CSE shall consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior (20 U.S.C. § 1414[d][3][B][i]; 34 C.F.R. § 300.324[a][2][i]; see 8 NYCRR 200.4[d][3][i]; see also E.H. v. Bd. of Educ., 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; A.C., 553 F.3d at 172; J.A. v. East Ramapo Cent. Sch. Dist., 603 F. Supp. 2d 684, 689 [S.D.N.Y. 2009]; M.M. v. Dep't of Educ., 583 F. Supp. 2d 498, 510 [S.D.N.Y. 2008]; Tarlowe, 2008 WL 2736027, at \*8; W.S. v. Rye City

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<sup>10</sup> In her decision, the impartial hearing officer neither included, nor cited to, any legal standards regarding special factors, interfering behaviors, or the development of a BIP in her determination that the district offered the student a FAPE for the 2010-11 school year; and further, her decision does not include any meaningful analysis of how, if at all, the 2010-11 IEP adequately addressed the student's behaviors (see IHO Decision at pp. 12-15).

Sch. Dist., 454 F. Supp. 2d 134, 149-50 [S.D.N.Y. 2006]; Application of a Student with a Disability, Appeal No. 09-101; Application of a Student with a Disability, Appeal No. 09-038; Application of a Student with a Disability, Appeal No. 08-028; Application of the Dep't of Educ., Appeal No. 07-120). To the extent necessary to offer a student an appropriate educational program, an IEP must identify the supplementary aids and services to be provided to the student (20 U.S.C. § 1414[d][1][A][i][IV]; 34 C.F.R. § 300.320[a][4]; 8 NYCRR 200.4[d][2][v][a], [b][3]; Piazza v. Florida Union Free Sch. Dist., 2011 WL 1458100, at \*1 [S.D.N.Y. Apr. 7, 2011]; Gavrity v. New Lebanon Cent. Sch. Dist., 2009 WL 3164435, at \*30 [N.D.N.Y. Sept. 29, 2009] [discussing the student's IEP which appropriately identified program modifications, accommodations, and supplementary aids and services]; P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 380 [S.D.N.Y. 2008]; see also Schreiber v. East Ramapo Cent. Sch. Dist., 700 F. Supp. 2d 529, 556 [S.D.N.Y. 2010] [noting that when defending a unilateral placement as appropriate under the IDEA, a parent in some circumstances may also be required to demonstrate that appropriate "supplementary aids and services" are provided to the student]).

Consistent with the IDEA, State policy guidance explains that an "IEP must include a statement (under the applicable sections of the IEP) if the student needs a particular device or service (including an intervention, accommodation or other program modification) to address one or more of the following needs in order for the student to receive" a FAPE, and specifically notes that in the case of a student whose behaviors impede learning, a CSE "must consider strategies, including behavioral interventions and supports and other strategies to address that behavior," and identify the "behavioral interventions and/or supports . . . under the applicable section of the IEP" to address those behaviors ("Guide to Quality Individualized Education Program [IEP] Development and Implementation," at p. 22, Office of Special Educ. [Dec. 2010], [available at http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf](http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf)). Moreover, the CSE—if necessary—must document "[a] student's need for a [BIP] . . . in the IEP" (*id.*).<sup>11</sup>

State procedures for considering the special factor of a student's behavior that impedes his or her learning or that of others may also require that the CSE consider conducting a functional behavioral assessment (FBA) and developing a BIP for a student in certain non-disciplinary situations (8 NYCRR 200.4[d][3][i]; 200.22[a], [b]). State regulations define an FBA as "the process of determining why a student engages in behaviors that impede learning and how the student's behavior relates to the environment," and

include[s], but is not limited to, the identification of the problem behavior, the definition of the behavior in concrete terms, the identification of the contextual factors that contribute to the behavior (including cognitive and affective factors) and the

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<sup>11</sup> While the student's need for a BIP must be documented in the IEP, and prior to the development of the BIP an FBA either "has [been] or will be conducted" ("Guide to Quality Individualized Education Program [IEP] Development and Implementation," at p. 22 [emphasis added]), it does not follow that in every circumstance an FBA must be conducted and a BIP developed at the same time as the IEP (see Cabouli v. Chappaqua Cent. Sch. Dist., 2006 WL 3102463, at \*3 [2d Cir. Oct. 27, 2006] [noting that it may be appropriate to address a student's behaviors in an IEP by noting that an FBA and BIP will be developed after a student is enrolled at the proposed district placement]).

