



The University of the State of New York

The State Education Department

State Review Officer

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No. 12-005

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, Diane da Cunha, Esq., of counsel

The Law Offices of Regina Skyer and Associates, LLP, attorneys for respondents, Gregory Cangiano, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) 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 Center for Developmental Pediatrics (McCarton Center) for the 2010-11 school year. The appeal must be sustained.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, at least one psychologist, and school district representatives (Educ. Law. § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process

hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; 34 CFR 300.151-300.152, 300.506, 300.511; Educ. Law § 4404[1]; 8 NYCRR 200.5[h]-[l]).

New York State has implemented a two-tiered system of administrative review to address disputed matters between parents and school districts regarding "any matter relating to the identification, evaluation or educational placement of a student with a disability, or a student suspected of having a disability, or the provision of a free appropriate public education to such student" (8 NYCRR 200.5[i][1]; see 20 U.S.C. § 1415[b][6]-[7]; 34 CFR 300.503[a][1]-[2], 300.507[a][1]). First, after an opportunity to engage in a resolution process, the parties appear at an impartial hearing conducted at the local level before an IHO (Educ. Law. § 4404[1][a]; 8 NYCRR 200.5[j]). An IHO typically conducts a trial-type hearing regarding the matters in dispute in which the parties have the right to be accompanied and advised by counsel and certain other individuals with special knowledge or training; present evidence and confront, cross-examine, and compel the attendance of witnesses; prohibit the introduction of any evidence at the hearing that has not been disclosed five business days before the hearing; and obtain a verbatim record of the proceeding (20 U.S.C. § 1415[f][2][A], [h][1]-[3]; 34 CFR 300.512[a][1]-[4]; 8 NYCRR 200.5[j][3][v], [vii], [xii]). The IHO must render and transmit a final written decision in the matter to the parties not later than 45 days after the expiration period or adjusted period for the resolution process (34 CFR 300.510[b][2],[c], 300.515[a]; 8 NYCRR 200.5[j][5]). A party may seek a specific extension of time of the 45-day timeline, which the IHO may grant in accordance with State and federal regulations (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5]). The decision of the IHO is binding upon both parties unless appealed (Educ. Law § 4404[1]).

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). The opposing party is entitled to respond to an appeal or cross appeal in an answer (8 NYCRR 279.5). The SRO conducts an impartial review of the IHO's findings conclusions and decision and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). The SRO must ensure that a final decision is reached in the review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.514[c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

In this case, the student's eligibility for special education programs and related services as a student with autism is not in dispute (Tr. pp. 14-15, 263-64; Dist. Ex. 1 at p. 1; 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

During the 2009-10 school year, the student attended the McCarton Center (see Dist. Exs. 7; 9; Parent Ex. C). In January and February 2009, over a period of three nonconsecutive days, a private psychologist conducted a psychological evaluation of the student (Dist. Ex. 4). In June

2009, based on the private psychologist's recommendation, the parents placed the student at the McCarton Center,¹ where he received six 45-minute sessions of individual speech-language therapy per week, five 45-minute sessions of occupational therapy (OT) per week, and 20 hours of 1:1 applied behavior analysis (ABA) per week (Tr. pp. 790-91; Dist. Ex. 13 at p. 1).² The student also received two sessions of speech-language services per week outside of the McCarton Center (Tr. p. 826; Dist. Ex. 13 at p. 1).³

On April 13, 2010, a district school psychologist observed the student during a 1:1 ABA lesson at the McCarton Center (Tr. p. 263; Dist. Ex. 9). On May 4 and May 5, 2010, the CSE convened for the student's annual review and to develop his IEP for the 2010-11 school year (Tr. pp. 259-60; Dist. Exs. 1; 2). The May 2010 CSE recommended a 12-month placement in a 6:1+1 special class in a specialized school with a 1:1 behavior management paraprofessional and related services (Tr. pp. 260, 263, 280; Dist. Exs. 1 at pp. 1, 26-27; 2 at p. 2).

