The University of the State of New York

The State Education Department
State Review Officer
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No. 11-141

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

The Law Offices of Lauren A. Baum, PC, attorneys for respondents, Lauren A. Baum, Esq., of counsel

DECISION

Petitioner (the district) appeals from the decision of an impartial hearing officer which found that it failed to offer an appropriate educational program to respondents' (the parents') son and ordered it to reimburse them for their son's tuition costs at the McCarton School (McCarton) for the 2009-10 school year. The appeal must be sustained.

Background

At the commencement of the impartial hearing in February 2011, the student was attending McCarton (Tr. p. 45).[1] The Commissioner of Education has not approved McCarton as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7). The student's eligibility for special education and related services as a student with autism is not in dispute in this proceeding (Tr. p. 58; see 34 C.F.R. § 300.8 [c][1]; 8 NYCRR 200.1[zz][1]).

[1] The hearing record indicates that the parents reenrolled the student in McCarton for the 2010-11 school year; however, at the time of her testimony in May 2011 the student's mother reported that the student was no longer attending the school (Tr. pp. 719-21, 736). Although the hearing record indicates that the student's mother wrote to the CSE in December 2010 seeking a specific public school placement for the student, it does not appear that the student attended the placement and the hearing record does not otherwise indicate where the student was being educated as of May 2011 (Tr. pp. 694-97; Dist. Ex. 13; Parent Exs. CC; DD).

When the student was approximately 1 1/2 years old, his parents referred him for an evaluation due to concerns regarding his development (Tr. p. 667). Shortly thereafter, the student began receiving speech-language therapy, occupational therapy (OT) and "special education" services through the early intervention program (EIP) (id.). At age two, the student was reportedly diagnosed by a neurologist as having a pervasive developmental disorder (PDD) (id.). Around age three, the student transitioned to the Committee on Preschool Special Education (CPSE) and began attending a State-approved nonpublic preschool on a half-day basis, in addition to receiving home-based speech-language therapy, OT and special education services (Tr. pp. 667-68). The student subsequently transitioned to the Committee on Special Education (CSE), where for kindergarten he attended a 6:1+1 special class in the district's elementary school and received ten hours per week of special education itinerant teacher (SEIT) services (Tr. pp. 668-69).[2] The student transferred to an 8:1+1 class for first grade, upon a determination by the CSE that the 6:1+1 class was too restrictive (Dist. Ex. 3 at p. 2; see Tr. p. 669). He was assigned a full-time paraprofessional due to health reasons, and in addition to the provision of in-school speech-language therapy and OT, he received home-based applied behavior analysis (ABA) services and speech-language therapy (Tr. pp. 669-70; Dist. Ex. 3 at p. 3).[3]

On March 9, 2007, when he was seven years old, the parents obtained a neurodevelopmental evaluation of the student conducted by a physician and a speech-language pathologist (Dist. Ex. 3). At the time of the evaluation, the parents expressed concern that much of the student's 1:1 teaching in the school setting was provided by his paraprofessional (id. at p. 3). The parents also voiced concerns regarding the paraprofessional's lack of training and opined that the student was not learning adequately in the district's classroom environment (id.). According to the neurodevelopmental evaluation report, the parents believed that the student was only able to acquire new skills as a result of his ABA services (id.). As part of the student's intervention history, the evaluators cited the results of a 2006 psychological and developmental evaluation that indicated the student's cognitive skills were in the "very low range," his scores on a measure of academic achievement ranged from "[v]ery [l]ow" to "[l]ow," and his performance on a language test yielded receptive and expressive language scores that were greater than three standard deviations below the mean (id. at p. 2). The prior testing further revealed that the student exhibited pragmatic language delays (id.). According to the evaluators, with respect to motor development, the prior testing showed that the student presented with normal muscle tone, but decreased strength and stability; difficulty with object manipulation/ball skills; a lack of safety awareness; and visual motor integration "struggles" (id.). The student was reported to have well-integrated sensory systems with likely deficits in modulation, behavior, and emotional responses (id.).

The evaluators assessed the student's social and communicative behaviors using Module 2 of the Autism Diagnostic Observation Schedule (ADOS) and reported that their observations yielded a standard score of 16, which fell in the "autism" range (Dist. Ex. 3 at pp. 3-4). They concluded that the student met both the ADOS and DSM-IV criteria for a diagnosis of autism (id.

[2] The Education Law defines special education itinerant services (commonly referred to as "SEIT") as "an approved program provided by a certified special education teacher . . . , at a site . . . , including but not limited to an approved or licensed prekindergarten or head start program; the child's home; a hospital; a state facility; or a child care location as defined in [§ 4410(8)(a)]" (Educ. Law § 4410[1][k]).

[3] The hearing record indicates that the student attended the district's 8:1+1 special class for two years (Tr. p. 671; Dist. Ex. 4 at p. 2).

at pp. 4, 6). Further assessment by the evaluators of the student's speech and language skills revealed that both expressively and receptively, the student struggled with vocabulary, grammar, and syntax (id. at pp. 5-6). The evaluators noted that at times during the examination, the student engaged in stereotypical and repetitive behaviors (id. at p. 5). They proceeded to describe the student's symbolic play skills as restricted, and they also observed that the student exhibited repetitive motor mannerisms in addition to weaknesses in graphomotor skills and sensory processing (id. at pp. 3, 5-6). With respect to academics, the evaluators indicated that the student demonstrated 1:1 correspondence up to nine, some letter-sound correspondence, and that he could print his name using upper and lowercase letters (id. at p. 5).

Ultimately, the evaluators concluded that the student did not yet have the skills to learn incidentally and needed a high degree of reinforcement and structure in order to learn (Dist. Ex. 3 at p. 6). Among other things, the evaluators recommended placement of the student in an educational setting combined with the provision of 1:1 teaching by a trained professional using the principles of applied behavior analysis/verbal behavior (ABA/VB) (id.). The evaluators also recommended that the student receive speech-language therapy, OT, and home-based ABA services to ensure generalization of skills across environments (id. at p. 7).

On May 22, 2007, the district prepared a social history of the student (Dist. Ex. 4). Similar to the March 2007 neurodevelopmental evaluation report, the social history reflected that the parents were dissatisfied with the student's 8:1+1 special class placement and believed that his medical, developmental, social, and academic needs had not been adequately met within the district's classrooms and programs (Tr. pp. 68-69; Dist. Ex. 4 at p. 2). They requested that the CSE convene to consider their request for a more highly structured and therapeutic placement to address the student's needs (id. at p. 2). For the 2007-08 school year, the CSE reportedly recommended that the student attend a State-approved nonpublic school; however, no school accepted the student (Tr. p. 671). In September 2007, the student was enrolled in McCarton (Tr. pp. 672-73).

On June 9, 2008, the CSE convened for an annual review of the student's program and to develop his individualized education program (IEP) for the 2008-09 school year (Parent Ex. C). The present levels of performance in the resultant IEP reflected the student's continued deficits in academics, communication and language, and motor development, as well as his need for "intense supervision" to remain on task and his need to remain consistently engaged (id. at pp. 3-4, 16-19). The June 2008 IEP indicated that the student exhibited agitated and non-compliant behaviors, and that he also engaged in self-injurious behaviors (id. at p. 4). The June 2008 IEP noted that the student's "autistic" behaviors were further compromised by his language deficits (id.). The student's medical needs, specifically his allergies, were also reflected in the June 2008 IEP (id. at p. 5). The June 2008 CSE considered placing the student in a 6:1+1 special class in a specialized school; however, the CSE rejected this option in light of the student's need for a more specialized program to address autistic behaviors and "issues around poor language and communication skills" (id. at p. 21). The June 2008 CSE also rejected placement in a special class in a community school, noting that due to the extent to which the age appropriate curriculum would need to be modified, the student's IEP goals could not be met in this environment (id.). Ultimately, the June 2008 CSE deferred the student's placement recommendation to the Central Based Support Team (CBST) (id. at p. 1).