formulation of a hypothesis regarding the general conditions under which a behavior usually occurs and probable consequences that serve to maintain it

(8 NYCRR 200.1[r]). According to State regulations, an FBA shall be based on multiple sources of data and must be based on more than the student's history of presenting problem behaviors (8 NYCRR 200.22[a][2]). An FBA must also include a baseline setting forth the "frequency, duration, intensity and/or latency across activities, settings, people and times of the day," so that a BIP (if required) may be developed "that addresses antecedent behaviors, reinforcing consequences of the behavior, recommendations for teaching alternative skills or behaviors and an assessment of student preferences for reinforcement" (8 NYCRR 200.22[a][3]). Although State regulations call for the procedure of using an FBA when developing a BIP, the failure to comply with this procedure does not automatically render a BIP deficient (A.H., 2010 WL 3242234, at \*3-\*4).

With regard to a BIP, the special factor procedures set forth in State regulations further note that the CSE or Committee on Preschool Special Education (CPSE) "shall consider the development of a [BIP], . . . , for a student with a disability when:"

(i) the student exhibits persistent behaviors that impede his or her learning or that of others, despite consistently implemented general school-wide or classroom-wide interventions;

(ii) the student's behavior places the student or others at risk of harm or injury;

(iii) the CSE or CPSE is considering more restrictive programs or placements as a result of the student's behavior; and/or

(iv) as required pursuant to [8 NYCRR] 201.3 of this Title

(8 NYCRR 200.22[b][1]).

Once again, State regulations require that "[i]f a particular device or service, including an intervention, accommodation or other program modification is needed to address the student's behavior that impedes his or her learning or that of others, the IEP shall so indicate" (8 NYCRR 200.22[b][2]). If the CSE determines that a BIP is necessary for a student, "the [BIP] shall identify:"

(i) the baseline measure of the problem behavior, including the frequency, duration, intensity and/or latency of the targeted behaviors . . . ;

(ii) the intervention strategies to be used to alter antecedent events to prevent the occurrence of the behavior, teach individual alternative and adaptive behaviors to the student, and provide consequences for the targeted inappropriate behavior(s) and alternative acceptable behavior(s); and

(iii) a schedule to measure the effectiveness of the interventions, including the frequency, duration and intensity of the targeted behaviors at scheduled intervals

(8 NYCRR 200.22[b][4]).<sup>12</sup> Neither the IDEA nor its implementing regulations require that the elements of a student's BIP be set forth in the student's IEP ("Student Needs Related to Special Factors," Office of Spec. Educ. [April 2011], available at <http://www.p12.nysed.gov/specialed/formsnotices/IEP/training/answers-needs.htm>). However, once a student's BIP is developed and implemented, "such plan shall be reviewed at least annually by the CSE or CPSE" (8 NYCRR 200.22[b][2]). Furthermore, "[t]he implementation of a student's [BIP] shall include regular progress monitoring of the frequency, duration and intensity of the behavioral interventions at scheduled intervals, as specified in the [BIP] and on the student's IEP" (8 NYCRR 200.22[b][5]). In addition, the "results of the progress monitoring shall be documented and reported to the student's parents and to the CSE or CPSE and shall be considered in any determination to revise a student's [BIP] or IEP" (*id.*).

In this case, the hearing record fails to contain sufficient evidence to establish that the CSE complied with State procedures for considering the special factor of a student's behavior that impedes his or her learning in the development of the student's 2010-11 IEP, which resulted in a substantive deficiency in this instance and deprived the student of educational benefits. Notably, although it is undisputed that the CSE was aware of the student's self-injurious, maladaptive, inappropriate, and at times, uncontrollable behaviors that were well-documented in both the student's 2010-11 IEP and in the information available to the March 2010 CSE; that RFTS had developed and implemented a BIP to address the student's behaviors;<sup>13</sup> and that the student exhibited "many behaviors that dramatically affect[ed] his learning," the CSE did not recommend a BIP for the student, but instead, recommended "highly intensive supervision" to address the student's behaviors, as well as a small class, redirection of attention, and the services of a 1:1 health paraprofessional (Parent Ex. Q at pp. 3-5, 7; see Tr. pp. 24, 47-49, 63-69, 141-44, 151-54, 162-63; Dist. Exs. 2 at p. 1; 5 at p. 1; 6 at pp. 1-2).