By letter dated June 15, 2010 to the district, the parents advised that they intended to unilaterally place the student in the McCarton Center for the 2010-11 school year (Parent Ex. C). The letter indicated that a request for an impartial hearing would follow (*id.*). In a letter dated June 16, 2010 to the parents, the district summarized the May 2010 CSE's recommendations and notified them of the school to which the student was assigned for the 2010-11 school year (Dist. Ex. 3). By letter dated June 28, 2010 to the district, the student's mother advised that she had visited the assigned school and had determined that it was inappropriate for the student (Parent Ex. B). The parent further advised the district of her concerns and indicated her willingness to consider "a program that provided what [the student] nee[ed]" (*id.*).

In September 2010, the student began to attend a private preschool for approximately two hours per day in addition to his program at the McCarton Center with the support of his 1:1 ABA therapist to promote socialization (Tr. pp. 810, 812, 816).

A. Due Process Complaint Notice

By due process complaint notice dated September 16, 2010, the parents alleged that the district denied the student a free appropriate public education (FAPE) during the 2010-11 school year (IHO Ex. I). As relief, the parents requested, among other things, tuition reimbursement for the unilateral placement of the student at the McCarton Center (*id.* at pp. 1, 6). The parents explained as background that during the 2009-10 they were unwilling to have the student vaccinated in order for him to be placed in the public school, that they had previously sought due process for the 2009-10 school year, and that the matter had settled (*id.* at p. 2; *see* Parent Ex. C). Specifically with regard to their claim that the district denied the student a FAPE during the 2010-11 school year, the parents raised the following factual allegations: (1) the district failed to provide

¹ The McCarton Center 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).

² In February 2009, the student began attending the McCarton Center on a part-time basis for a few afternoons per week; however, in June 2009, he enrolled as a full-time student (Tr. pp. 791-92).

³ The parents are not seeking reimbursement for the costs of the student's additional speech-language therapy (Tr. p. 827).

the student with an appropriate placement recommendation, in part, because the public school rejected the student, given that he had not completed his vaccinations; (2) the proposed 6:1+1 program was not reasonably calculated to confer educational benefits to the student; (3) the CSE did not rely on the necessary evaluations "to properly gauge the student's skill levels;" (4) the annual goals and short-term objectives contained in the May 2010 IEP were inadequate; (5) the district did not complete a functional behavioral assessment (FBA) of the student; and (6) the behavioral intervention plan (BIP) was not adequate (IHO Ex. I at pp. 3-5). The parents further maintained that the McCarton Center was appropriate to meet the student's educational needs and that equitable considerations weighed in favor of their request for relief (id. at p. 5).

On September 24, 2010, the district submitted a response to the parents' due process complaint notice (IHO Ex. II).

B. Impartial Hearing Officer Decision

On March 10, 2011, the parties proceeded to an impartial hearing, which concluded on August 23, 2011 after seven days of proceedings (Tr. pp. 1-963).⁴ In a decision dated December 1, 2011, the IHO ordered the district to reimburse the parents for the costs of the student's tuition at the McCarton Center for the 2010-11 school year (IHO Decision at p. 21). Although he determined that the May 2010 CSE properly relied on the evaluations available to it to assess the student's skill levels, and that the behavioral intervention strategies devised by the CSE for the student were sufficient to meet his needs, the IHO ultimately concluded that the district denied the student a FAPE during the 2010-11 school year (id. at pp. 12-15). The IHO based this conclusion on the following findings: (1) the annual goals contained in the May 2010 IEP were inappropriate because they failed to include evaluative criteria, evaluation procedures, and schedules to be used to measure the student's progress toward meeting the goals; (2) the annual goals were vaguely worded; and (3) the recommended 6:1+1 program was inappropriate because the student's academic, social/emotional and management needs required greater individualized instruction than the 20-minute sessions per day that the teacher of the assigned class would have provided (id. at pp. 13, 15).

With regard to the parents' unilateral placement, the IHO found that the McCarton Center was appropriate because it provided the student with sufficient levels of "specifically designed, individualized instruction to meet his unique educational needs" (IHO Decision at p. 16). The IHO determined, among other things, that the student required 1:1 ABA instruction to acquire requisite learning skills, help him focus his attention and manage his behavior, aid in his functional communication, and facilitate his development of social skills (id. at p. 19). Next, with respect to equitable considerations, although the IHO noted that the parents' 10-day notice of unilateral placement failed to indicate that the parents would seek private placement at public expense, he did not find that this defect weighed against their request for relief, given that the district failed to object to the parents' failure to include such language, nor was it prejudiced by their failure to do so (id. at p. 20). Lastly, regarding the district's claim that the parents never intended to enroll the student in a public placement, the IHO did not find that the parents' pursuit of a private school

⁴ The IHO included in the hearing record each written response to the parties' requests for an extension, in which he described the factors considered, the reasons why he granted the parties' extension request, and his notification to the parties of the new date for rendering his decision (IHO Exs. IX-XVII; see 8 NYCRR 200.5[j][5][iv]).

precluded their claim for relief, absent any evidence of a failure to cooperate with the district or their interference with the selection of an appropriate placement by the district (id. at p. 21).

