



# The University of the State of New York

The State Education Department  
State Review Officer  
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No. 11-124

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

**Appearances:**

Michael Best, Special Assistant Corporation Counsel, attorneys for petitioner, John Tseng, Esq., of counsel

Partnership for Children's Rights, attorneys for respondent, Erin McCormack-Herbert, 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 respondent's (the parent's) son and ordered it to reimburse the parent for her son's tuition costs at the Rebecca School for the 2010-11 school year. The appeal must be sustained.

At the time of the impartial hearing, the student was attending the Rebecca School (Tr. pp. 173, 178, 310, 387; Dist. Ex. 1 at p. 2),<sup>1</sup> which has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7). The student's eligibility for special education and related services as a student with autism is not in dispute in this appeal (see 34 C.F.R. § 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

According to the hearing record, the student, who had been enrolled in State-approved private school placements throughout his educational career, received a diagnosis of autism at the

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<sup>1</sup> The hearing record contains duplicative exhibits. For purposes of this decision, only District exhibits were cited in instances where both District and Parent exhibits were identical. I remind the impartial hearing officer that it is her responsibility to exclude evidence that is irrelevant, immaterial, unreliable, or unduly repetitious (see 8 NYCRR 200.5[j][3][xii][c]). A prehearing conference is an effective tool, during which the impartial hearing officer has the authority to direct parties to coordinate their efforts to offer joint exhibits or to otherwise avoid duplicative submissions (see 8 NYCRR 200.5[j][3][xi]).

age of 3.8 years, at which time he began receiving speech-language services (Parent Ex. F at p. 2; see Tr. pp. 310-12, 373-74). He was determined eligible for special education and related services by the district's Committee on Preschool Education (CPSE) and the Committee on Special Education (CSE) as a student with autism, and received speech-language therapy services from ages 5 through 8, and speech-language therapy, occupational therapy (OT), physical therapy (PT), and counseling services between the ages of 8 and 12 (Parent Ex. F at p. 2; see Tr. pp. 310-12). The hearing record reflects that student had been enrolled at the Rebecca School since May 2007 (Tr. p. 173), and that he had received additional diagnoses of moderate mental retardation, a sensory integration disorder, and an attention deficit hyperactivity disorder (ADHD) (Tr. p. 312; Dist. Exs. 1 at p. 1; 7 at p. 3; Parent Exs. F at p. 1; G at pp. 1, 5; H at p. 2; I at p. 1). His adaptive behavior skills were assessed in the low range of functioning and he exhibited significant communication, fine motor, gross motor, and sensory processing deficits (Tr. pp. 174-78; Dist. Ex. 8; Parent Ex. I at p. 1).

## **Background**

On November 12, 2009, the district's school psychologist conducted a 30 minute classroom observation of the student at the Rebecca School (Dist. Ex. 9). The school psychologist noted that after receiving teacher redirection, the student was able to participate in a class discussion, transition to a "brain gym" activity group at a table in the classroom after several teacher prompts, and was "rocking his body back and forth" throughout the observation (id.).

On December 23, 2009, the parent obtained a comprehensive psychosocial evaluation conducted by a social worker to assess the student's current level of care and additional service needs (Parent Ex. F at p. 1; see Tr. p. 367). The evaluating social worker indicated that the student was receiving OT, PT, speech-language therapy, and counseling services at the Rebecca School, was functioning at a second grade level in reading and writing, was able to follow simple directions and verbally express his preferences, was able to perform activities of daily living with guidance and assistance, and expressed anger and frustration by pacing back and forth, hand flapping, and rocking, after which he could be calmed down through relaxation time and verbal redirection (Parent Ex. F at pp. 2-4; see Parent Ex. G at pp. 1, 5). Among the evaluating social worker's recommendations were an after school program and camp services to promote interaction with his peers (Parent Ex. F at p. 4).

On January 26, 2010, the parent obtained a comprehensive psychological evaluation of the student to assess his current level of adaptive functioning (Parent Ex. G at p. 1; see Tr. p. 367). The parent reported the student's history of communication delays, social delays, and behavioral rigidity, noting that her son "function[ed] best with structure and routine" (Parent Ex. G at pp. 1-2). The evaluating psychologist administered several standardized tests to the student, including the Stanford Binet Intelligence Scales – Fifth Edition (SB-5), which yielded a nonverbal IQ of 46, a verbal IQ of 43, and a full scale IQ of 42 (below the first percentile), all falling within the moderate mental retardation range, and the Wide Range Achievement Test – Fourth Edition (WRAT-4) reading subtest, which yielded a standard score of 66 (first percentile, first grade equivalent) (id. at pp. 2-3). Administration of the Vineland Adaptive Behavior Scales – Second Edition (Vineland), with the parent serving as informant, yielded scores in the low range across communication, daily living skills, and socialization domains and a low range adaptive behavior composite score of 58 (below first percentile) (id. at pp. 2-5).

In May 2010, the Rebecca School issued an interdisciplinary progress report summarizing the student's overall educational performance for the 2009-10 school year (Dist. Ex. 8).<sup>2</sup> The progress report indicated that the student was enrolled in an 8:1+3 class at the Rebecca School, with peers ranging in age from 13 to 15 years, and was receiving OT twice per week for 30 minutes per session in a 1:1 setting, PT twice per week for 30 minutes per session, once in a 1:1 setting and once in a "core strengthening and yoga group session," speech-language therapy three times per week for 30 minutes per session in a 1:1 setting, and music therapy twice per week for 30 minutes per session in a 1:1 setting (*id.* at pp. 1-5).<sup>3</sup>

With regard to the student's social/emotional functioning, the progress report reflected that the student was "able to remain regulated for longer periods of time when frustrated or needing sensory input such as hand squeezes, whereas in December [2009] he would demonstrate regulation across a small array of emotions" (Dist. Ex. 8 at p. 1). The progress report noted that the student's communication had become more verbal and spontaneous during the last several months, including an increased ability to verbally request sensory materials and breaks throughout the day, and that he showed an interest in his peers (*id.*). The progress report indicated that the student increased his initiation since December 2009, and "was able to remain in continuous back and forth interactions with adults ... with moderate adult support" (*id.*). The progress report also reflected expansions of the student's abilities to "pretend play" using puppets and Legos and to answer "wh" questions, but noted that the latter was dependent upon his regulation and access to sensory activities (*id.* at p. 2).