At the impartial hearing, the district's special education teacher and school psychologist who both attended the March 2010 CSE meeting defended the CSE's decision to not recommend a BIP, and testified that in this case, a BIP was not warranted because the student "had his own para[professional]," he was not "dangerous to himself . . . or to others," the student's behavior was "part of who he [wa]s," the CSE "believe[d] that the nature of his behavior was more neurologically based," the student's behavior did not "really serve any purpose" because it resulted from the student's "neurological problems with the seizures," the student did not lash out or become "aggressive or dangerous" to himself or to other children, and the student did not "bolt out of the

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<sup>12</sup> The Official Analysis of Comments to the federal regulations explains that the decision regarding whether a student requires interventions such as a BIP rests with the CSE and is made on an individual basis (Consideration of Special Factors, 71 Fed. Reg. 46683 [Aug. 14, 2006]).

<sup>13</sup> Although not raised by either party or submitted into evidence at the impartial hearing, I note that the evidence demonstrates that at RFTS, "all" of the BIPs are drafted based upon an FBA (Tr. pp. 255-56).

room" or "cause danger or hit other children" (Tr. pp. 48-49, 143).<sup>14</sup> In addition, the special education teacher testified that a full-time 1:1 health paraprofessional could "curtail any behaviors that might be self-injurious" by redirecting the student's attention or distracting the student from the self-injurious or "self-stim[ulatory]" behavior (Tr. pp. 63-68; see Tr. pp. 143-44 [noting that the CSE recommended the 1:1 health paraprofessional, a small class, nursing services, and a transportation paraprofessional to address the student's behaviors]).

However, this testimony is contradicted by the information reported in the student's 2010-11 IEP itself, which the district described the student's behaviors in the present levels of performance not as neurologically based but as: "maladaptive behaviors including hitting himself, head jerks, vocalizations, swiping, throwing, and flopping," . . . that were "escape and avoidance based as well as attention seeking in nature;" "self injurious behaviors, such as hitting his head and body, as well as head thrusting," and "self stimulatory vocalizations and vocal protests;" and as serving a "variety of functions, including communicative attempts, having difficulty accepting no, escaping demands, and transitioning from one activity to the next" (Parent Ex. Q at pp. 4-5). The testimony is also wholly inconsistent with information contained within the district's January 2010 classroom observation report—noting that the during the observation, the "teacher prompted [the student] to express his needs and to decrease inappropriate behaviors, such as yelling, hitting himself, hand waving, and flapping," and that RFTS used a "token system" to "decrease inappropriate behaviors and to reward attention to tasks"—an RFTS 2009 speech-language annual evaluation report, and the RFTS 2009 OT annual evaluation report available to the March 2010 CSE (Tr. pp. 22, 58-59, 133-34; Dist. Exs. 2-6). In addition, the hearing record indicates that for the 2010-11 school year, the district recommended placing the student in a 12:1+4 special class in a specialized school, which would nearly double the number of individuals within the classroom when compared to the student's then-current setting at RFTS (Parent Ex. Q at p. 1; compare Tr. pp. 86, 90, 97, 99-100, 119, with Tr. pp. 241-47, 252, 268, 308, 323-27).

Thus, while the evidence indicates that the CSE appeared to consider the use of positive behavioral interventions and supports by recommending in the IEP "highly intensive supervision," a small class, and the support of a 1:1 health paraprofessional to address the student's behaviors; in this case, I agree with the parent that these recommendations were not adequate in light of the severity and nature of the student's self-injurious, maladaptive, inappropriate, and at time, uncontrollable behaviors described in the hearing record. Moreover, the hearing record also indicates that the members of the CSE adopted RFTS's description of the student's needs and deficits regarding the student's interfering behaviors, but then improperly substituted a significantly different, unstated opinion about the reasons underlying the student's behaviors—without the benefit of conducting an FBA, reviewing the BIP implemented by RFTS for the student, or meaningfully considering all of the information available to the CSE about the student's behavior—to determine whether the student required a BIP, which violates the State procedures for considering the special factor of a student's behavior that impedes his or her learning. I also note that the hearing record is devoid of evidence to demonstrate that the CSE considered the effects of placing the student in 12:1+4 special class, the student's transition into the recommended

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<sup>14</sup> When asked to identify some of the student's neurologically based behavioral difficulties, the district school psychologist indicated the following: "uncontrollable movements, like jerking his hands, jerking his head, some hand and arm movement" (Tr. p. 162).

placement, and how, if at all, the size of the classroom and the transition into the classroom may have affected the student's current behaviors.