IV. Appeal for State-Level Review

The district appeals and requests reversal of a number of adverse findings in the IHO's decision. Regarding the provision of a FAPE to the student, the district maintains that the annual goals included in the May 2010 IEP were proper, in part, because they were detailed, measurable and designed to meet the student's needs. Moreover, while the district acknowledges that some of the annual goals could be described as vaguely worded, it further asserts that the IHO failed to recognize that the May 2010 IEP's short-term objectives clarified any ambiguity in the goals and provided specific criteria to measure progress toward meeting them. The district also contends that the May 2010 IEP contained detailed information concerning the student's present levels of performance to enable measurement of his progress toward the stated goals. Furthermore, the district alleges that the IHO incorrectly found that the goals failed to include evaluative criteria and evaluation procedure and schedules. Rather, the district argues that the May 2010 IEP provided for three progress reports per year, and also prescribed that the student should be assessed through teacher observation and assessment and teacher-made materials. While the district notes that the May 2010 CSE did not specify the methods to measure the student's progress in the IEP, it maintains that the method of measurement was a matter to be determined by the student's classroom teacher.

With respect to the recommended 6:1+1 program, the district alleges, among other things, that it was appropriate to meet the student's needs. Despite the IHO's finding that the 6:1+1 class would not have provided the student with sufficient personalized instruction, the district asserts that the student would have received ample 1:1 time each day. Additionally, notwithstanding the parents' claims that the student could not work without an adult present to redirect and focus him, the district contends that a 1:1 behavior management paraprofessional could appropriately fulfill that role. Moreover, the district submits that the evidence did not demonstrate that the student required more support than a 1:1 behavior management paraprofessional would provide. Further, the district notes that the 6:1+1 class would also have provided the student with the necessary opportunity to socialize with age appropriate peers.

Regarding the appropriateness of the McCarton Center, the district maintains that it was not appropriate to meet the student's unique needs. Lastly, the district argues that equitable considerations weigh against the parents' claim for relief, because they acted unreasonably, the cost of the McCarton Center is unreasonable, and they never intended to place him in a district program. Moreover, the district alleges that the parents' 10-day notice failed to comport with the IDEA because it did not notify the district that the parents would request the unilateral placement would be at public expense.

The parents submitted an answer in which they request that the IHO's decision be upheld in its entirety. With respect to the district's claim that it offered the student a FAPE during the 2010-11 school year, the parents maintain, in part, that the IHO correctly determined that the annual goals were inappropriate. The parents also argue that the IHO properly found that the student's needs for individualized instruction could not have been met in a 6:1+1 class and that the proposed program was not reasonably calculated to confer educational benefits on the student.

The parents further maintain that at the time of the May 2010 CSE meeting, the student was unable to learn in a group setting. Next, while the parents acknowledge that a 1:1 behavior management paraprofessional could address safety concerns, they contend such services alone would not have provided educational benefits to the student. With regard to the appropriateness of the McCarton Center, the parents agree with the IHO's determinations that the school was appropriate. Lastly, the parents allege that equitable considerations support their request for relief.

The district also submitted a reply. Pursuant to State regulations, a reply is limited to procedural defenses interposed by a respondent or to any additional documentary evidence served with the answer (8 NYCRR 279.6; see Application of the Bd. of Educ., Appeal No. 09-060; Application of a Student with a Disability, Appeal No. 09-056; Application of a Student with a Disability, Appeal No. 09-034; Application of a Student with a Disability, Appeal No. 08-036; Application of a Child with a Disability, Appeal No. 06-046). In this case, the district's reply contained additional arguments directed at the substantive arguments interposed by the parents in their answer. Accordingly, the portions of the district's reply that exceed the permissible scope will not be considered (see 8 NYCRR 275.14[a], 279.6; Application of the Bd. of Educ., Appeal No. 09-060; Application of a Student with a Disability, Appeal No. 09-056; Application of a Student with a Disability, Appeal No. 08-028; Application of a Student Suspected of Having a Disability, Appeal No. 08-002; Application of a Child with a Disability, Appeal No. 06-046; Application of a Child with a Disability, Appeal No. 04-064; Application of a Child with a Disability, Appeal No. 02-009).