Academically, the progress report indicated that the student participated in reading two fairy tales since December 2009, participated in group "read alouds," demonstrated both an interest in reading and the ability to read books at a primary level and lyrics to familiar songs when he was in a quiet environment, and increased his word recognition from 70 words in December 2009 to 85 in May 2010; however, the progress report also noted that the student's reading was often disfluent, especially when presented with unfamiliar texts (Dist. Ex. 8 at pp. 2-3). In math, the progress report indicated that the student increased his ability to complete single and multi digit addition and subtraction problems, and began to apply this knowledge to word problems with maximum adult support; was able to use money in functional math activities, although he struggled with identification of the correct amount of change when purchasing an item in the community; was able to distinguish between big versus small and same versus different objects with moderate adult support, although he struggled with understanding measurement in real world applications, such as cooking; and was able to follow his daily schedule with increased independence, demonstrating an ability to pace his movements across environments with adults or peers during sensory play, although he struggled doing so across emotions with people during the school day (*id.* at p. 3). In social studies, the progress report indicated that the student exhibited increased self-awareness and awareness of his emotions, while in science, he demonstrated increased interest

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<sup>2</sup> The May 2010 Rebecca School interdisciplinary progress report indicated that it was "an update of progress based on [an] [i]nitial [i]nterdisciplinary [p]rogress [r]eport dated December 2009" (Dist. Ex. 8 at p. 1); however, the hearing record does not contain a copy of the December 2009 progress report.

<sup>3</sup> Although both the comprehensive psychosocial evaluation report and the comprehensive psychological evaluation reports indicated that the student was receiving counseling at the Rebecca School (*see* Parent Exs. F at pp. 2-4; G at p. 1), the May 2010 interdisciplinary progress report did not indicate that the student received school-based counseling services.

in participating in exploration activities using tactile sensory experiences and was able to sequence two to three steps with the aide of adult support and visual and gestural cues (id. at pp. 3-4).

With regard to related services, the progress report indicated that in OT, the student transitioned well in and out of sessions with minimal verbal and visual cueing, that he demonstrated improved ability to remain emotionally regulated, that he increased his ability to engage in two way purposeful interactions, that he increased his functional abilities and improved his self-coping strategies, that he reduced the frequency of attention seeking behavior, and overall, that he demonstrated more appropriate behaviors and was making better choices (Dist. Ex. 8 at p. 4). However, the progress report also indicated that the student continued to exhibit occasional non-compliance, continued to require increased time to process auditory information such as verbal instruction, and continued to require adult verbal and tactile cueing in order to request strong sensory input to his hands, shoulders, and head (id.). The progress report indicated that the Rebecca School's sensory diet, which incorporated vestibular,<sup>4</sup> visual, proprioceptive,<sup>5</sup> and tactile input, enabled the student to remain calmer and more alert (id.). In PT, the progress report indicated that the student enjoyed visits to the Rebecca School's sensory gym and "using the suspended swing equipment, therapy balls, and trampoline" in particular (id. at p. 5). With regard to speech-language therapy, the progress report reflected that the student experienced difficulties using expressive language to express ideas and feelings, relying upon gestures and affective cues to communicate his intentions, and interpreting and expressing spoken language (id.). With regard to music therapy, which was characterized in the progress report as a "mental health service," the progress report indicated that after 15-20 minutes of music playing, the student's spontaneous language typically emerged (id.).

On May 17, 2010, the CSE convened for the student's annual review to develop his individualized education program (IEP) for the 2010-11 school year (Dist. Ex. 7 at pp. 1-2; see Dist. Ex. 6). Attendees included a special education teacher, who also served as district representative, the school psychologist, the parent, and an additional parent member; the student's special education teacher from the Rebecca School participated telephonically (Tr. pp. 70-71; Dist. Exs. 6; 7 at p. 2). According to the hearing record, the May 2010 CSE considered the November 2, 2009 classroom observation report and the Rebecca School interdisciplinary progress reports from December 2009 and May 2010 in developing the student's IEP (Tr. p. 71; see Dist. Ex. 8).

The May 2010 CSE continued the student's classification as a student with autism, and recommended a 12-month special education program consisting of a 6:1+1 special class in a specialized school with related services consisting of speech-language therapy, twice per week for 45 minutes per session in a 1:1 setting and twice per week for 45 minutes per session in a 2:1 setting; counseling services, once per week for 45 minutes per session in a 1:1 setting and once per week for 45 minutes per session in a 2:1 setting; OT, four times per week for 45 minutes per session in a 1:1 setting; and PT, twice per week for 45 minutes per session in a 1:1 setting (Dist. Exs. 6; 7 at pp. 1, 15, 17). The CSE further recommended a 1:1 paraprofessional for three months to assist the student in his transition to a public school placement; program modifications

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<sup>4</sup> "Vestibular" input is defined in the hearing record as "... what we get through our vision and our middle ear. It's the synchrony of this input [that] gives us an idea of where we are in relation to gravity ..." (Tr. p. 250).

<sup>5</sup> "Proprioceptive" input is defined in the hearing record as "... the information that we receive through our joints, our muscles [and] our ligaments to give us an idea of where our body is in space in relation to other people" (Tr. p. 251).

consisting of redirection, sensory cues and prompts, use of manipulatives/puppets, teacher use "high affect," adaptive seating, access to sensory materials, heavy work activities, use of a weighted vest and ankle weights, and deep pressure; and a transition plan (Dist. Exs. 6; 7 at pp. 1-5, 15, 18-19). The student's IEP also contained annual goals and short term objectives addressing the areas of reading, math, writing, gross motor, motor planning, speech, social, play, sensory integration, and his transition to a new school environment (Dist. Ex. 7 at pp. 6-14).

The hearing record reflects that the May 2010 CSE considered recommending either a 12:1+1 special class or an 8:1+1 special class in a specialized school, but ultimately rejected these alternatives as "insufficiently supportive," noting that the student "need[ed] a smaller student to teacher ratio in order to achieve his IEP goals" (Dist. Ex. 7 at p. 16; see Tr. pp. 87-88). The district also considered a 6:1+1 special class in a specialized school without the services of a three-month transitional paraprofessional, but ultimately rejected this alternative as well, noting that the student "would benefit from individualized support to facilitate the transition between school environments" (Dist. Ex. 7 at p. 16). The May 2010 IEP also indicated "any program that does not provide services for 12 months is rejected and deemed insufficiently supportive" (id.).