For the 2008-09 school year, the student attended McCarton (Tr. pp. 672, 674). McCarton personnel developed an "Individual Education Plan" for the student that addressed his skills with respect to the following areas of need: receptive and expressive language, community skills,

academics, social and leisure skills, activities of daily living (ADL) skills, and behavior (Dist. Ex. 5 at pp. 1-9). During the 2008-09 school year at McCarton, the student attended a class of five students that utilized the principles of ABA (Dist. Ex. 7 at p. 1). He received one hour of speech-language therapy and 45 minutes of OT daily (Dist. Exs. 6 at p. 1; 8 at p. 1). The student's classroom employed an interdisciplinary instructional model and had a 1:1 staff-to-student ratio (Dist. Ex. 7 at p. 1).

In January 2009, McCarton personnel evaluated the student's progress across domains (Dist. Exs. 6; 7; 8). The student's teacher completed an educational progress report in which she commented on the student's learning style, communication, learning readiness and academics, social and play skills, and ADLs (Dist. Ex. 7). With respect to learning style, the student's teacher reported that the student learned best when provided with highly individualized instruction based on the principles of ABA (id. at p. 1). She noted that poor attention and challenging behaviors interfered with the student's learning and ability to socialize with others (id.) The teacher indicated that the student demonstrated relatively strong receptive language skills, visual discrimination/performance, and rote memory, although generalization of learned skills continued to be problematic (id. at p. 2). In commenting on the student's communication skills, the teacher reported that the student used three to five-word utterances when making a request or answering a question, and that he frequently raised his voice and protested when presented with nonpreferred activities (id.). The teacher noted that the student spontaneously greeted his teacher and parents upon arrival and dismissal from school and although interested in peers, he required physical redirection to appropriately greet them (id.). The student was able to independently follow group instructions and daily classroom routines with help of visual support (id.). With respect to learning readiness and academics, the teacher indicated that the student could engage in academic tasks for up to 15 minutes on average without a break or challenging behaviors (id. at p. 3). Academically, she described the student as an emergent reader and noted that he continued to develop math skills related to counting, matching numbers to quantities, and adding up to ten (id.).

The teacher detailed the student's social and play skills, including his ability to play board games with a friend and take turns when provided with visual support (Dist. Ex. 7 at p. 4). She noted that without visual support, the student was unable to structure his down time and reverted to high rates of repetitive stereotypical behaviors, and at times engaged in self-injury (id.). According to the teacher, the student required little assistance when engaging in self-care activities (id.). The teacher reported that while the student had made progress in cognition, communication and adaptive behavior, his social, play and adaptive skills continued to be areas of weakness (id. at p. 5). She further reported that the student's challenging behaviors, including self-injurious behaviors, had increased during the evaluation period resulting in decreased learning and opportunities for socialization (id.). The teacher stated that the continuation of individualized education with 1:1 staff support was necessary for the student to make meaningful educational gains and ensure a low rate of challenging behavior and safety (id.).

In a January 2009 speech and language progress report, the student's speech-language pathologist reported that the student's receptive language goals focused on his ability to attend to structured language tasks, understand and follow directions, improve temporal sequencing, improve linguistic concepts, understand word relationships, and expand receptive vocabulary (Dist. Ex. 6 at p. 1). With respect to expressive language, the speech-language pathologist reported that the student's goals focused on expanding expressive vocabulary, expanding sentence length and improving story structure, improving linguistic concepts and answering questions appropriately (id. at p. 2). The student's pragmatic language goals focused on improving his social

communication and expanding his play skills (id. at p. 3). Despite continued difficulties, the speech-language pathologist concluded that the student had made progress in all areas of speech and language (id. at p. 4). She recommended the continued provision of individual speech-language therapy five times per week for 60-minute sessions inside the classroom (id.).

In a January 24, 2009 OT progress report, the student's occupational therapists reported that the student's sensory processing skills were addressed through a sensory rich daily classroom schedule and daily individual OT sessions (Dist. Ex. 8 at p. 1). According to the therapists, the student's daily schedule included opportunities for physical activity, oral motor sensory input, fine motor exercise, and relaxation (id.). With respect to the student's motor planning and coordination, the therapists reported that the student's gross motor skills had improved and he had made good progress in this area since September (id. at p. 3). The therapists stated that the student had also shown improved balance, strength, and coordination (id.). According to the therapists, the student also demonstrated significant progress in fine motor skills (id. at p. 4). They recommended the continued provision of individual OT for five 45-minute sessions per week (id. at p. 5).

On April 28, 2009, a district special education teacher conducted a classroom observation of the student at McCarton (Tr. p. 77; Dist. Ex. 9). The district teacher reported that during the course of her observation, the student participated in a variety of academic activities including reading c-v-c words, matching words to photographs, filling in the missing letter of two to three letter words, and reading short sentences (Dist. Ex. 9). The district teacher noted that the student earned tokens for participating in the decoding activity and also earned the chance to do a puzzle, his chosen reinforcer, at the completion of the activity (id. at p. 1). The student earned additional tokens and rewards for participating in subsequent activities (id. at p. 2). The district teacher observed that the student often responded incorrectly to questions posed by his teacher (id. at pp. 1-2). She further observed that the student clapped his hands and cried at various times during the observation (id.). According to the district teacher, the student's teacher responded at different times by physically cueing the student, squeezing his head to calm him, and offering the verbal prompt "quiet hands" (id.). The district teacher also observed the student during snack time, and reported that with teacher prompts, the student gave plates to two other children and appropriately greeted them using scripts (id.).

On May 8, 2009, the CSE convened to develop the student's IEP for the 2009-10 school year (Dist. Ex. 10; see Dist. Ex. 11). A district representative, who also acted as school psychologist (district representative), the parents, a district special education teacher, and an additional parent member attended the CSE meeting (Dist. Ex. 10 at p. 2). The following individuals also participated in the May 8, 2009 CSE meeting by telephone: the director of the OT department at McCarton, the head teacher from McCarton, the student's occupational therapist, and his speech-language pathologist (id.). At the beginning of the May 8, 2009 meeting, the parents provided the CSE with the private March 2007 neurodevelopmental evaluation and the CSE decided to adjourn for one hour to review it (Tr. pp. 49, 64, 172; Dist. Ex. 11 at p. 1; see Dist. Ex. 3). In addition to the neurodevelopmental evaluation, the CSE considered the student's McCarton individual education plan for the 2008-09 school year; the January 2009 educational, speech-language, and OT reports completed by the student's McCarton providers; and the district's April 2009 classroom observation to develop the student's 2009-10 IEP (Tr. pp. 65-79).