V. Applicable Standards

Two purposes of the 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 CFR 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 IHO'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 CFR 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 CFR 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 CFR 300.320[a][2]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "Reimbursement merely requires [a

district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 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]).

VI. Discussion

A. Scope of Review

Initially, I note that neither party has appealed from the IHO's decision with respect to the following issues: (1) that the parents attempted to raise issues not contained in the due process complaint notice, and therefore, the IHO did not consider them; (2) that the May 2010 CSE properly relied on the evaluations available to it to assess the student's skill levels; and (3) that the behavioral intervention strategies in the IEP were sufficient to meet the student's needs. Accordingly, those determinations are final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]). Therefore, the remaining issues in dispute are the appropriateness of the annual goals included in the May 2010 IEP and whether the recommended 6:1+1 program with a 1:1 behavioral management paraprofessional was reasonably calculated to enable the student to receive educational benefits.

B. May 2010 IEP

As expressed in greater detail below, although the IHO's decision was well-reasoned in most respects, after an independent review of the hearing record, I disagree with his conclusions regarding the adequacy of the goals contained in the May 2010 IEP and the appropriateness of the proposed 6:1+1 program.

1. Annual Goals and Short-term Objectives

I will first consider the parties' claims regarding the adequacy of the annual goals listed in the May 2010 IEP. As detailed below, a review of the hearing record shows that the annual goals and short-term objectives contained in the May 2010 IEP were detailed, measurable, and designed to meet the student's needs.

In April 2010, the McCarton Center provided updated annual goals and long-term and short-term objectives to the May 2010 CSE, which the CSE used in conjunction with the evaluative reports it had before it, to develop the student's annual goals on his IEP (Tr. pp. 276-77, 681, 695; compare Dist. Ex. 1, with Dist. Ex. 7). The May 2010 IEP contained 17 annual goals and 96 short-term objectives that addressed the student's needs in the areas of reading, math, visual-perceptual, language processing, articulation, play skills, communication, oral/speech motor skills, social/emotional functioning, self-care skills, sensory processing, and behavior as well as fine and gross motor skills (Tr. pp. 276-77; Dist. Ex. 1 at pp. 8-23). The district's school psychologist testified that the May 2010 CSE developed annual goals based on the student's individual needs (Tr. p. 277).

The IHO described the annual goals as "vaguely worded" (IHO Decision at p. 13). While the annual goals contained in the May 2010 IEP lacked specificity and measurability, the hearing record does not demonstrate that the goals' lack of specificity resulted in a denial of a FAPE because, as explained below, all of the goals contained specific short-term objectives related to the student's needs from which the student's progress could be measured (Dist. Ex. 1 at pp. 8-23). The school psychologist described how the May 2010 CSE reviewed every goal with each of the student's providers at the meeting and she added that while they were developing the IEP, the CSE asked the providers to "think forward," and look at the goals on which they were working (Tr. pp. 277, 304-05). She further testified that the May 2010 CSE read through every single goal at the meeting and made sure that they made sense for the student (Tr. p. 277). According to the school psychologist, the May 2010 CSE questioned each provider working with the student regarding how the CSE should indicate the goals on the IEP to facilitate his transition to a public school so that he would continue to work on the goals on which he was working at the time of the May 2010 CSE meeting (Tr. pp. 277-78).