On May 28, 2010, the parent signed an enrollment contract with the Rebecca School and paid a nonrefundable deposit for the 2010-11 school year (Parent Exs. D; M;<sup>6</sup> N). In a notice dated June 15, 2010, the district summarized the recommendations made by the May 2010 CSE and informed the parent of the particular school to which the district assigned the student (Dist. Ex. 10). Also in June 2010, the hearing record reflects that the parent visited the assigned school, including two classes utilizing the Treatment and Education of Autistic and other Communication Handicapped Children (TEACCH) methodology that was used in the assigned class (Tr. pp. 327-29, 331-32, 353-56, 376; Dist. Ex. 1 at p. 2; see Tr. p. 115).

In a written response to the district dated July 2, 2010, the parent expressed her concerns with the district's assigned school and assigned 6:1+1 special class, asserting that the TEACCH methodology was not appropriate for the student, that the assigned school lacked a sensory diet and sensory equipment, that the assigned 6:1+1 special class offered the student insufficient individual attention, and that the assigned school was unable to fulfill the levels of related services in OT, PT, speech-language therapy, and counseling as recommended in the May 2010 IEP (Parent Ex. P at p. 2).

In a letter to the district dated July 13, 2010, the parent forwarded documentation to the district supporting her request for specialized transportation for the student for the 2010-11 school year (Parent Ex. R at pp. 3, 6). On July 16, 2010, the parent waived a further CSE meeting and allowed the district to amend the May 2010 IEP to include provision of specialized transportation to the student for the 2010-11 school year, in the form of limited travel time in an air conditioned bus (Parent Ex. S).

The parent rejected the May 2010 IEP and the assigned school in a letter to the district dated August 23, 2010 which reiterated the same grounds previously set forth in her letter of July 2, 2010, and informed the district of her intention to reenroll her son at the Rebecca School for the

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<sup>6</sup> This exhibit in the hearing record contains a typographical error indicating that the parent paid the nonrefundable deposit to the Rebecca School on "6/21/20" (compare Parent Ex. M, with Parent Ex. N).

2010-11 school year and to seek reimbursement at public expense (compare Parent Ex. P at p. 2, with Parent Ex. Q at p. 1).

### **Due Process Complaint Notice**

By due process complaint notice dated March 4, 2011, the parent alleged, among other things, that the district failed to offer the student a free appropriate public education (FAPE) for the 2010-11 school year (Dist. Ex. 1 at pp. 2-3). The parent contended that the May 2010 IEP was inappropriate because the recommended 6:1+1 special class would not have provided adequate individualized support to the student, because the three month limitation on the services of a 1:1 paraprofessional to assist with the student's transition to public school was inadequate to meet the student's needs, and because the IEP failed to adequately address the student's transition needs, as exemplified by the district's failure to conduct transitional assessments or a functional vocational assessment prior to developing the transition plan included in the May 2010 IEP (id. at p. 3).<sup>7</sup> The parent also argued that the educational program recommended by the district in the May 2010 IEP was substantially similar to the program it offered the student for the 2009-10 school year, which had been found to be inappropriate for the student in a prior impartial hearing officer decision dated November 19, 2010 that the district did not appeal (id. at pp. 2-3; compare Dist. Ex. 7 at pp. 1-5, 15, 17-19, with Parent Ex. C at pp. 2, 11-13). The parent also alleged that the particular school to which the district assigned the student was inappropriate because it lacked the specialized program, physical space, and sensory equipment necessary to address the student's sensory integration needs, because it presented an environment that would have led to the student's sensory dysregulation, and because it lacked the staff necessary to meet the May 2010 IEP mandates for OT and PT services (Dist. Ex. 1 at p. 3). The parent also maintained that the TEACCH methodology utilized in the assigned 6:1+1 special class was inappropriate for the student. The parent also asserted that the Rebecca School was an appropriate placement for the student for the 2010-11 school year (id.).

The parent sought an order from an impartial hearing officer determining that the Rebecca School constituted the student's pendency placement pursuant to the unappealed November 19, 2010 impartial hearing officer decision, that the district failed to offer the student a FAPE for the 2010-11 school year, that the Rebecca School was an appropriate placement for the student for the 2010-11 school year, and that equitable considerations favored the parent (Dist. Ex. 1 at p. 4). The parent also requested that the impartial hearing officer order the district to reimburse her for the nonrefundable tuition deposit she advanced to the Rebecca School and to provide direct funding for the balance of her son's tuition at the school for the 2010-11 school year (id.).

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<sup>7</sup> The Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) does not specifically set forth the provisions requiring a school district to formulate a "transition plan" as part of a student's individualized education program (IEP). Under the IDEA, to the extent appropriate for each individual student, an IEP must focus on providing instruction and experiences that enables the student to prepare for later post-school activities, including postsecondary education, employment, and independent living (20 U.S.C. § 1401[34]; see Educ. Law § 4401[9]; 34 C.F.R. § 300.43; 8 NYCRR 200.1[fff]). Accordingly, pursuant to federal law and State regulations, an IEP for a student who is at least 16 years of age (15 under State regulations) must include appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, if appropriate, independent living skills (20 U.S.C. § 1414[d][1][A][viii]; 34 C.F.R. § 300.320[b]; 8 NYCRR 200.4[d][2][ix]). It must also include the transition services needed to assist the student in reaching those goals (id.).

On March 10, 2011, the district responded to the parent's due process complaint notice (Dist. Ex. 2).

### **Impartial Hearing Officer Decision**

An impartial hearing convened on April 28, 2010 and concluded on July 21, 2011, after four days of proceedings.<sup>8</sup> On April 29, 2011, the impartial hearing officer issued an interim order on pendency, determining that the Rebecca School constituted the student's pendency placement for the duration of the instant appeal pursuant to the unappealed impartial hearing officer decision dated November 19, 2010 (IHO Interim Order at p. 2).