Based upon the foregoing, I find that the CSE's failure adequately address the student's behaviors in the 2010-11 IEP or alternatively, to recommend a BIP for the student, resulted in the denial of a FAPE (see R.K. v. New York City Dep't of Educ., 2011 WL 1131492, at \*18-19 [E.D.N.Y. Jan. 21, 2011]; Application of a Student with a Disability, Appeal No. 10-050; Application of a Student with a Disability, Appeal No. 10-007; cf. A.C. v. Bd. of Educ., 553 F.3d at 172; E.M. v. New York City Dep't of Educ., 2011 WL 1044905, \*9 [S.D.N.Y. Mar. 14, 2011]; Oberti v. Bd. of Educ., 995 F.2d 1204, 1217, 1220-21 [3d Cir. 1993]). Accordingly, I find that the district's failure to comply with State regulations resulted in a substantive deficiency in this instance and deprived the student of educational benefits by failing to sufficiently address the student's behaviors which impeded his learning.

### **Appropriateness of the Parent's Unilateral Placement at RFTS**

Having found that the district failed to offer the student a FAPE, I turn now to the district's cross-appeal. Here, the district contends that the impartial hearing officer erred in concluding that the parent sustained her burden to establish the appropriateness of RFTS for the 2010-11 school year because the student did not make progress at RFTS, RFTS did not provide the student with PT services or with the services of a registered nurse, and 1:1 instruction was too restrictive for the student. Contrary to the district's arguments, however, and as discussed more fully below, the evidence indicates that the given the student's significant cognitive, motor, and speech-language skill deficits, the parent sustained her burden to establish that RFTS reasonably addressed the student's individual needs and provided educational instruction specially designed to meet the unique needs of the student necessary to permit him to benefit from instruction.

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

placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115 [citing Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] [stating "evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]]). A private placement is only appropriate if it provides education instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; 34 C.F.R. § 300.39[a][1]; Educ. Law § 4401[1]; 8 NYCRR 200.1[ww]; Rowley, 458 U.S. at 188-89; Gagliardo, 489 F.3d at 114-15 [noting that even though the unilateral placement provided special education, the evidence did not show that it provided special education services specifically needed by the student]; Frank G., 459 F.3d at 365; Stevens v. New York City Dep't of Educ., 2010 WL 1005165, \*9 [S.D.N.Y. Mar. 18, 2010]).

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

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

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

The hearing record includes a description of RFTS as a school dedicated to serving students on the "autism spectrum" (Tr. pp. 241-42). During the 2010-11 school year at RFTS, the student received instruction in a 1:1 educational setting from an ABA therapist (Tr. pp. 241-42, 323-24). Staffing in the student's classroom included two teachers, the student's full-time 1:1 paraprofessional, a teacher's assistant, and a speech-language pathologist who provided services to the students in the classroom; the classroom also included one other student (Tr. pp. 252, 245-47, 268, 308, 326-27). The student also received the services of a 1:1 paraprofessional for transportation, five 45-minute to 60-minute sessions per week of individual OT, and five 60-minute sessions per week of individual speech-language therapy (Tr. pp. 177-82, 213-15, 325; Parent Exs. F; G at p. 1; I at p. 1). A registered nurse—who provided services to four other students at RFTS through a contract with the district—also provided services to address the student's physical needs during the 2010-11 school year (see Tr. pp. 32-34, 325).

According to the hearing record, RFTS developed an IEP for the student's 2010-11 school year, which addressed his identified needs in the areas of expressive and receptive language, pre-