Specifically, the annual goals and short-term objectives targeted the student's vocabulary skills, matching skills, knowledge of math concepts, articulation, oral motor skills, communication skills, social skills, ability to follow instructions, identification of feelings, behavior, sensory processing, play skills, visual motor skills, activities of daily living (ADL) skills, writing grasp, graphomotor skills, strength, and stamina as well as his needs related to receptive, expressive, and pragmatic language (Dist. Ex. 1 at pp. 8-23). Although these goals neither contained evaluative criteria or schedules, the corresponding short-term objectives "contained sufficiently detailed information regarding 'the conditions under which each objective was to be performed and the frequency, duration, and percentage of accuracy required for measurement of progress'" and remedied any deficiencies in the annual goals (Tarlowe, 2008 WL 2736027, at *9; see M.C. v. Rye Neck Union Free Sch. Dist., 2008 WL 4449338, at *11 [S.D.N.Y. Sept. 29, 2008]; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 146, 147 [S.D.N.Y. 2006]; Application of a Student with a Disability, Appeal No. 11-073; Application of a Student with a Disability, Appeal No. 09-038; Application of the Dep't of Educ., Appeal No. 08-096).

The IHO also found that the annual goals were deficient because they lacked evaluative criteria, evaluation procedures, and schedules to be used to measure the student's progress toward meeting the annual goals in those areas; however, the evidence in the hearing record fails to substantiate this finding. Rather, the school psychologist described how the goals were measureable and how they would be modified through an IEP meeting according to mastery (Tr. pp. 278-79). According to the school psychologist, the student's teacher would determine the methods of measurement rather than reflecting such measures on the May 2010 IEP (Tr. pp. 278-79).⁵ The school psychologist further testified that the student's teacher filled out the methods of measurement portion of the IEP during the course of the school year when they were reviewing

⁵ The psychologist indicated that the methods of measurement are not dictated to the teachers or therapists working with the student because it would not be appropriate (Tr. p. 278). To the extent her testimony may be read as applying to any student, I note, that it is not impermissible to for a CSE to designate evaluative criteria (the measure used to determine if the goal has been achieved) and evaluation procedures (how progress will be measured) on an IEP ("Guide to Quality Individualized Education Program [IEP] Development and Implementation," Office of Special Educ. [Dec. 2010], available at <http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf>).

the IEP, based upon the teacher's observations how the student was progressing toward that goal (Tr. p. 305). She noted that because the teachers and therapists worked with the student on certain skills, the CSE afforded them discretion regarding how they measured the student's ability to master a skill (Tr. pp. 278, 315). The school psychologist also described the various methods of measurement listed in the IEP that the classroom teacher could employ, such as teacher-made materials and standardized tests (Tr. pp. 313-14; Dist. Ex. 1 at p. 8). Further, the May 2010 IEP indicated that progress toward meeting the goals would be measured by written reports three times during the school year (Tr. pp. 314, 316; Dist. Ex. 1 at pp. 8-23).

In summary, I find that the student's annual goals and short-term objectives, when read together, were sufficiently detailed, and measurable, and they adequately addressed his significant areas of need regarding language processing, communication, articulation, sensory regulation, social skills, play skills, behavior, attention, and academics in addition to fine and gross motor skills. Consequently, I disagree with his determination that the district denied the student a FAPE on this basis.

2. 6:1+1 Special Class Placement

Turning next to a review of the parties' claims regarding the May 2010 CSE's recommended 6:1+1 placement, as detailed below, an independent review of the hearing record compels a conclusion that the May 2010 CSE recommended an appropriate placement for the student for the 2010-11 school year designed to address his academic, language and social/emotional needs.

Testimony by the school psychologist supports a finding that the May 2010 CSE's recommendation of a 6:1+1 special class combined with a 1:1 behavior management paraprofessional was based on the student's needs as set forth in his IEP (Tr. pp. 260, 274, 280-81, 307). She testified that the May 2010 CSE convened over a two-day period in order to review all the information and gain input from all of the student's providers to develop a program for him for the 2010-11 school year (Tr. pp. 260, 312). Prior to the meeting, the May 2010 CSE read reports provided to it, and then during the meeting, the CSE also received additional detailed reports from the student's teacher (Tr. pp. 266-67). Although the May 2010 CSE considered placement of the student in 12:1+1 special class, it rejected this program option because it determined that the student needed the additional support provided in a smaller classroom setting (Tr. pp. 279-80; Dist. Ex. 1 at p. 25). The May 2010 CSE also considered and rejected placement of the student in a 6:1+1 special class without a 1:1 paraprofessional because the CSE opined that the student would benefit from the support of a behavior management paraprofessional (Tr. p. 280; Dist. Ex. 1 at p. 25).