On August 23, 2011, the impartial hearing officer issued a decision, determining, among other things, that the lack of a vocational assessment and "a fuller exploration of post-school transition goals" on the May 2010 IEP, by themselves, did not deny the student a FAPE; that the district nevertheless failed to offer the student a FAPE for the 2010-11 school year on other grounds; that the parent met her burden of proving that the Rebecca School was an appropriate placement for the student for the 2010-11 school year; and that equitable considerations supported the parent (IHO Decision at pp. 10-13). Specifically, the impartial hearing officer found that (1) although the May 2010 IEP noted the student's "sensory needs are significant," the CSE did not adequately address the student's sensory needs; (2) the district failed to prove that the 6:1+1 student-teacher ratio in the recommended special class would have adequately addressed the student's management needs; (3) the hearing record lacked sufficient evidence establishing that the May 2010 IEP could have been amended to extend the recommended 1:1 paraprofessional services beyond the three month period prescribed in the IEP;<sup>9</sup> (4) although the student was appropriately grouped in the assigned 6:1+1 special class with other students of similar ages and having similar functional levels, the hearing record was insufficient to establish that the resources at the assigned school could have met the student's sensory integration needs; and (5) the TEACCH methodology utilized in the assigned 6:1+1 special class was not sufficiently individualized to meet the student's needs (*id.* at pp. 11-12). The impartial hearing officer ordered the district to reimburse the parent for her nonrefundable tuition deposit paid to the Rebecca School and pay the Rebecca School the outstanding balance of the student's tuition for the 2010-11 school year (*id.* at p. 14).

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

The district appeals from the impartial hearing officer's decision, arguing, among other things, that the impartial hearing officer's finding that it failed to offer the student a FAPE for the

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<sup>8</sup> I note that while the parties may not complain or may even agree that an extension of time is warranted, such agreements provide no basis for granting an extension and the impartial hearing officer has an independent obligation to comply with the timelines set forth in the federal and State regulations (*see* 34 C.F.R. § 300.515[a]; 8 NYCRR 200.5[j][3][iii], [5]) and regulatory provisions dictating that extensions of the 45-day timeline may only be granted consistent with regulatory constraints and that she must ensure the hearing record includes documentation setting forth the reason for each extension (8 NYCRR200.5[j][5]). A "joint request" by the parties merely constitutes an agreement, and such agreements are expressly prohibited as a basis for granting an extension (8 NYCRR 200.5[j][5][iii]). I caution the impartial hearing officer to comply with State regulations by including written documentation in the hearing record that shows how impartial hearing officer considered of the factors for granting each extension beyond the 45-day timeline.

<sup>9</sup> The impartial hearing officer declined to consider whether the district's recommended program would have been appropriate for the student had the district offered him a full-time paraprofessional for the entire school year (IHO Decision at p. 11).

2010-11 school year was erroneous. Specifically, the district maintains that the hearing record demonstrated that the May 2010 IEP could have been amended to extend the 1:1 paraprofessional services to meet the student's needs. The district also asserts that the impartial hearing officer's finding that the assigned school did not have sufficient sensory equipment to address the student's sensory needs was speculative, insofar as the student never attended the assigned school. The district also contends that the impartial hearing officer's determination that the TEACCH methodology utilized in the assigned 6:1+1 special class was inappropriate for the student was erroneous. Specifically, the district asserts that the student's abilities and needs would have been assessed at the start of the 2010-11 school year and that any changes requiring modification of the student's program would have been identified, and that the hearing record demonstrated that the TEACCH methodology was appropriate for the student because it promoted greater student independence in the classroom.

The district also alleges that the impartial hearing officer erred because the Rebecca School was not an appropriate placement for the student for the 2010-11 school year. Specifically, the district alleges that the Rebecca School's 10-month program was insufficient to meet the student's unique special education needs, which the district maintained could only be addressed through a 12-month program, that the Rebecca School failed to provide related services at levels comparable to those recommended in the May 2010 IEP, and that it failed to provide the student with summer services or counseling services altogether. Lastly, the district maintains that equitable considerations did not favor the parent's claim because she never intended to place the student in public school. The district requests that the impartial hearing officer's decision be vacated, or, alternatively, in the event of an adverse finding, that any award of tuition funding be reduced, because, it alleges, the terms of the enrollment contract reduced the amount of tuition that she was legally obligated to pay.

The parent answers, countering, among other things, that the impartial hearing officer correctly found that the district failed to offer the student a FAPE for the 2010-11 school year. Specifically, the parent asserts that the hearing record was insufficient to support the district's argument that the 1:1 paraprofessional services could have been extended beyond the three month period specified in the May 2010 IEP, that the district's assigned school would not have adequately addressed the student's sensory deficits, and that the TEACCH methodology utilized in the assigned 6:1+1 special class required independence beyond the student's capability. The parent also argues that the impartial hearing officer correctly found that the Rebecca School was an appropriate placement for the student for the 2010-11 school year, and that equitable considerations supported her claims. The parent contends that the impartial hearing officer's decision should be upheld, and argues against any reduction in the award of tuition funding.

### **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, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 C.F.R. § 300.148).

The 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**

### **Scope of Review**

I note that the parent did not cross-appeal the impartial hearing officer's determinations that the district's failures to conduct both a vocational assessment and "a fuller exploration of post-school transition goals"<sup>10</sup> did not invalidate the May 2010 IEP or deny the student a FAPE for the 2010-11 school year, and that the student was appropriately grouped in the district's assigned 6:1+1 special class. An impartial hearing officer's decision is final and binding upon the parties unless appealed to a State Review Officer (34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[j][5][v]). Accordingly, I will not address these matters further.

### **May 2010 IEP**

#### **Recommended 6:1+1 Special Class Placement**

I begin with the parties' dispute regarding the appropriateness of the recommended 6:1+1 special class placement. The impartial hearing officer found that the district failed to prove

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<sup>10</sup> Assuming for the sake of argument that the parent had cross-appealed this determination, I note that the May 2010 IEP described the student's diploma objective, future community integration, post-secondary placement, independent living, and employment (Dist. Ex. 7 at p. 19). Thus, I find that the transition plan included in the May 2010 IEP provided sufficient detail to the extent that it did not result in a denial of a FAPE to the student (see D.B. v. New York City Dep't of Educ., 2011 WL 4916435, at \*9 [S.D.N.Y. Oct. 12, 2011]; Antonaccio v. Bd. of Educ., 281 F. Supp. 2d 710, 720 [S.D.N.Y. 2003]; K.C. v. Mansfield Independent Sch. Dist., 618 F. Supp. 2d 568, 582 [N.D.Tex. 2009]). For the benefit of the student's next annual review, I encourage the parties to examine a recently issued guidance document from the Office of Special Education regarding transition services and the development of transition plans ("Transition Planning and Services for Students with Disabilities" November 2011, located at <http://www.p12.nysed.gov/specialed/publications/transitionplanning-nov11.pdf>).

that the 6:1+1 student-teacher ratio adequately addressed the student's management needs (IHO Decision at p. 11).