According to CSE meeting notes, the parents reported that the student was doing better than before, but still had "a long way to go" (Dist. Ex. 11 at p. 1). They reported that the student learned through ABA and that he could only learn in a 1:1 setting (id.). The parents discussed the

student's medical problems with committee members, including the student's need for a special diet and the effect of his medical problems on his behavior (id. at pp. 1-2). As reflected in the meeting notes, the McCarton head teacher reported on the student's behaviors and present levels of academic performance and the CSE subsequently developed academic goals for reading, writing, and math (Dist. Exs. 10 at pp. 8-10; 11 at pp. 1-2). Following the McCarton teacher's presentation, the parents agreed to allow the CSE to speak with the student's related services providers on an individual basis (Tr. p. 51; Dist. Ex. 11 at p. 2). The student's speech-language pathologist assisted the May 8, 2009 CSE in creating speech and language goals (Dist. Exs. 10 at pp. 11-13; 11 at p. 2). The student's occupational therapist reported that the student was making meaningful progress and the CSE reviewed the student's OT goals with the occupational therapist present (Dist. Exs. 10 at pp. 15-19; 11 at p. 1; see Tr. pp. 70, 76-77). Regarding the student's behavior, the student's occupational therapist relayed her observations to the May 8, 2009 CSE; however, the district representative advised that the CSE needed the McCarton head teacher's input to explain the student's behavior reduction program, and accordingly, the meeting was rescheduled (Dist. Ex. 11 at p. 3).

On May 26, 2009, the CSE reconvened (Dist. Exs. 10; 11). The same individuals who attended the May 8, 2009 meeting took part in the May 26, 2009 CSE; however, a different individual fulfilled the role of the additional parent member (compare Dist. Ex. 10 at p. 2, with Dist. Ex. 10 at p. 3). Additionally, the McCarton head teacher participated in the May 26, 2009 CSE meeting by telephone (Dist. Ex. 10 at p. 3). According to meeting notes from the May 26, 2009 meeting, the head teacher described the student's behaviors and discussed the student's behavior plan (Dist. Ex. 11 at pp. 3-4). The resultant IEP reflected information regarding the student's academic performance, social/emotional functioning, physical development, and behavioral needs as described by the parents and McCarton personnel (compare Dist. Ex. 10 at pp. 4-6, with Dist. Exs. 6; 7; 8; 11). The CSE noted that the student's behavior seriously interfered with instruction and in addition to the IEP, it developed a behavioral intervention plan (BIP) for the student (Dist. Ex. 10 at pp. 6, 24). Ultimately, the CSE recommended that the student be placed in a 6:1+1 special class in a specialized school together with adapted physical education (APE) and related services consisting of speech-language therapy and OT (Dist. Exs. 10 at pp. 1, 3, 23; 11 at p. 5). The CSE also recommended that the student receive a full-time 1:1 behavior management paraprofessional (Dist Exs. 10 at pp. 3, 23; 11 at pp. 4-5).

In a letter dated June 13, 2009 to the parents, the district summarized the May 26, 2009 CSE's recommendations and notified the parents of the school to which the student was assigned for the 2009-10 school year (Dist. Ex. 12).

On June 19, 2009, the parent visited the assigned school (Tr. p. 683; see Parent Ex. B at p. 1). By letter dated June 25, 2009 to the district, the parent noted her objections to the assigned school, which included, among other things, "the insufficient level of individual attention available from a properly trained individual" using a methodology proven successful with autistic students, inappropriate peer grouping, lack of appropriate sensory equipment, and lack of a plan to assist the student in transitioning to an alternative program and methodology (Parent Ex. B at pp. 1-2). Although the parent indicated that she remained willing to consider placing the student in a district program, she stated that in the interim, she planned to enroll the student in McCarton and to seek tuition funding for his placement (id. at p. 2).

For the 2009-10 school year the student remained at McCarton where he received 1:1 instruction in a class of six students (Tr. pp. 804-05; see Parent Ex. H at p. 1). In addition, the

student received one hour of individual speech-language therapy and 45 minutes of individual OT daily (Dist. Ex. 15 at p. 1; see Parent Ex. M at p. 1).[4] The individual education plan developed for the student by McCarton personnel for the 2009-10 school year addressed the student's needs with respect to his expressive and receptive language skills, community skills, academics, social and leisure skills, and ADL skills, in addition to his behavior (Parent Ex. G at pp. 1-9).

Due Process Complaint Notice

By due process complaint notice dated November 9, 2010, the parents commenced an impartial hearing in which they requested, among other things, tuition reimbursement for McCarton for the 2009-10 school year (Parent Ex. A at pp. 1, 5). The parents maintained that the district denied the student a free appropriate public education (FAPE) for the 2009-10 school year (id. at p. 1). The parents asserted, in pertinent part, that the information that was before the May 2009 CSEs did not justify its decision to change its previous recommendation to defer the student's assigned school recommendation to the CBST, to a recommendation for placement in a 6:1+1 special class (id. at p. 2). With respect to the May 2009 IEP, the parents raised the following allegations: (1) it was not reasonably calculated to provide the student with educational benefits; (2) it did not "fully and accurately" reflect the student's present levels of performance and needs; (3) the supports and goals listed in the May 2009 IEP were insufficient to address the student's special education needs; (4) the May 2009 IEP did not provide the student with sufficient individual instruction and support from a teacher trained in teaching autistic students; (5) the BIP was not sufficient to adequately address the student's needs and enable him to make measurable progress; (6) the district failed to conduct a functional behavioral analysis (FBA) prior to developing the BIP; (7) the May 2009 IEPs lacked transition supports to facilitate the student's transition from McCarton to a district school; and (8) the May 2009 IEP lacked promotional criteria (id. at pp. 2-3). In addition, although they did not identify any particular CSE members that were absent from the May 2009 CSE meetings, the parents argued that the CSEs were not properly composed (id. at p. 1). The parents further contended that the assigned school was inappropriate to meet the student's needs (id. at pp. 2-3). Next, the parents maintained that McCarton appropriately addressed the student's needs, and enabled him to make educational progress and avoid regression (id. at p. 4). Lastly, the parents claimed that equitable considerations supported their request for relief (id.).

On November 19, 2010, the district filed a response to the parents' due process complaint notice (Dist. Ex. 2).

Impartial Hearing Officer Decision

On February 10, 2011, the parties proceeded to an impartial hearing that concluded on July 14, 2011, after six days of testimony (IHO Decision at p. 3; Tr. pp. 1-907). On September 26, 2011, the impartial hearing officer rendered a decision in which she ordered the district to render direct payment of the student's tuition to McCarton for the 2009-10 school year (IHO Decision at pp. 35-36). The impartial hearing officer concluded that the district denied the student a FAPE based on the following findings, among other things: (1) the May 2009 CSEs "failed to appropriately address the programmatic changes engendered by the IEP's 6:1+1 recommendation;" (2) the parents were denied the opportunity to meaningfully participate in the creation of the

[4] The frequency of the student's OT sessions was temporarily reduced at McCarton during the 2009-10 school year due to staff shortages (Tr. pp. 460-62).

student's IEP; (3) the May 2009 IEP was predetermined; (4) the CSE meetings did not include the simultaneous participation of all members; (5) the BIP lacked any method of quantification or response criteria; (6) the BIP lacked specific details regarding the frequency, duration or intensity of the student's behavior, and did not explain how progress would be monitored; (7) the verbal reports provided by McCarton staff at the CSE meetings did not constitute the evaluations upon which an FBA must be based; and (8) the parents were not afforded an opportunity to review the district representative's notes (id. at pp. 23-30). In addition, the impartial hearing officer found that the hearing record did not afford a basis to support the district's "dramatically less restrictive recommendation" of a 6:1+1 placement for the student (id. at pp. 30-31). The impartial hearing officer also found that the student required 1:1 assistance in the classroom; however, the hearing record did not indicate whether a paraprofessional could fulfill this need (id. at p. 31). Accordingly, the impartial hearing officer concluded that the district's recommendation to place the student in a 6:1+1 classroom for the 2009-10 school year was not supported by sufficient evaluative data (id. at p. 33).