The school psychologist further testified that the CSE reviewed the student's needs regarding academic achievement, language processing, and social/emotional functioning to assist in the development of the student's program recommendations (Tr. pp. 266-68). At the time of the May 2010 CSE meeting, the student exhibited delays in receptive, expressive, and pragmatic language, ADLs, attention, communication, articulation, sensory regulation, social skills, play skills, behavior, and academics as well as fine and gross motor skills (Tr. pp. 265, 537, 557, 645, 656, 780-84; Dist. Exs. 4; 8-10; 12-13). Additionally, according to the private 2009 psychological evaluation of the student, although he lacked the capability to engage in standardized testing, the student sat at a table, briefly maintained his attention, and with practice, understood some basic

commands related to testing (Dist. Ex. 4 at p. 2). Based on the information before the May 2010 CSE, the student's IEP reflected the CSE's discussion regarding his then-current functioning and needs in the areas of reading, writing, math, behavior, language processing, social skills, attention, articulation, sensory regulation as well as fine and gross motor skills (Tr. pp. 265-69, 275, 309; Dist. Ex. 1 at pp. 3-7). Teacher reports from the McCarton Center estimated that the student was functioning on a pre-kindergarten to kindergarten level in reading, writing, and mathematics (Dist. Ex. 1 at pp. 4-5). According to the IEP, the student also exhibited variable attention skills; however, he could listen to short stories read to him for 75 percent of the time (Tr. p. 265; Dist. Ex. 1 at pp. 4, 6). The student was also able to follow simple one-step directions, and when attending, the student could follow two-step related commands (Dist. Ex. 1 at p. 4). The May 2010 IEP further indicated, among other things, that the student showed comprehension of "yes/no" questions via nodding or shaking his head, and that he was also able to identify objects and their functions, as well as actions in pictures (*id.*). Furthermore, the student could spontaneously and independently request preferred toys, and was expanding his vocabulary of single words and two-word approximations (*id.*). Regarding the student's pragmatic language skills, the CSE found that the student was more interested in reciprocal interactions and more easily used language to greet with approximations of "hi" and "bye" (*id.*). The IEP also reflected the student's improvement in simple turn-taking skills and significant improvement regarding his motor planning and execution of the necessary motor skills to produce sounds (*id.*). The CSE also noted that the student attended to his teacher and would look at other children, but he was not afforded an opportunity to be with other children for learning (Tr. p. 268). In addition, the student's providers noted that he was easily redirected (Tr. p. 269).

State regulations provide that a 6:1+1 special class placement is designed for 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]). To address the student's needs as outlined above, the May 2010 CSE recommended a 12-month placement for the student in a 6:1+1 special class in a specialized school with a 1:1 behavior management paraprofessional (Dist. Ex. 1 at pp. 1, 26). The May 2010 CSE also recommended five 45-minute sessions of individual speech-language therapy per week, one 30-minute session of individual speech-language therapy per week, one 30-minute session of speech-language therapy per week in a group of two, five 45-minute sessions of individual OT per week, two 30-minute sessions of individual PT per week, and two 30-minute sessions of individual counseling per week to address the student's needs in the area of articulation, language processing, and social-emotional functioning as well as fine and gross motor skills (Tr. p. 280; Dist. Ex. 1 at pp. 5-7, 26-27).

Moreover, the May 2010 IEP contained specific recommendations regarding accommodations and strategies for the student based on his needs (Dist. Ex. 1 at pp. 3-7). The May 2010 CSE incorporated these environmental modifications and human/material resources into the resultant IEP to address the student's management needs as follows: (1) a highly structured setting; (2) a predictable learning environment; (3) positive reinforcement; (4) systematic visual, verbal, and physical prompts; (5) tasks broken down into small steps; (6) frequent variation of work tasks and materials; (7) frequent repetition, practice, and review to maintain newly learned skills; (8) modeling, redirection, frequent breaks, and clear and consistent routines; (9) functional application and generalization of skills; (10) related services of speech-language therapy and OT; and (11) the provision of a 1:1 behavior management paraprofessional (*id.* at pp. 5-7).