The hearing record indicates that the May 2010 CSE discussed the student's deficits, academic, social/emotional, and health management needs, present levels of performance, annual goals, educational program, and related services, with input from the student's teacher from the Rebecca School and meaningful participation by the parent (see Tr. pp. 76-88, 90-91, 319-24; Dist. Exs. 6; 7 at pp. 3-5, 16). According to the May 2010 interdisciplinary progress report, which was prepared by the Rebecca School and reviewed by the May 2010 CSE, the student had reportedly improved his ability to remain regulated for longer periods of time when frustrated or needing sensory input (Tr. p. 71; Dist. Ex. 8 at p. 1). The progress report also indicated that the student's communication skills had improved to the extent that he was becoming "more verbal" and at times, "spontaneous," that he demonstrated an increased ability to verbally request sensory materials and breaks throughout the day from a variety of adults and peers, that he benefited from "hand squeezes" and other forms of tactile and proprioceptive input, and that the student generally completed academic tasks at a first to second grade level with varying degrees of adult support, depending on the nature of the activity (Dist. Ex. 8 at pp. 1-4; see Tr. p. 391). The November 2, 2009 classroom observation report, also reviewed by the May 2010 CSE, indicated that within his classroom of five students and three adults at the Rebecca School, the student demonstrated the abilities to answer questions posed by personnel, ask a peer a question, accept redirection and prompts related to activities, and to determine which activities were on the classroom schedule for the day (Tr. p. 71; Dist. Ex. 9).

According to the school psychologist, who conducted the classroom observation of the student and participated at the May 2010 CSE meeting, the CSE actively discussed the student's sensory needs during the meeting, particularly the student's sensory integration disorder, which, among other difficulties, affected his academic functioning (Tr. pp. 69-70, 76-78). The school psychologist acknowledged that the student's need for sensory input in order to remain regulated throughout the school day was the "most significant" aspect of the student's social/emotional performance (Tr. pp. 77-78).

The student's May 2010 IEP noted that the student had received a diagnosis of a sensory integration disorder, and that he required significant sensory input throughout the day to remain regulated (Dist. Ex. 7 at pp. 4-5). The IEP further indicated that the student benefited from receiving sensory input prior to academic activities, and, to address the student's sensory needs, the May 2010 IEP recommended that the student's classroom teacher use "high affect," described in the hearing record as "exaggerated tones of voice, to keep him engaged and interested, as well as potential modifications to his chair, again to keep him engaged, and attentive," redirection, sensory cues and prompts, manipulatives/puppets, and adaptive seating (Tr. p. 77; Dist. Ex. 7 at p. 3). The CSE also recommended that the student be given access to sensory materials and heavy work activities, and use ankle weights and a weighted vest, and noted that he also benefited from the application of deep pressure (Dist. Exs. 7 at p. 4; 8). Based upon the impartial hearing testimony of the school psychologist and the resultant IEP, the hearing record supports a finding that the May 2010 CSE acknowledged the significance of the student's sensory needs and their affect upon his classroom functioning, provided interventions to address those needs, and, as further discussed below, recommended a placement that provided the student with appropriate support.

State regulations mandate that "[t]he maximum class size for special classes containing students whose management needs are determined to be highly intensive, and requiring a high degree of individualized attention and intervention, shall not exceed six students, with one or more supplementary school personnel assigned to each class during periods of instruction" (8 NYCRR 200.6 [h][4][ii][a]). The hearing record establishes that during the 2009-10 school year, the student's class at the Rebecca School was composed of eight students, one head teacher, and three teacher assistants (Tr. pp. 387-88; Dist. Ex. 8 at p. 1). The hearing record further reflects that the May 2010 CSE considered placement of the student in 12:1+1 and 8:1+1 special class settings, but ultimately determined that those class ratios were "too large" for the student (Tr. pp. 87-88; Dist. Ex. 7 at p. 16). The school psychologist testified that the CSE recommended a 6:1+1 special class because the placement tended to be language based and offered "a lot of support" due to the "3:1" ratio of students to adults (Tr. p. 72). In addition to the 6:1+1 special class, the May 2010 CSE recommended weekly related services consisting of two individual and two group speech-language therapy sessions, one individual and one group counseling session, four individual OT sessions, and two individual PT sessions, with all sessions lasting 45 minutes and no group sizes exceeding three students (Dist. Ex. 7 at p. 17). The school psychologist testified that she believed the 6:1+1 special class placement was appropriate for the student due to his "significant" difficulties and his need for "a lot" of support throughout the school day, adding that "a very small classroom, as the one [the CSE] recommended, with the amount of related services to support him in that classroom, [could] promote progress" (Tr. pp. 75-76).

In consideration of the foregoing, I do not find support in the hearing record for the impartial hearing officer's determination that the district's recommendation of a 6:1+1 special class was inadequate to address the student's management needs. However, I do find that the hearing record supports a finding that the May 2010 CSE recognized the student's "highly intensive management needs," such that he required "a high degree of individualized attention and intervention" as contemplated by the State regulations governing recommendations for 6:1+1 special class placements (see 8 NYCRR 200.6 [h][4][ii][a]).

### **1:1 Paraprofessional**

The parent argues that the three month limitation on the services of a 1:1 paraprofessional to assist with the student's transition to public school was inadequate to meet the student's needs, and that contrary to the representation of the district, the hearing record lacked sufficient evidence indicating that the 1:1 paraprofessional services could have been extended. The hearing record reflects that the CSE's recommendation for the three month 1:1 paraprofessional to assist with the student's transition to the public school setting was based upon the concerns of the student's teacher from the Rebecca School, who opined that a 6:1+1 special class would be "too large" for the student (Tr. p. 88; Dist. Ex. 6). The May 2010 IEP noted that the CSE considered recommending a 6:1+1 special class placement without 1:1 paraprofessional services, but ultimately rejected this option, concluding that it was "insufficiently supportive" and that "[the student] would benefit from individualized support to facilitate the transition between school environments" (Dist. Ex. 7 at p. 16). However, during the impartial hearing, the program director of the Rebecca School (director) testified that the student was neither receiving 1:1 paraprofessional services at the Rebecca School, nor did he require them, because school staff were able to meet his needs with the 8:1+3 classroom staffing ratio (Tr. pp. 183-84).