academic skills, social and leisure skills, ADL skills, and behavior skills (Parent Ex. C at pp. 1-14; see Tr. pp. 271-93). In addition, RFTS created annual goals and short-term objectives for speech-language therapy and OT (see Parent Exs. J at pp. 1-6; H at pp. 1-17). And while RFTS did not offer the student PT services, which the district views unfavorably, a review of the OT annual goals—which included annual goals characterized by the CSE as PT goals to address the student's gross motor needs—and an RFTS 2010 OT annual review evaluation report, indicate that RFTS was able to meet the gross motor needs of the student (see Tr. pp. 42-44, 145-46, 227; Parent Ex. I at pp. 1-6; compare Parent Ex. J at pp. 1-6, with Parent Ex. Q at pp. 7, 12-13; M.N. v. New York City Dept. of Educ., Region 9 (Dist. 2), 700 F.Supp.2d 356, 368 [S.D.N.Y. 2010][upholding different but appropriate delivery of related services]). RFTS also created a sensory diet and a BIP to address the student's interfering behaviors for the 2010-11 school year (Parent Exs. E; M). The student's daily schedule at RFTS during the 2010-11 school year indicated that ABA instruction was incorporated throughout the day, and further, a classroom profile demonstrated that the student had been grouped with other non-verbal students, who exhibited "low" cognitive abilities, "emerging" social skills, behavior needs that required "intensive interventions," and physical profiles similar to the student (Parent Ex. O; see Tr. pp. 262-69).

In addition, I note that while evidence of progress at RFTS, or a lack thereof, would not by itself be sufficient to establish that RFTS was appropriate; progress is nevertheless a relevant factor that may be considered (see Gagliardo, 489 F.3d at 115; Stevens v. New York City Dep't of Educ., 2010 WL 1005165, \*8-\*9 [S.D.N.Y. Mar. 18, 2010]; see also Application of the Dep't of Educ., Appeal No. 11-051). At the impartial hearing, the RFTS educational director (director) testified that during the 2010-11 school year, the student made "[s]low, but steady" progress that she characterized as being consistent with "his pace of learning" (Tr. pp. 238-42, 328-29). She also testified that since 2005, the student overall made "great progress" based upon a comparison of his performance across several administrations of the Assessment of Basic Language and Learning Skills—Revised (ABLRS), and upon a review of the student's "personal books, [and] the maintenance books" (Tr. pp. 331-32; see Parent Ex. K). She noted that although the student may be "slow to acquire new skills," he "ha[d] acquired new skills" (Tr. p. 332). In particular, the director testified that during the 2010-11 school year, the student "made progress with his visual performance skills" and "receptive language skills;" the student improved his ability to produce "more vocalizations in an imitative way;" the student became "more successful" in his ability to remain in a group setting "for longer periods" of time; and the student showed progress in his activities of daily living—such as eating more "effectively and independently with a fork," "chewing his food a little bit more," and "dressing and undressing" with less assistance (Tr. pp. 332-33).

The RFTS speech-language pathologist who provided services to the student during the 2010-11 school year testified at the impartial hearing (Tr. pp. 175-210). With respect to progress, she testified that the student improved his ability to: identify an increased "number of pictures and objects related to . . . functional activities;" follow "functional one-step directions" and had moved on to "following two-step directions;" understand "more action words;" attend in a both a 1:1 setting and in a group setting; match both identical and non-identical items; take turns; use his voice-output device; appropriately seek attention from both teachers and peers; appropriately play with particular toys and engage in parallel play; and incorporate new foods at mealtime (Tr. pp. 193-96).

Similarly, the RFTS occupational therapist who provided services to the student during the 2010-11 school year testified at the impartial hearing (Tr. pp. 210-34).<sup>15</sup> With respect to progress, she testified that the student improved his "core strength" and posture, his ability to "mount different equipment . . . in the gym," his ability to "play ball for longer periods of time," and increased arm strength (Tr. pp. 222-24). In addition, the student improved his endurance to participate in activities and his ADL skills (Tr. pp. 224-26).

Thus, weighing the evidence, I find that although the student received educational services in an almost exclusively 1:1 setting, that he did not receive PT services separate and distinct from the OT services, and that his registered nursing services—as recommended in his IEP—were provided by a registered nurse who served other district students at RFTS, the parent sustained her burden to establish that the student's placement at RFTS during the 2010-11 school year was appropriate because based upon a totality of the circumstances, RFTS provided educational instruction specially designed to meet the student's unique needs.

### **Equitable Considerations**

Finally, the district argues in its cross-appeal that the impartial hearing officer erred in concluding that equitable considerations did not preclude an award of tuition reimbursement because the parent was not prepared to accept a placement other than the 1:1 ABA program at RFTS, the parent failed to articulate any concerns about the student's IEP, and she rejected the district's recommended program based solely upon the classroom recommended; therefore, these deficiencies warrant either a reduction or a denial of tuition reimbursement in this case. As discussed below, the district's arguments, however, are without merit.