In addition, the May 2010 CSE also developed a BIP to address the student's behaviors that included scratching, leaving his seat, and biting (Dist. Ex. 1 at p. 28). The BIP described behavioral goals for the student including the expression of his needs, wants, frustrations, and emotions in an appropriate manner rather than engaging in the behaviors described above (id.). In addition, the BIP included the strategies and supports to assist the student in achieving his behavioral goals including positive reinforcement, redirection, modeling, practicing, and instruction regarding alternative responses (id.). The school psychologist added that the student's 1:1 behavioral management paraprofessional and the classroom paraprofessional could also provide "educational behavioral direction" under the supervision of the special education teacher (Tr. p. 274). Additionally, the school psychologist stated that within a 6:1+1 special class, the provision of positive reinforcement and utilization of the strategies of blocking and redirection also could address the student's behavior (id.).

Based on the above, I find that the CSE's recommendation to place the student in a 6:1+1 special class was tailored to address the student's educational needs and was designed to offer the student a FAPE for the 2010-11 school year.

3. 1:1 Support

The parents also contend that the recommended program in the May 2010 IEP did not afford the student sufficient 1:1 instruction to meet his needs. As set forth below, the recommendation of a 6:1+1 special class combined with the provision of a 1:1 behavior management paraprofessional was appropriately designed to address the student's academic and social/emotional needs.

During the 2009-10 school year at the McCarton Center, the student made progress in the areas of attention, receptive and expressive language, oral motor skills, motor-speech skills, pragmatic language, and play skills (Dist. Ex. 13 at p. 1). In the areas of receptive and expressive language, a March 2009 educational progress report reflected the student's progress through his use of PECS⁶ to spontaneously express his needs, identify and label vocabulary words, and follow one-step directions with cues (Dist. Ex. 12 at p. 1). Additionally, the student's SEIT reported that the student used PECS to request food, toys, and other objects including the computer and books (id. at p. 3). Further, while the student's ability to maintain his attention was limited, he responded to redirection, which included the use of verbal and visual cues to assist him to remain on task (id. at p. 4). Additionally, when provided with visual and verbal redirection, the student followed teacher directions (id.). The student's SEIT also reported that the student comprehended material presented to him at home and at school (id.). According to reports from the McCarton Center that were utilized by the May 2010 CSE, the student had also recently engaged in social interactions, such as turn taking for two to three turns with prompts and reciprocal exchanges with peers (Dist. Exs. 10 at p. 2; 13 at p. 1). Teacher reports reviewed by the May 2010 CSE further revealed that the student followed three or more verbal directions and simple commands in sequence (Dist. Ex. 13 at p. 3). An OT progress note showed that he had also progressed with respect to his fine and gross motor, and self-care skills (Dist. Ex. 10 at pp. 2-3). However, the information before the CSE also showed that notwithstanding his progress, the student continued to demonstrate delays

⁶ According to the hearing record, PECS is an acronym for the Picture Exchange Communication System (Dist. Ex. 4).

in the areas of language, communication, social skills, behavior, sensory regulation, and fine and gross motor skills (Tr. pp. 265, 537, 557, 645, 656, 780-84; Dist. Exs. 4; 10; 12-13).

According to the school psychologist, a more restrictive setting than a 6:1+1 special class would not have been appropriate for the student (Tr. pp. 306-07). The school psychologist also testified that a private school such as the McCarton Center was too restrictive and that a public school setting where the student could interact with the six other students in his special class would benefit him (*id.*). Consistent with the information noted above, the school psychologist testified that the May 2010 CSE determined that the student attended to his teacher, and looked at other children; however, at the McCarton Center he was not afforded an opportunity to be with other children for learning (Tr. p. 268). She further emphasized the importance of socialization, particularly for autistic students, with respect to exposure to other students for modeling purposes and for learning communication because students needed "to be able to function in a world with other people" (Tr. p. 310).