Furthermore, even if the hearing record established that the student required 1:1 paraprofessional services in order to receive educational benefits, the school psychologist testified

during the impartial hearing that the CSE recommended a 1:1 paraprofessional "for three months, with the understanding that at that point, the IEP would be – the need would be reassessed and re-evaluated. If [the student] still needed the para[professional], ... then they can continue it if it was warranted," adding "we didn't know if it would be warranted," and acknowledging that when the CSE discussed the issue, "[t]here was the potential for him needing [the 1:1 paraprofessional] longer, but we didn't know.... [a]nd if theoretically it was all initiated, they could best determine if it was warranted for longer and make changes to the IEP.... Three months was a minimum" (Tr. pp. 73-74, 102-03). I further note that the May 2010 IEP provided that the student's progress toward his transitional goal with the support of the 1:1 paraprofessional would be reported four times during the school year, during which an extension of such services, if necessary, could have been discussed by the CSE (Dist. Ex. 7 at p. 13). Based upon the foregoing, I do not find support in the hearing record for the parent's arguments that the student required 1:1 paraprofessional services extended beyond three months in order to receive educational benefits from the district's recommended program, or, that if the student was found to need such services, that the district would have been unable or unwilling to modify his IEP.

In summary, I conclude that the evidence contained in the hearing record established that the district's recommended educational program as embodied in the May 2010 IEP, consisting of a 6:1+1 special class in a special school and related services, was, at the time of its development, reasonably calculated to enable the student to receive educational benefits in the LRE for the 2010-11 school year.

### **Assigned School**

The parent argues that the district denied the student a FAPE for the 2010-11 school year because the district's assigned school lacked the specialized program, physical space, and equipment necessary to address the student's sensory needs, and because the TEACCH methodology utilized in the assigned 6:1+1 special class was inappropriate for the student insofar as it required independence beyond the student's capability.

The IDEA and State regulations provide parents with the opportunity to offer input in the development of a student's IEP, but they do not permit parents to direct, through veto, a district's efforts to implement each student's IEP (see T.Y., 584 F.3d at 420). A delay in implementing an otherwise appropriate IEP may form a basis for finding a denial of a FAPE only where the student is actually being educated under the plan, or would be, but for the delay in implementation (see E.H., 2008 WL 3930028, at \*11, aff'd 2009 WL 3326627 [2d Cir. Oct. 16, 2009]). If it becomes clear that the student will not be educated under the proposed IEP, there can be no denial of a FAPE due to the failure to implement it (id.; see also Grim, 346 F.3d at 381-82 [holding that the district was not liable for a denial of a FAPE where the challenged IEP was determined appropriate, but the parents chose not to avail themselves of the public school program]). The sufficiency of the district's offered program is to be determined on the basis of the IEP itself (see R.E. v. New York City Dep't of Educ., 785 F. Supp. 2d 28, 42 [S.D.N.Y. 2011], but see C.F. v. New York City Dep't of Educ., 2011 WL 5130101, at \*8 [S.D.N.Y. Oct. 28, 2011]). Furthermore, I note that the hearing record in its entirety does not support the conclusion that had the student attended the assigned school, the district would have deviated from substantial or significant provisions of the student's IEP in a material way and thereby precluded the student from the opportunity to receive educational benefits (Rowley, 458 U.S. at 206-07; A.P. v. Woodstock Bd. of Educ., 2010 WL 1049297 [2d Cir. March 23, 2010]; Cerra, 427 F.3d at 192; see Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811 [9th Cir. 2007]; Houston Independent Sch. Dist. v. Bobby R., 200 F.3d 341 at 349

[5th Cir. 2000]; see also D.D.-S. v. Southold U.F.S.D., 2011 WL 3919040, at \*13 [E.D.N.Y. Sept. 2, 2011]; A.L. v. Dep't of Educ., 2011 WL 4001074, at \*9 [S.D.N.Y. Aug. 19, 2011]; Catalan v. Dist. of Columbia, 478 F. Supp. 2d 73 [D.D.C. 2007]).

In this case, a meaningful analysis of the parent's claims with regard to implementation of the recommended 6:1+1 special class at the assigned school would require me to determine what might have happened had the district been required to implement the student's May 2010 IEP, which is in part speculative because in August 2010 it became clear that the parent would not accept the placement recommended by the district in the May 2010 IEP and that she intended to enroll the student at the Rebecca School. Even assuming for the sake of argument that the student had attended the district's recommended program, the evidence in the hearing record nevertheless does not support the conclusion that the district would have deviated from the IEP in a material way in the 6:1+1 special class and related services at the assigned school and thereby deny the student a FAPE.

### **Sensory Needs**

The impartial hearing officer found that the school to which the district assigned the student was inappropriate because the hearing record lacked "proof that the resources available at the [assigned] school would meet the student's significant sensory needs" (IHO Decision at p. 12). According to the testimony of the OT supervisor from the Rebecca School, the student exhibited the need for vestibular and proprioceptive input in order to remain regulated; without such input, she explained, the student would begin seeking input in his own non-therapeutic ways, such as speaking in a loud voice, putting pressure on his eyes, rocking back and forth, and pacing in the classroom (Tr. pp. 242-43, 250-52; see Dist. Exs. 8 at p. 4; 9; Parent Ex. J).

The student's OT assistant at the Rebecca School during the 2010-11 school year testified during the impartial hearing that her three weekly therapy sessions with the student focused, in part, on improving the student's sensory regulation, which the hearing record reflects was addressed by his wearing a weighted vest intermittently during the school day, and his wearing ankle weights throughout the school day (Tr. pp. 276, 281, 283-85, 292-93, 402; see Parent Ex. K at p. 5). She testified that some of the sensory strategies used with the student to provide both proprioceptive and vestibular input included walking up and down stairs, bouncing on a therapy ball, tossing a weighted ball, using a scooter board, requesting hand squeezes or body hugs, and manipulating "thera-putty" or a "stress" ball in his hands while participating in classroom tasks (Tr. pp. 286-87, 301-02; see Tr. p. 402). She reported that in the school's sensory gym, the student used swings to provide vestibular input, and that in addition to the scheduled OT sessions, the student used the sensory gym approximately once per week (Tr. pp. 287, 291-92; see Tr. p. 403; Dist. Ex. 8 at p. 5; Parent Ex. K at p. 5).