The final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; M.C. v. Voluntown, 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]). With respect to equitable considerations, the IDEA also provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; see S.W. v. New York City Dep't of Educ., 2009 WL 857549, at \*13-14 [S.D.N.Y. March 30, 2009]; Thies v. New York City Bd. of Educ., 2008 WL 344728 [S.D.N.Y. Feb. 4, 2008]; M.V. v. Shenendehowa Cent. Sch. Dist., 2008 WL 53181, at \*5 [N.D.N.Y. Jan. 2, 2008]; Bettinger v. New York City Bd. of Educ., 2007 WL 4208560, at \*4 [S.D.N.Y. Nov. 20, 2007]; Carmel Cent. Sch. Dist. v. V.P., 373 F. Supp. 2d 402, 417-18 [S.D.N.Y. 2005], aff'd, 2006 WL 2335140 [2d Cir. Aug. 9, 2006]; Werner v. Clarkstown Cent. Sch. Dist., 363 F. Supp. 2d 656, 660-61 [S.D.N.Y. 2005]; see also Voluntown, 226 F.3d at n.9; Wolfe v.

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<sup>15</sup> The RFTS occupational therapist had provided OT services to the student since September 2005 (Tr. pp. 214-25).

Taconic Hills Cent. Sch. Dist., 167 F. Supp. 2d 530, 533 [N.D.N.Y. 2001]; Application of the Dep't of Educ., Appeal No. 07-079; Application of the Dep't of Educ., Appeal No. 07-032).

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

Here, the impartial hearing officer properly noted—and sufficient evidence in the hearing record supports—that the parent "cooperated with the CSE by attending the CSE meeting, visiting the proposed placement and then communicating [her] concerns to the CSE" (IHO Decision at pp. 16-17). Moreover, the hearing record indicates that although the district had recommended the same assigned school for the student since 2005, the parent had continued to visit and observe the school throughout the years, and again, conducted a 45-minute to 60-minute visit of that same assigned school for the 2010-11 school year, hoping that "there [were] changes" (Tr. pp. 361-62, 364-65, 385). In addition, the hearing record indicates that while the parent did not explicitly reference the student's 2010-11 IEP in her notice to the district rejecting the recommended program in April 2010, or in her responses to two subsequent June 2010 notices to the district, her 10-day notice specifically described the concerns she had with the type of program described in the IEP and the CSE did not attempt to reconvene to address the parent's concerns after she visited the assigned classroom (see Dist. Exs. 8-9; Parent Exs. R; S). Additionally, there is some evidence suggesting that both the parent and staff from RTFS staff expressed disagreement with the with the CSE recommendations during the March 2010 CSE meeting, and a district witness simply could not recall whether the parent objected to the IEP during the CSE meeting (Tr. pp. 146-47, 364). Finally, the fact that the parent did not execute an enrollment contract with RFTS until September 12, 2010, weighs heavily against a finding that the parent did not cooperate in the efforts to seek an appropriate public school placement for the student (Tr. pp. 379-81; Parent Exs. T-V; V3-V4; Y). Accordingly, I will not disturb the impartial hearing officer's conclusion with regard to equitable considerations.

## **Conclusion**

In this case, having found that the district's failure to recommend a BIP or otherwise adequately address the student's behaviors in the 2010-11 IEP constituted a denial of a FAPE for the 2010-11 school year, and further, that the parent sustained her burden to establish that RFTS

met the student's unique special education needs, and that equitable considerations do not weigh against the parent in this case, the parent is entitled to reimbursement for the costs of the student's tuition at RFTS for the 2010-11 school year, including the costs of the health paraprofessional.

**THE APPEAL IS SUSTAINED.**

**THE CROSS-APPEAL IS DISMISSED.**

**IT IS ORDERED** that the impartial hearing officer's decision, dated July 14, 2011, which determined that the district offered the student a FAPE for the 2010-11 school year is hereby annulled; and

**IT IS FURTHER ORDERED** that the impartial hearing officer's decision, dated July 14, 2011, which denied the parent's request for reimbursement for the costs of the student's tuition at RFTS and reimbursement for the costs of the health paraprofessional during the 2010-11 school year are hereby annulled; and

**IT IS FURTHER ORDERED** that the district is directed to reimburse the parent for the costs of the student's tuition at RFTS and reimburse the parent for the costs of the health paraprofessional for the 2010-11 school year, upon proper proof of payment.

**Dated: Albany, New York  
October 31, 2011**

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**JUSTYN P. BATES  
STATE REVIEW OFFICER**