Next, the impartial hearing officer concluded that McCarton was appropriate for the student (IHO Decision at p. 35). Although the impartial hearing officer noted that she was not convinced that the 8:1+7 pupil-to-personnel ratio was "necessary" for the student, she did not find it to be inappropriate (id. at p. 34). She noted that the student had made progress at McCarton, and the extent to which the student's behaviors precluded meaningful instruction had declined (id. at p. 35). Moreover, the impartial hearing officer found that the student's providers had "uniformly observed areas of significant achievement," particularly with regard to the student's speech needs (id.). Lastly, the impartial hearing officer determined that equitable considerations favored the parents' claim for relief (id.).

Appeal for State-level Review

The district appeals and requests that the impartial hearing officer's decisions that the district did not offer the student a FAPE for the 2009-10 school year and that McCarton was appropriate be annulled.[5] The district first asserts that the impartial hearing officer erred in deciding issues that the parents did not allege in their due process complaint notice. Specifically, the district argues that the impartial hearing officer erred by finding that the parents were deprived of an opportunity to meaningfully participate in the development of the student's IEP because all individuals did not simultaneously participate in the CSE meetings. The district further alleges that the impartial hearing officer erred in finding that the district representative was required to provide her notes to the parents. Additionally, the district notes that with the exception of the classroom observation, the remaining documentation that was before the May 2009 CSEs was prepared by McCarton personnel. The district claims that its 6:1+1 program recommendation was appropriate for the student because it would have provided the student with a small, well-structured classroom setting, in addition to the support of a 1:1 behavior management paraprofessional. Moreover, the district maintains that its assignment of a 1:1 behavior management paraprofessional evidences that the CSEs considered the difference in the student-to-teacher ratio between the student's class at McCarton and the district's recommended program. In addition, the district claims that transitional supports for the student were programmatic. With regard to the parents' claims that the district failed to conduct an FBA, the district also alleges that the CSEs

[5] The district does not appeal the impartial hearing officer's decision that equitable considerations favored the parents.

considered McCarton's behavior plan to address the student's tantrums and self-injurious behavior and obtained information from the student's teacher. In addition, the district asserts that data was collected regarding the frequency, intensity and duration of the targeted behaviors, which resulted in the development of a BIP that identified the behaviors and provided strategies to address them. Lastly, the district argues that the student's special education needs would have been met at the assigned school.

Next, the district contends that McCarton was not appropriate for the student because in part, McCarton could not meet the student's related services mandate with regard to OT. In addition, the district contends that despite the student's hypersensitivity to noise, his speech-language therapy sessions at McCarton took place almost exclusively in the classroom. Lastly, although the district submits that it was undisputed that the student required a predictable routine in a structured environment, it alleges that McCarton never provided him with a steady 1:1 paraprofessional, and his schedule for related services varied.

The parents submitted an answer and assert that the impartial hearing officer's decision should be upheld. Regarding the district's assertion that the impartial hearing officer improperly addressed several issues not raised in the due process complaint notice, the parents submit that the due process complaint notice explicitly raised such issues and/or that they were "encompassed" by the issues raised in the complaint. They further argue that regardless of whether they were properly raised below, they reserved their right in the due process complaint notice to raise any issues that might arise during the litigation of the instant case, and when such issues arose at the impartial hearing, the district failed to object on the basis that they were outside the scope of the due process complaint notice. Next, the parents maintain that the district committed a number of procedural violations which deprived the parents of a meaningful opportunity to participate in the development of the student's IEP. The parents further maintain that the district lacked evaluative material to support its 6:1+1 recommendation and consequently, improperly initiated a significant change in placement without performing a full evaluation or considering any new evaluative material that would have justified its recommendation. Moreover, the parents allege that district failed to conduct an FBA or develop an appropriate BIP. Furthermore, the parents allege that the impartial hearing officer correctly found that the hearing record failed to demonstrate that a 1:1 paraprofessional could have appropriately met the student's needs for substantial 1:1 support. They further maintain that the May 2009 IEP was not reasonably calculated to provide the student with educational benefits because it did not reference the use of ABA, nor did it include the provision of transition supports. The parents also challenge the goals contained in the May 2009 IEP, and argue that although McCarton drafted the goals, they were prepared with a 1:1 ratio and use of ABA methodology in mind. In addition, they parents assert that the assigned school would have been inappropriate for the student. Lastly, the parents maintain that McCarton was appropriate for the student.

Applicable Standards

Two purposes of the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[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

Initially, I note that neither party has appealed from the impartial hearing officer's decision with respect to the following issues: (1) the May 2009 IEP did not fully and accurately reflect the student's present levels of performance and needs; (2) the supports and goals listed in the May 2009 IEP were insufficient to address the student's special education needs; (3) the May 2009 IEP lacked transition supports to facilitate the student's transition from McCarton to a district school; (4) the lack of promotional criteria in the May 2009 IEP; and (5) the appropriateness of the assigned school (Parent Ex. A at pp. 2-4).[6,7] Accordingly, those determinations are final and binding on the parties and will not be reviewed on appeal (34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[j][5][v]).

[6] With the exception of the propriety of the goals enumerated in the May 2009 IEP, which were found appropriate, the impartial hearing officer did not make any determinations with regard to the remaining issues (see IHO Decision at pp. 22-33).

[7] To the extent that the parents refer to placement as the particular classroom to implement the student's IEP, I note that the Second Circuit has explained, under the Individuals with Disabilities Education Act (IDEA) an "'educational placement' refers to the general educational program—such as the classes, individualized attention and additional services a child will receive—rather than the 'bricks and mortar' of the specific school" (T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 419-20, cert. denied, 130 S. Ct. 3277 [2010]; see K.L.A. v. Windham Southeast Supervisory Union, 2010 WL 1193082, at *2 [2d Cir. Mar. 30, 2010]; Concerned Parents & Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751, 756 [2d Cir. 1980]).

Scope of Impartial Hearing

Next, the district asserts that the impartial hearing officer erred by addressing issues that were not raised in the parents' due process complaint notice. It is well settled that a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 C.F.R. §§ 300.507[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]) or the original due process complaint is amended prior to the impartial hearing per permission given by the impartial hearing officer at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 C.F.R. § 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]). Moreover, under the IDEA, a complaining party is not entitled to proceed to an impartial hearing unless the challenged due process complaint notice meets minimal pleading requirements to be legally sufficient, including a description of the nature of the problem of the student "relating to the proposed or refused initiation or change, including facts relating to the problem" (20 U.S.C. § 1415[b][7][A][ii]; 34 C.F.R. § 300.508[b]; 8 NYCRR 200.5[i][1]).