The special education teacher of the assigned class testified during the impartial hearing that her classroom provided a "chill out area," which she described as a sensory area "where students can go if they need to relax or need a calming sensory activity," and that in this area, students could use mats and a beanbag chair, noting that additional sensory items had been added to the area since summer 2010; the hearing record reflects that among the sensory equipment available at the assigned school were "polar" vests, therapy balls, mats, and tables, but no suspended equipment or swings (Tr. pp. 115, 118, 122). The hearing record reflects that the sensory equipment available to students at the assigned school, which included a "polar" (weighted) vest, therapy balls, ramp-shaped mats, and tables, was similar to the sensory equipment

available to the student at the Rebecca School (compare Tr. pp. 115, 118, 122, 162, 271-73, with Tr. pp. 401-02), except that the assigned school did not have suspended sensory equipment or swings (compare Tr. pp. 268, 272-73, with Tr. p. 287, and Dist. Ex. 8 at p. 5). However, during the impartial hearing, although the OT supervisor from the Rebecca School opined that suspended equipment was the most effective therapy to address the student's need for vestibular input, she also acknowledged that it was not the only type of sensory equipment capable of addressing the student's need (Tr. pp. 268-69, 274). Furthermore, although a swing was used with the student at the Rebecca School, the district was not required to furnish "every special service necessary to maximize each handicapped child's potential," provide the optimal level of services, or even a provide level of services that would confer additional benefits (A.H., 2010 WL 3242234 at \*3 [2d Cir. Aug. 16, 2010]; Cerra, 427 F.3d at 195; D.B. v. New York City Dep't. of Educ., 2011 WL 4916435, at \*12 [S.D.N.Y. Oct. 12, 2011] [although IEP did not provide student with all of the services her parents would have liked and which were available to the student at a private school, the IEP did provide the student with a FAPE in the LRE]; see Carlisle Area Sch. v. Scott P., 62 F.3d 520, 534 [3d Cir. 1995]). I also note that the special education teacher of the assigned 6:1+1 special class testified during the impartial hearing that the occupational therapist at the assigned school instructed teachers on how to implement items in the sensory area in order to meet the students' sensory needs, advised that she collaborated with the occupational therapist in reviewing IEPs to determine which sensory materials would benefit a particular student, and indicated that if the assigned school lacked a particular item of sensory equipment that was recommended on an IEP, the occupational therapist would order it (Tr. pp. 122-23, 130-31).<sup>11</sup> She further explained how she would have implemented the sensory cues and prompts recommended in the student's May 2010 IEP in the assigned classroom (Tr. pp. 126-28; see Dist. Ex. 7 at p. 3).

In summary, I do not find support in the hearing record for the impartial hearing officer's finding that the assigned school lacked the requisite resources to address the student's sensory needs. Although I can fully appreciate that the parent may have preferred a school with sensory equipment more similar to the sensory equipment available at the Rebecca School, I find that the hearing record does not support a finding that had the student attended the assigned school, the district was obligated to provide the same equipment that the private school provided or that the district was incapable of addressing the student's sensory needs sufficiently to enable him to receive educational benefits.

### **Assigned Class – TEACCH Methodology**

Turning to the parties' dispute regarding the appropriateness of the TEACCH methodology to address the student's educational needs, I note that although not specified in the student's May 2010 IEP, the hearing record reflects that the assigned school employed the TEACCH methodology in all of its 6:1+1 special classes (see Tr. p. 160). Generally, a CSE is not required to specify methodology on an IEP, and the precise teaching methodology to be used by a student's teacher is usually a matter to be left to the teacher (Rowley, 458 U.S. at 204; M.M. v. Sch. Bd. of Miami-Dade County, 437 F.3d 1085, 1102 [11th Cir. 2006]; Lachman v. Illinois State Bd. of Educ., 852 F.2d 290, 297 [7th Cir. 1988]; A.S. v New York City Dep't of Educ., 10-cv-00009

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<sup>11</sup> The testimony demonstrates how the IEP continues the "centerpiece" of educational delivery system under the IDEA (Murphy v. Arlington Cent. Sch. Dist. Bd. of Ed., 297 F.3d 195, 197 [2d Cir. 2002]). If a student requires that instruction or services be delivered in a particular manner or a special piece of equipment—without which a FAPE cannot be offered to a particular student—it is critical that such matters be addressed at the CSE meeting and included on the student's IEP.

[E.D.N.Y. May 26, 2011] [noting the "broad methodological latitude" conferred by the IDEA]; Application of a Student with a Disability, Appeal No. 11-089; Application of the Bd. of Educ., Appeal No. 11-058; Application of the Bd. of Educ., Appeal No. 11-007; Application of a Student with a Disability, Appeal No. 10-056; Application of a Student with a Disability, Appeal No. 09-092; Application of the Dep't of Educ., Appeal No. 08-075; Application of a Child with a Disability, Appeal No. 07-065; Application of a Child with a Disability, Appeal No. 07-054; Application of a Child with a Disability, Appeal No. 07-052; Application of a Child with a Disability, Appeal No. 06-022; Application of a Child with a Disability, Appeal No. 05-053; Application of a Child with a Disability, Appeal No. 94-26; Application of a Child with a Disability, Appeal No. 93-46).