I also note the recent issuance of a guidance document by the Office of Special Education in January 2012 entitled "Guidelines for Determining a Student with a Disability's Need for a One-to-One Aide," which indicated that with respect to special classes, an additional 1:1 aide should only be considered based upon the student's individual needs and in light of the available supports in the setting where the student's IEP will be implemented ([see http://www.p12.nysed.gov/specialed/publications/1-1aide-jan2012.pdf](http://www.p12.nysed.gov/specialed/publications/1-1aide-jan2012.pdf)). For those student's recommended for a special class setting, the 1:1 aide should be recommended "when it has been discussed and determined by the CPSE/CSE that the recommended special class size in the setting where the student will attend school, other natural supports, a behavioral intervention plan, etc., cannot meet these needs" (*id.*). Consistent with the student's needs, the May 2010 CSE recommended a 1:1 behavior management paraprofessional, counseling services, and the supports of a special education teacher and school staff to address the student's behaviors (Dist. Ex. 1 at p. 6). Although the parents maintain that the student required intensive 1:1 instruction to receive educational benefits, there is nothing in the hearing record to suggest that the student would not be adequately supported by a 1:1 paraprofessional working under the direction of the special education teacher to provide support with the student's behaviors (Tr. p. 274). For example, although at times, the student engaged in self-stimulatory behavior, the hearing record also reveals that he could maintain eye contact and was easily redirected (Tr. pp. 268-69). Moreover, despite recommendations from the private psychologist and the student's previous SEIT instructors for an individual program for the student, the evidence does not support the conclusion that the student would require more support than a 1:1 paraprofessional could provide within a 6:1+1 special class (Tr. pp. 170, 181, 213-14, 274; Dist. Ex. 4 at p. 4). Additionally, the May 2010 CSE recommended the provision of the following supports to address the student's behaviors and his social/emotional management needs: (1) clear and consistent routines; (2) positive reinforcement; (3) visual and verbal supports; (4) redirection; (5) prompting; and (6) modeling appropriate behavior (Dist. Ex. 1 at p. 6).

In addition to the supports incorporated into the May 2010 IEP, the hearing record reflects that the particular school in which the district had intended to implement the IEP provided several academic and social/emotional related strategies such as positive reinforcement, sensory breaks, prompts, transitional cues, and social stories in an effort to promote independence (Tr. pp. 166-68,

183).⁷ According to the teacher of the assigned class, students received 1:1 instruction as well as whole and small group instruction at the assigned school (Tr. p. 170). Additionally, students at the assigned school received a 20-minute session of ABA discrete trial instruction per day (Tr. pp. 213-14). The hearing record also reveals that students received a number opportunities for socialization within the assigned school and in the community (Tr. pp. 181, 185-86).

Accordingly, I find that the CSE's recommendation of a 6:1+1 special class with the added supports of a 1:1 behavior management paraprofessional and the recommended program accommodations and strategies described above was designed to provide the student with sufficient individualized support such that his IEP was reasonably calculated to enable the student to receive educational benefits for the 2010-11 school year (Rowley, 458 U.S. at 206-07; Cerra, 427 F.3d at 192).

VII. Conclusion

In summary, I find that the IHO's conclusion that the district failed to offer the student a FAPE for the 2010-11 school year must be reversed with respect to his determinations regarding the appropriateness of the goals and the 6:1+1 special class placement. Having reached this determination, it is not necessary to reach the issues of whether the McCarton Center was appropriate for the student or whether equitable considerations support the parents' claims 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.

⁷ In this case it is not entirely clear whether the IHO ruled that the IEP as designed by the CSE was inadequate or whether the district, if given the opportunity, would not have implemented student's program in conformity with the IEP (see IHO Decision at p. 15). In this case, the parents rejected the IEP and enrolled the student at the McCarton Center prior to the time that the district became obligated to implement the student's IEP. Thus, the district was not required to establish that the special education services were provided in conformity with the student's IEP in the proposed classroom. Even assuming for the sake of argument that the student had attended the district's recommended program, the evidence in the hearing record nevertheless shows that the 6:1+1 special class at the assigned district school was capable of providing the student with adequate supports and the evidence does not support the conclusion that the district would have deviated from the student's IEP in a material or substantial way (A.P. v. Woodstock Bd. of Educ., 2010 WL 1049297 [2d Cir. March 23, 2010]; Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 822 [9th Cir. 2007]; see D.D.-S. v. Southold U.F.S.D., 2011 WL 3919040, at *13 [E.D.N.Y. Sept. 2, 2011]; A.L. 2011 WL 4001074, at *9).

IT IS ORDERED that the IHO's decision dated December 1, 2011 is modified by reversing those portions 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 parents for the costs of the student's attendance at the McCarton Center.

Dated: **Albany, New York**
 March 5, 2012

JUSTYN P. BATES
STATE REVIEW OFFICER