Here, the impartial hearing officer made findings with regard to the following issues that were not reasonably included with the scope of issues to be decided at the impartial hearing: (1) in creating the May 2009 IEP, the CSEs engaged in impermissible predetermination; (2) the district deprived the parents of an opportunity to meaningfully participate in the development of the student's IEP; (3) the lack of certainty as to what materials were before the CSE members; (4) the district failed to consider any substantive discussion of placing the student at McCarton; and (5) the district representative failed to provide the parents with a copy of her typewritten notes (compare Parent Ex. A, with IHO Decision at pp. 23-26, 29-30). The aforementioned claims may not be reasonably read as included within the due process complaint and there is no indication that the parties agreed that these issues should be decided by the impartial hearing officer. Accordingly, these issues were not properly before the impartial hearing officer, and she should have confined her determination to only those claims that were raised in the parents' due process complaint notice (see 20 U.S.C. § 1415[c][1],[c][2][E], [f][3][B]; 34 C.F.R. §§ 300.508[b],[d][3], 300.511[d]; 8 NYCRR 200.5 [i][1][iv],[i][7],[j][1][ii]; S.H. v. Eastchester Union Free Sch. Dist., 2011 WL 6108523, at *6 n.3 [S.D.N.Y. Dec. 8, 2011]; C.F. v. Dep't of Educ., 2011 WL 5130101, at *12 [S.D.N.Y. Oct. 28, 2011]; C.D. v. Bedford Cent. Sch. Dist., 2011 WL 4914722, at *13 [S.D.N.Y. Sept. 22, 2011]; R.B. v. Dep't of Educ., 2011 WL 4375694, at *6-7 [S.D.N.Y. Sept. 16, 2011]; M.H. v. New York City Dep't of Educ., 712 F. Supp. 2d 125, 159 [S.D.N.Y. 2010]; Application of the Bd. of Educ., Appeal No. 11-129; Application of the Bd. of Educ., Appeal No. 11-096; Application of a Child with a Disability, Appeal No. 07-051; Application of a Child with a Disability, Appeal No. 07-047; Application of a Child with a Disability, Appeal No. 06-139; Application of a Child with a Disability, Appeal No. 06-065; Application of a Child with a Disability, Appeal No. 99-060).

Nor am I persuaded by the language in the parents' due process complaint notice seeking to "reserve" a right to raise "any other procedural or substantive issue that may come to their attention during the pendency of the litigation of this matter" where, as here, the parents did not seek the district's agreement to expand the scope of the impartial hearing to include these issues or file an amended due process complaint notice. To hold otherwise would render the IDEA's statutory and regulatory provisions meaningless (see 20 U.S.C. § 1415[f][3][B]; 34 C.F.R. §§ 300.511[d], 300.508[d][3][i]; 8 NYCRR 200.5[j][1][ii]; B.P. and A.P v New York City Dep't of Educ., 11-cv-02141 at *8 [EDNY Jan. 12, 2012] [rejecting the proposition that a general

reservation of rights in an impartial hearing request preserves additional procedural arguments later in the proceeding]; Application of a Student with a Disability, Appeal No. 11-010).

Predetermination/Parent Participation

However, even if I were to assume for the sake of argument that the parents had raised the issues of predetermination and meaningful parent participation, as set forth below, I find that the impartial hearing officer's determinations that the district failed to offer the student a FAPE as a result of impermissible predetermination and that it significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student are not supported by the hearing record. The consideration of possible recommendations for a student, prior to a CSE meeting, is not prohibited as long as the CSE understands that changes may occur at the CSE meeting (see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]; Nack v. Orange City Sch. Dist., 454 F.3d 604, 610 [6th Cir. 2006] ["predetermination is not synonymous with preparation"]; Deal v. Hamilton County Bd. of Educ., 392 F.3d 840, 857-60 [6th Cir. 2004]; A.G. v. Frieden, 2009 WL 806832, at *7 [S.D.N.Y. Mar. 26, 2009]; P.K. v. Bedford Central Sch. Dist., 569 F. Supp. 2d 371, 382-83 [S.D.N.Y. 2008]; Danielle G. v. New York City Dep't of Educ., 2008 WL 3286579, at *6-*7 [E.D.N.Y. 2008]; M.M. v. New York City Dep't of Educ., 583 F. Supp. 2d 498, 507 [S.D.N.Y. 2008]; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 147-48 [S.D.N.Y. 2006]; Application of the Dep't of Educ., Appeal 10-070). Courts have rejected predetermination claims where the parents have actively and meaningfully participated in the development of the IEP or where there was credible evidence that the school district maintained the requisite open mind during the CSE meeting (J.G. v. Kiryas Joel Union Free School District, 2011 WL 1346845, at *30-31 [S.D.N.Y. Mar. 31, 2011] [rejecting the parents' assertion that the offer of a "cookie-cutter" placement rose to the level of impermissible predetermination]).

In the instant case, the hearing record reflects meaningful and active parental participation in the development of the student's May 2009 IEP and a willingness among the CSE members to consider different program options for the student. The hearing record reveals that the district developed the May 2009 IEP over the course of two meetings because the CSE wanted to provide for sufficient time for everyone to speak, as well as enough time to speak with the student's therapists on an individual basis (Tr. p. 49; Dist. Exs. 10; 11). Moreover, both parents were in attendance at both CSE meetings (Tr. pp. 53-54; Dist. Exs. 10 at pp. 2-3; 11). According to the district representative, the parents provided the CSE with "a lot of background information," in addition to information regarding the student's medical history and his behaviors (Tr. p. 55). They advised the district that they wanted the student to attend a private school and receive five sessions per week of speech-language therapy and OT (Tr. p. 61; Dist. Ex. 11 at p. 1). Likewise, the parents did not object to the district's related services recommendation, and the hearing record demonstrates that the district honored the parents' requests regarding related services (Tr. pp. 119-20; Dist. Ex. 10 at pp. 3, 25). The hearing record further shows that the parents brought a private neuropsychological evaluation to the May 8, 2009 meeting and the CSE took a break in order to review it (Tr. pp. 64, 172, 201; Dist. Ex. 11 at p. 1).

In reaching its program recommendations, the hearing record shows that the CSE discussed other program options for the student (Tr. p. 122; Dist. Ex. 10 at p. 22). According to the IEP, the CSE considered placement in an 8:1+1 special class in a community school; however, the CSE determined that the student required greater support at that time (id.). The CSE also rejected placement in a 6:1+1 special class in a specialized school without the support of a 1:1 behavior

management paraprofessional, because it determined that the student required additional support at that time (id.). The May 2009 CSEs did not recommend deferring the student's placement recommendation to the CBST, having deemed such a recommendation to be overly restrictive (Tr. p. 62). At the end of the meeting, the parents expressed their concerns regarding the district's program recommendation (Tr. pp. 55, 63; Dist. Ex. 11 at pp. 4-5).

Moreover, the hearing record illustrates that although the student's McCarton individual education plan served as one of a variety of sources considered for the recommendations made in the May 2009 IEP, the CSE did not merely copy the McCarton plan; rather, the May 2009 CSEs sought the input of the student's teacher and related services providers in order to modify that plan and to arrive at an appropriate public school program recommendations for the student (Tr. pp. 111, 203, 205-06). For example, the district representative described how the CSE drafted the goals contained in the May 2009 IEP (Tr. pp. 70, 120, 159). According to the district representative, throughout "the goal making process" the CSE continually asked for input and included a goal regarding the ability to read an analog clock pursuant to the student's father's request (Tr. p. 120; Dist. Ex. 11 at p. 2). With regard to the student's related services goals, the district representative testified that the CSE reviewed the goals with each person who worked in the specific domain and asked them to discuss which goals needed to be continued or modified and which goals had been mastered, and consider going forward for the next year which goals should be included (Tr. p. 70). She added that the CSEs did not modify any goals without seeking input from McCarton personnel (Tr. pp. 206-07). Based on the foregoing, I find that the evidence in the hearing record does not support a finding that the district predetermined the student's program for the 2009-10 school year; rather, the hearing record reflects that the parents meaningfully participated and contributed to the development of the student's IEP during the May 2009 CSE meetings.

6:1+1 Special Class Placement vs. Deferral to CBST

Next, I will review the impartial hearing officer's finding that when considering placement options for the student for the 2009-10 school year, the CSE did not consider the student's then-current placement at McCarton, which she characterized as an 8:1+7 special class, that had been funded by the district for the two preceding school years (IHO Decision at pp. 23-24, 30-31). As a result, the impartial hearing officer found that the CSE failed to appropriately address the programmatic changes engendered by moving the student to a "dramatically less restrictive program," specifically, the 6:1+1 special class recommended by the May 26, 2009 CSE (id. at p. 24).