The parent initially contends that the TEACCH methodology had previously been found to be inappropriate for the student in an earlier impartial hearing officer decision dated November 19, 2010 which addressed the student's 2009-10 school year, and that this decision was not appealed by the district (see Parent Ex. C at p. 12). There are a variety of reasons why a party may decide not to appeal and, in general, such a decision is not construed as an admission with respect to a separate claim for a different school year (see generally Dalrymple v. United Servs. Auto. Ass'n, 40 Cal.App.4th 497, 523 [Cal. Ct. App. 1995] [holding that a party's decision not to appeal was not an admission of any lack of merit of its previous position]; Florence v. Gabinski, 1985 WL 2503 [N.D.Ill. Sept. 11, 1985] [holding that a party's decision not to appeal may be made for a variety of reasons and that such a decision is not an admission]; see also Mrs. C. v. Voluntown Bd. of Educ., 226 F.3d 60, 67 [2d Cir. 2000] [examining the prongs of the Burlington/Carter test separately for each school year at issue]; Snyder v. Montgomery County Pub. Schs., 2009 WL 3246579, at \*9-\*10 [D.Md. Sept. 29, 2009]; Omidian v. Bd. of Educ., 2009 WL 904077 at \*21-\*26 [N.D.N.Y. Mar. 31 2009] [analyzing each year of a multi-year tuition reimbursement claim separately]; Student X v. New York City Dep't of Educ., 2008 WL 4890440, at \*16 [E.D.N.Y. Oct. 30, 2008]; Application of the Dep't of Educ., Appeal No. 11-085; Application of the Bd. of Educ., Appeal No. 11-071; Application of a Student with a Disability, Appeal No. 11-068; Application of the Bd. of Educ., Appeal No. 09-055).

In this case, I find that it was not reasonable to construe the district's decision not to appeal the November 19, 2010 impartial hearing officer decision as an admission that the TEACCH methodology, or, for that matter, any other component of its recommended educational program for the student's for the 2009-10 school year, was inappropriate for the student's 2010-11 school year, particularly when the November 19, 2010 decision involved the analysis of the parent's claim for a different school year (Parent Ex. C at pp. 3, 13-14). Furthermore, while the district's election not to appeal the November 19, 2010 decision rendered that decision final and binding on the parties relative to the student's 2009-10 school year, the prior decision is not final and binding on a State Review Officer's consideration of the merits of this case, which relates to the 2010-11 school year.

During the impartial hearing, the special education teacher of the assigned 6:1+1 special class described the TEACCH methodology as a method of "classroom set-up" in which her classroom included one work station per student, a large table for group instruction, an area for 1:1 instruction, and a sensory area (Tr. p. 115). She explained that each student had an individual daily schedule, reflected in either words or symbols and based upon the student's skill level, that was used throughout the day to indicate to the student the next activity, and that these schedules were individualized based upon factors such as a student's needs for breaks or individual attention, and were posted in the assigned classroom along with other visual materials, such as "word walls"

and bulletin boards (Tr. pp. 116-19). She advised that during a typical 50-minute classroom lesson, students received group instruction, then proceeded to a 10 minute 1:1 instructional session or individual work station to practice working on tasks independently (Tr. pp. 119-20). After 10 minutes, depending on their needs, students rotated through 1:1 instruction, work stations, or took a break, depending on their individual schedules (Tr. pp. 120-21). She explained that the remainder of the 50-minute lesson was devoted to group instruction, during which the class assembled to discuss what they learned during the lesson (Tr. p. 121). She also advised that the students in the assigned class at the start of the 2010-11 school year functioned at academic levels similar to the student (Tr. p. 130).

During the impartial hearing, the parent testified that the student "needs breaks, he needs to constantly be redirected and regulated" (Tr. p. 357). The director testified during the impartial hearing that the TEACCH approach with the student would be inappropriate due to his inability to "do things independently," that he would get "stuck," and that he would not be provided with adequate support to complete scheduled tasks (Tr. pp. 210-11). However, the director also acknowledged that she had not personally observed a district 6:1+1 special class in "five to six years," and that she had never personally observed the student in a TEACCH classroom (Tr. pp. 223-24). Furthermore, the director also testified that the student's "independence in the school has gotten much better. He can navigate throughout the school independently... his motor planning and sequencing [are] better," and while acknowledging the student's "very large sensory needs," she added "... he gets sensory breaks probably about every 20 minutes. And once he gets that, he's able to engage and attend and learn. And he is really able to be more present, with those breaks, on a very regular basis" (Tr. pp. 204-05). During the impartial hearing, the parent also described observing the classroom teacher and paraprofessional "going back and forth, one teacher, one para[professional]" among the student work stations in the two TEACCH classrooms she visited at the assigned school (Tr. p. 355).

Assuming that the district had been required to implement the student's IEP and upon consideration of the totality of the evidence contained in the hearing record, I find the parent's concerns regarding the assigned school's ability to address the student's sensory needs, and the appropriateness of the TEACCH methodology utilized in the assigned 6:1+1 special class to address the student's educational needs are not supported by the preponderance of the evidence contained in the hearing record (see generally, M.H. v. New York City Dep't of Educ., 2011 WL 609880 [S.D.N.Y. Feb. 16, 2011], citing Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 145 [N.D.N.Y. 2004]).

## **Conclusion**

In summary, I find that the impartial hearing officer's determination that the district failed to offer the student a FAPE for the 2010-11 school year must be reversed. The hearing record contains evidence showing that the May 2010 IEP recommending a 6:1+1 special class in a special school with related services was reasonably calculated to enable the student to receive educational benefits, and thus, the district offered the student a FAPE for the 2010-11 school year (Rowley, 458 U.S. at 206-07; Cerra, 427 F.3d at 192).

Having reached this determination, it is not necessary to address the appropriateness of the student's unilateral placement at the Rebecca School, and I need not consider whether equitable considerations support the parent's requests; thus, the necessary inquiry is at an end (see Voluntown, 226 F.3d at 66; Walczak, 142 F.3d at 134; Application of the Dep't of Educ., Appeal

No. 11-113; Application of a Student with a Disability, Appeal No. 11-100; Application of the Dep't of Educ., Appeal No. 11-080; Application of the Bd. of Educ., Appeal No. 11-007; Application of the Dep't of Educ., Appeal No. 10-094; Application of a Student with Disability, Appeal No. 08-158; Application of a Child with a Disability, Appeal No. 05-038).

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

**THE APPEAL IS SUSTAINED.**

**IT IS ORDERED** that those portions of the impartial hearing officer's decision dated August 23, 2011 which determined that the district failed to offer the student a FAPE for the 2010-11 school year and ordered the district to reimburse the parent for her nonrefundable tuition deposit paid to the Rebecca School and to provide direct tuition funding to the Rebecca School for the balance of the student's tuition for the 2010-11 school year are annulled.

**Dated:**           **Albany, New York**  
                          **November 22, 2011**

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