As explained below, the impartial hearing officer's determination appears, in part, to be predicated on a misunderstanding of the evidence in hearing record. The impartial hearing officer noted that the district representative testified that she was unfamiliar with the 8:1+7 recommendation "underwritten" by the district during the two preceding school years (IHO Decision at p. 23). However, the hearing record shows that for the two preceding school years (2007-08 and 2008-09), the CSE deferred the student's placement to the CBST for assistance in locating an appropriate State-approved nonpublic school; the student ultimately attended the

McCarton School (Tr. pp. 672-74; Parent Ex. C at p. 1).[8, 9] The hearing record indicates that during the 2008-09 school year, the student received 1:1 instruction in a class of five students at McCarton and does not reference an 8:1+7 special class (Dist. Ex. 7 at p. 1). Rather reference to the 8:1+7 special class ratio appears to stem from the March 2007 neurodevelopmental evaluation, which indicated that at that time (2006-07 school year), the student was attending a district class with an 8:1+7 ratio (Dist. Ex. 3 at p. 3). However, during testimony, the district representative suggested that the 8:1+7 designation may have been a typographical error (Tr. pp. 185-86; see Tr. p. 216). The hearing record supports the district representative's supposition (Tr. pp. 62-64, 184-85, 669; Dist. Ex. 3 at p. 2). Furthermore, the parent testified that prior to McCarton, the student attended an 8:1+1 special class and received home-based services (Tr. p. 669). Based on the hearing record, it does not appear that the student attended an 8:1+7 special class while in district programs, nor does it appear that the ratio of the student's McCarton classes was 8:1+7.[10]

Next, based on the testimony of the district representative and the parent, the impartial hearing officer determined that the CSE either did not or refused to discuss a continuing placement for the student at McCarton for the 2009-10 school year (IHO Decision at pp. 23-24). As discussed above, the hearing record shows that for the 2007-08 and 2008-09 school years, the CSE deferred the student's placement recommendation to the CBST (Tr. pp. 732-33; Parent Ex. C at p. 1). According to the parent, she was subsequently contacted by and visited State-approved nonpublic schools; however, none of the schools accepted the student for either the 2007-08 or 2008-09 school years (Tr. p. 671). The district representative could not recall if there was a discussion at the May 2009 CSE meetings regarding the previous CSE recommendation to defer the student to a nonpublic school (Tr. p. 169). She rejected the idea that the recommendation to defer the student had been discontinued and explained that the CSE was creating a new IEP and that everything was "back on the table" (id.). The district representative explained that the question before the CSE was "what [was] appropriate at [that] time" (id.). She confirmed that the placements considered by the CSE included an 8:1+1 special class in a community school and a 6:1+1 special class without a paraprofessional, but did not include deferral to a nonpublic school (id.).

Notwithstanding the impartial hearing officer's conclusion that the CSE refused to conduct any substantive discussion regarding continuing placement of the student at McCarton for the

[8] The June 2008 IEP, which deferred the student to the CBST did not include a recommended class ratio (Parent Ex. C at p. 1). However, the IEP indicated that the CSE considered and rejected placing the student in a 6:1+1 special class in a special school because he required a more specialized program (id. at p. 21).

[9] The student attended McCarton for the 2007-08 and 2008-09 school years, although it is not clear from the hearing record how his placement at McCarton was funded. According to the student's mother, for the 2007-08 school year, the parents signed a contract with McCarton (Tr. p. 673). In their answer, the parents indicate that they placed the student at McCarton for the 2007-08 and 2008-09 school years (Ans. ¶ 8).

[10] Furthermore, the impartial hearing officer found that the district used the March 2007 neurodevelopmental evaluation to validate recommendations for both an 8:1+7 class at McCarton for the 2007-08 and 2008-09 school years and a 6:1+1 placement in the district for the 2009-10 school years (IHO Decision at p. 30). As noted above, the hearing record does not indicate that the CSE ever recommended the student for placement in an 8:1+7 special class nor does it indicate that the district recommended the student for placement at McCarton for the 2007-08 and 2008-09 school years. I note that McCarton is not a State-approved nonpublic school that the CBST could recommend the student to attend. In addition, the impartial hearing officer's finding suggests that the March 2007 neurodevelopmental evaluation was the only information considered by the CSE in developing the student's IEP, despite testimony that the CSE relied on detailed information from the student's McCarton teacher and therapists as to the student's needs (see id.).

2009-10 school year, a review of the hearing record fails to substantiate this finding (IHO Decision at pp. 23-24). The parent testified that the 2009-10 school year was the first year that she was not advised by the CSE to look into a private school and that she asked "why it changed" (Tr. p. 729). The parents acknowledge in their answer that the district correctly asserted that McCarton is not a State-approved nonpublic school, and thus could not be directly funded through the student's IEP (Answer ¶28). However, the parents maintain that the impartial hearing officer correctly found that the CSE should have considered a nonpublic school placement for the student with a staffing ratio similar to McCarton, since the CSE lacked any evaluative material supporting a need for a different less restrictive program (id.).

The hearing record reflects that the CSE developed a program recommendation for the student based on information that was before it at the time of the May 2009 meetings. As noted below, information provided by McCarton detailed the student's improvements in language and communication and his ability to function in group settings with support. Contrary to the parents' assertions, I find that the CSE considered the student's ability to function in a 6:1+1 setting and determined that the student required additional support and therefore recommended that the provision of a full-time 1:1 behavior management paraprofessional (Tr. pp. 85-86; Dist. Ex. 10 at pp. 22-23). Moreover, I further note that despite the parents' preference for McCarton, evidence of the alleged appropriateness of a private school placement does not establish that the program offered by a school district is inappropriate (Application of a Student with a Disability, Appeal No. 08-043; see, e.g., M.B. v. Arlington Cent. Sch. Dist., 2002 WL 389151, at *8 [S.D.N.Y. Mar. 12, 2002]; Fuhrmann v. East Hanover Bd. of Educ., 993 F.2d 1031, 1037 [3d Cir. 1993]; Application of a Child with a Disability, Appeal No. 06-062; Application of a Child with a Disability, Appeal No. 06-054).

In addition, the district representative testified that the CSE reviewed all of the information provided to it, including information from McCarton and believed that the student's needs could be met in a 6:1+1 special class and that a CBST referral would be overly restrictive (Tr. p. 62). The district representative that based on the student's improvement in language and social skills, he could benefit from a class that afforded him the opportunity to socialize yet also "had the extra measure" of being a small classroom with a special education teacher, classroom paraprofessional, and the student's dedicated paraprofessional (Tr. p. 200; see Tr. p. 109). She further testified that given the student's strengths, including his progress in language and social development, the student's needs could be met in a 6:1+1 class and a CBST recommendation would have been excessively restrictive (Tr. p. 199). According to the district representative, despite the fact that a 6:1+1 special class had previously been viewed as too restrictive for the student, the May 2009 CSE recommended a 6:1+1 special class for the student because at that time, he was in a class of six students and was exhibiting behaviors that required closer monitoring in a small classroom setting (Tr. p. 200). Based on the foregoing, contrary to the parents' assertions, I find that at the time it was developed, the CSE's recommendation for placement in a 6:1+1 setting with a 1:1 full-time behavioral management paraprofessional was reasonably calculated to confer educational benefits to the student (see Antonaccio, 281 F. Supp. 2d at 724-25).

CSE Composition

I will now turn to the parties' claims regarding the composition of the May 2009 CSEs. The district asserts that it complied with federal and State regulations with respect to the composition of the CSEs; however, the parents maintain that the CSEs were not properly composed because the district did not secure the simultaneous participation of McCarton personnel

during the CSE meetings. The IDEA requires a CSE to include, among others, one special education teacher of the student, or where appropriate, not less than one special education provider of the student (20 U.S.C. § 1414[d][1][B][ii]-[iii]; see 34 C.F.R § 300.321[a][2]-[3]; 8 NYCRR 200.3[a][1][ii]-[iii]). The Official Analysis of Comments to the federal regulations indicate that the special education teacher or provider "should" be the person who is or will be responsible for implementing the student's IEP (IEP Team, 71 Fed. Reg. 46670 [Aug. 14, 2006]).

Here, despite the parents' claims to contrary, the hearing record establishes that the May 2009 CSE's were properly constituted in accordance with State and federal regulations. A district special education teacher participated throughout the entirety of both CSE meetings and the student's McCarton teacher also participated telephonically during part of both meetings (Tr. pp. 50-52; see Dist. Exs. 10 at pp. 2-3; 11). Furthermore, notwithstanding the parents' allegations that they were deprived of an opportunity to meaningfully participate in the development of the student's IEP because, as detailed below, the hearing record does not indicate that the district's failure to ensure McCarton personnel's simultaneous participation resulted in substantive harm to the student or rose to the level of a denial of a FAPE. On the contrary, the hearing record suggests that McCarton had requested that the CSE meet with the student's providers one at a time (Tr. p. 50; see Tr. p. 134).[11] Moreover, throughout the CSE process, a McCarton staff person was always in attendance (Tr. p. 51). The hearing record further reflects that the parents approved the district's request to meet with the student's providers on an individual basis (Tr. p. 51; Dist. Ex. 11 at p. 2). Additionally, the district representative testified that everyone in attendance at the CSE meetings was afforded an opportunity to participate in the meetings and as discussed above, the parents were not denied meaningful participation in the decision-making process (Tr. pp. 54-55; Dist. Ex. 11).

Based on the foregoing, the hearing record establishes that the May 2009 CSEs were properly composed. Furthermore, there is no showing in the hearing record that the lack of simultaneous participation of McCarton personnel amounted to a procedural error that impeded the student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process, or caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; see 34 C.F.R. § 300.513; 8 NYCRR 200.5[j][4]).

6:1+1 Special Class Placement

Next, I will consider the parties' claims regarding the district's May 2009 placement recommendation. Upon review of the hearing record, I find that the 6:1+1 special class placement recommended in the May 2009 IEP with a 1:1 behavior management paraprofessional constituted an appropriate educational setting for the student and was reasonably calculated to provide the student with meaningful educational benefits.

At the time of the May 2009 CSE meeting, the student exhibited significant delays in cognition, academics, language and communication, motor development, sensory processing, adaptive skills, and socialization (Dist. Exs. 3; 6; 7; 8; 9; 10 at pp. 4-7). In addition, he had

[11] The district school psychologist testified that at the beginning of the school year, she met with the educational director from McCarton who advised that it would be too difficult to remove everyone from their therapies and their classes at the same time, and therefore, pursuant to parent agreement, McCarton would make one person available to the CSE at a time (Tr. p. 134). However, the educational director testified that she would have arranged for the simultaneous participation of the student's providers if she had received such a request (Tr. pp. 890-91).

difficulty attending and engaged in stereotypic motor movements and self-injurious behaviors (Dist. Exs. 6 at p. 1; 7 at pp. 1-2; 8 at p. 2; see Dist. Ex. 5 at pp. 7-8). The student's McCarton teacher reported that the student's poor attention and challenging behaviors interfered with his ability to learn and socialize (Dist. Ex. 7 at p. 1). Similarly, the student's speech-language pathologist and occupational therapist noted that his behavior interfered with his ability to complete tasks during therapy (Dist. Exs. 6 at p. 1; 8 at p. 2).

State regulations provide that a 6:1+1 special class placement is designed to address students "whose management needs are determined to be highly intensive, and requiring a high degree of individualized attention and intervention" (8 NYCRR 200.6[h][4][ii][a]). Consistent with the student's needs and State regulations, the May 26, 2009 CSE recommended that the student be placed in a 6:1+1 special class in a specialized school (Dist. Ex. 10 at p. 1). In addition, recognizing the intensity of his management needs, the CSE also recommended that the student be provided with a full-time 1:1 behavior management paraprofessional (Tr. p. 86; Dist. Ex. 10 at pp. 23-24). The CSE also developed a goals and short-term objective that targeted the student's interfering behaviors and developed a BIP for the student (Dist. Ex. 10 at pp. 14, 23-24). To effectuate those goals, the May 26, 2009 CSE detailed on the student's IEP the environmental modifications and human/material resources needed to address his management needs such as: (1) a highly structured setting; (2) clear and consistent expectations; (3) predictable routines; (4) verbal and visual prompting; (5) verbal modeling, phonemic cues, or cueing through questioning; (6) continuous positive reinforcement; (7) frequent repetition and review; practical application of skills; (8) systematic generalization of skills across people, materials, setting, and contexts; (9) frequent breaks to improve ability to persevere and attend; (10) step-by-step instruction; (11) the provision of a 1:1 behavior management paraprofessional; and (12) related services consisting of speech-language therapy and OT (Dist. Ex. 10 at p. 5).

In addition to recommending the student for placement in a small, highly structured environment, the CSE developed academic goals and short-term objectives designed to address the student's deficits in reading, writing, and math, as well as an annual goal and short-term objectives targeting the student's weaknesses in social and play skills (Dist. Ex. 10 at pp. 8-10, 16; see Tr. pp. 85, 122-23). The May 26, 2009 CSE also developed annual goals and short-term objectives that targeted the student's deficits in expressive and receptive language, pragmatics and social communication and feeding skills, and recommended the provision of five 60-minute sessions of individual speech-language therapy per week (Dist. Ex. 10 at pp. 11-13, 20). With respect to the student's motor delays and difficulties with sensory processing, the CSE developed annual goals and short-term objectives related to improving his fine motor and perceptual skills, sensory processing abilities, motor planning and coordination, and self-care skills (id. at pp. 17-20). To assist the student in achieving these goals, the CSE recommended the provision of five 45-minute sessions of individual OT per week (id. at p. 23). The CSE further recommended that the student receive APE (id. at p. 7). Lastly, to reduce the possibility of regression, the CSE recommended the student for a 12-month school year (Tr. p. 61; Dist. Ex. 10 at p. 1).

Although the impartial hearing officer determined that the student could not function in the classroom without the benefit of 1:1 assistance and that the hearing record lacked information to demonstrate that a paraprofessional, rather than an instructor, could serve in this role, the hearing record suggests otherwise (IHO Decision at p. 31). Here, the hearing record shows that the CSE's recommendation for the provision of a full-time 1:1 behavioral management paraprofessional for the student was based on information that was before it at the time of the meeting (see J.S. v. North Colonie Cent. School Dist., 586 F. Supp. 2d 74, 84 [N.D.N.Y. 2008] citing J.R. v. Bd. of Educ. of

City of Rye Sch. Dist., 345 F. Supp. 2d 386, 395 [S.D.N.Y. 2004]. According to the district representative, the CSE determined that placement in a 6:1+1 class would provide the student with appropriate support because he would have a full-time special education teacher who would direct the instruction, combined with a paraprofessional who would be in the classroom to support the behaviors, in addition to the 1:1 behavior management paraprofessional assigned to the student (Tr. pp. 197-98). The district representative further explained that as a result, two other adults would also be present in the classroom, including the behavior management paraprofessional specifically designated to the student to address his behaviors (Tr. pp. 122-23).

Notwithstanding the impartial hearing officer's finding that in light of "the intensity of [the student's] self-injurious behaviors," he required the 1:1 intervention that he was receiving at McCarton, the hearing record indicates that at the time of the May 2009 CSE meetings, the student was "doing better" with groups and placement in a 6:1+1 setting would have allowed him to engage with his classmates and participate in group learning (Tr. p. 109). Additionally, the full-time 1:1 behavior management paraprofessional would have assisted the student in his interactions with others (id.). Lastly, the district representative indicated that the behavior management professional was trained to work with the student in a classroom of children with autism (Tr. pp. 223-24). Accordingly, given the information that was before the CSE at the time that it developed the May 2009 IEP, the hearing record suggests that CSEs' recommendation to place the student in a 6:1+1 class and provide him with 1:1 behavioral management paraprofessional services would have provided him with sufficient support and was reasonably calculated to provide the student with educational benefits.

Special Factors and Interfering Behaviors

The impartial hearing officer found that the BIP developed by the district did not comport with the requirements laid out in State regulations, specifically that it did not include "methods of quantification or response criteria" and "offer[ed] no specifics as to frequency, duration or intensity nor [wa]s it clear as to how progress w[ould] be monitored" (IHO Decision at p. 28). She further found that the verbal reports offered by McCarton did not constitute the "predicate evaluations upon which an FBA must be based," nor did McCarton personnel intend them to serve as such (id. at p. 29). As set forth in greater detail below, the hearing record supports the district's contention that the CSE properly considered an FBA and developed an appropriate BIP for the student in accordance with State regulations.

Under the IDEA, a CSE may be required to consider special factors in the development of a student's IEP. 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 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. Board 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., 583 F. Supp. 2d at 510; Tarlowe, 2008 WL 2736027, at *8; W.S, 454 F. Supp. 2d at 149-50; 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., 569 F. Supp. 2d at 380 ; see also Schreiber v. East Ramapo Central 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]).

In New York State, policy guidance explains that "the 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]" ("Guide to Quality Individualized Education Program [IEP] Development and Implementation," at p. 25, Office of Special Educ. [Dec. 2010], available at http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf). "The behavioral interventions and/or supports should be indicated under the applicable section of the IEP," and if necessary, "[a] student's need for a [BIP] must be documented in the IEP" (id.).[12] 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 having an FBA conducted and a BIP developed for a student in certain non-disciplinary situations (8 NYCRR 200.4[d][3][i], 200.22[a], [b]). An FBA is defined in State regulations 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 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).

With regard to a BIP, the special factor procedures set forth in State regulations further note that the CSE or 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

[12] 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. 25 [emphasis in original]), 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 [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]).

(iv) as required pursuant to" 8 NYCRR 201.3 (8 NYCRR 200.22[b][1]). Once again, "[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]).[13] 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 Special Education [April 2011], available at http://www.p12.nysed.gov/specialed/formsnotices/IEP/training/QA-411.pdf). 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. 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" (8 NYCRR 200.22[b][5]).

Here, the district representative reported that the CSE conducted an FBA of the student's behavior "utilizing the data provided to [the CSE] by the school [McCarton]" during the May 2009 CSE meetings, the results of which were reflected in the meeting notes (Tr. pp. 93-100; Dist. Ex. 11 at pp. 3-4).[14] She explained that as part of the FBA process, she reviewed with the student's teacher the interfering behaviors identified in the student's 2008-09 McCarton behavior plan including the frequency, intensity, and duration of the behaviors (Tr. pp. 93, 100-04; see Tr. p. 69). The district representative further testified that as with the IEP goals, McCarton personnel were asked to indicate the behaviors from the student's 2008-09 McCarton individual education plan that continued to require intervention, the behaviors that had been addressed and no longer required intervention, and any new behaviors that had developed (Tr. p. 101). The CSE meeting notes indicated that the student's teacher described the strategies used by McCarton to address the student's behaviors (Dist. Ex. 11 at pp. 3-4). In addition, they reflected that the parents participated in the discussion regarding the student's behaviors (id.).

The district representative testified that she prepared a BIP for the student based on the data provided by McCarton personnel (Tr. pp. 92-93, 105). The BIP described the student's behaviors that interfered with learning, including tantrums characterized by loud vocalizations and jumping in his chair; head banging; and motor and vocal stereotypy (Dist. Ex. 10 at p. 24). The

[13] 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 [August 14, 2006]).

[14] The school psychologist testified that she believed an FBA was not an official document, rather a compilation of data used to create a BIP (Tr. p. 95). She stated that an FBA could consist of information given at a CSE meeting (Tr. p. 98).

BIP outlined the student's expected behavior changes, such as: (1) being able to express his needs and wants in an appropriate manner through the use of words or pictures; (2) being able to express that he was not feeling well or was agitated without harming himself; and (3) reducing instances of motor and vocal stereotypy (id.). According to the BIP, the strategies that would be employed in an effort to change the student's behavior included: (1) positive reinforcement for attending to instruction and engaging in appropriate behaviors; (2) the use of sensory breaks when agitated, including deep breathing; (3) provision of a schedule and a predictable daily routine; (4) blocking to prevent head banging; (5) redirection to classroom tasks; (6) the provision of relaxation periods; (7) modeling of appropriate behaviors; and (8) verbal prompts to engage in appropriate behaviors (id.). The May 2009 IEP also incorporated the following supports to assist the student in changing his behavior: a behavior management paraprofessional, related services, a small class (6:1+1) setting, and collaboration between home and school to foster consistency (id.). The district representative noted that the May 2009 IEP included behavior management strategies that were employed by McCarton and designed to address the student's interfering behaviors (Tr. pp. 107-08; compare Dist. Ex. 7, with Dist. Ex. 10 at pp. 5-6, 24).

Based on the foregoing, in this case, the hearing record does not support a finding that the student was a denied a FAPE, where the district formulated a BIP based on information and documentation provided by the student's teacher, and developed management needs designed to target the student's interfering behaviors (C.F. v. New York City Dep't. of Educ., 2011 WL 5130101, at *9-*10 [S.D.N.Y., Oct. 28, 2011]; W.S. v. Nyack Union Free Sch. Dist., 2011 WL 1332188, at *10 [S.D.N.Y., Mar. 30, 2011]; Connor v. New York City Dep't of Educ., 2009 WL 3335760, at *4 [S.D.N.Y. Oct. 13, 2009]).

Conclusion

Based on all of the above, I find that the district offered the student a FAPE for the 2009-10 school year. Having so determined, it is not necessary to reach the issue of whether McCarton was appropriate for the student or whether equitable considerations support the parents' claim and the necessary inquiry is at an end (M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134; Application of a Child with a Disability, Appeal No. 08-158; Application of a Child with a Disability, Appeal No. 05-038).

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

THE APPEAL IS SUSTAINED

IT IS ORDERED that the portion of the impartial hearing officer's decision dated October 13, 2011 which determined that the district failed to offer the student a FAPE for the 2009-10 school year and ordered the district to provide direct payment of tuition costs for the student's attendance at McCarton is hereby annulled.

Dated: **Albany, New York**
January 6, 2012

JUSTYN P. BATES
STATE REVIEW OFFICER