



**The University of the State of New York**  
**The State Education Department**  
**State Review Officer**

**No. 07-030**

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

**Appearances:**

Mayerson & Associates, attorney for petitioners, Randi M. Rothberg, Esq., of counsel

Hon. Michael A. Cardozo, Corporation Counsel, attorney for respondent, Daniel J. Schneider, Esq., of counsel

**DECISION**

Petitioners appeal from a decision of an impartial hearing officer which denied their request to be reimbursed for their son's tuition cost at the ELIJA School (ELIJA), the cost of supplemental home and community-based applied behavior analysis (ABA) services, and transportation costs for the 2006-07 school year. The appeal must be sustained in part.

When the impartial hearing began in December 2006, the child was eight years old and attending school at ELIJA (Parent Exs. A at p. 3; C at p. 1). The Commissioner of Education has not approved ELIJA as a school with which school districts may contract to instruct students with disabilities (Dist. Ex. 17 at p. 1; see 8 NYCRR 200.1[d], 200.7). The child was described as having marked delays in language skills that interfere with his social skills development and academic and cognitive functioning (Parent Ex. S at pp. 6-7). He spontaneously communicates by single words and, with prompting, two to three word utterances to label items and request preferred activities (Tr. p. 116). His receptive language skills are delayed and his academic skills in word reading, spelling and math are estimated to be at a pre-kindergarten (pre-K) to kindergarten level (Tr. p. 37; Dist. Ex. 11 at p. 3). He engages in screaming, self-injurious and tantrum behaviors when demands are placed on him (Tr. pp. 37-38, 274-75). The child's classification as a student with autism and eligibility for special education services are not in dispute in this appeal (see 8 NYCRR 200.1[zz][1]).

The child's mother reported that he was a typically developing infant and toddler until approximately 18 months of age at which time he began to exhibit "extreme loss of functional language and serious behavioral problems" (Tr. p. 271). Subsequently, the child received Early Intervention Program services and services pursuant to an individualized education program (IEP)

which was developed by respondent's Committee on Preschool Special Education (Tr. pp. 271-72). Prior to March 2003, the child received 40 hours per week of home-based ABA services and also speech-language and occupational therapy (OT) services at the McCarton Center (Tr. p. 272; Dist. Ex. 19 at p. 4). In March 2003, the child began attending the McCarton School (McCarton) and received 20 hours per week of individual instruction, and five hours of individual speech-language and OT (Dist. Exs. 1; 19 at p. 4). The child also received ten hours per week of home-based ABA services and a private speech-language therapy session one time per week (Dist. Ex. 1). On April 24, 2004, a social history update report of the child was completed (id.). The child's mother expressed satisfaction with the child's program at McCarton (id.). During the 2005-06 school year, the child attended McCarton and received 1:1 instruction (Tr. pp. 35, 273). The child also received approximately ten hours per week of home-based ABA services, which were provided two hours per day after school from 4:00 to 6:00 p.m. (Tr. pp. 273-74). In November 2005, McCarton developed a behavior reduction plan for the child (Dist. Ex. 3). The target response was to improve social behaviors, evidenced by a reduction in self-injurious, vocal protest, disrobing and tantrum behaviors (id. at p. 1). Preventative strategies and specific interventions were described in the plan (id. at pp. 1-3).

On December 2, 2005, an impartial hearing (Hearing 1) commenced as a result of petitioners' July 2005 due process complaint notice (Parent Ex. B at p. 3). The request asserted that respondent failed to offer an appropriate program to the child for the 2004-05 school year and requested tuition reimbursement for McCarton, 15-20 hours of home-based ABA services, and speech-language therapy services for the same time period (id.). At Hearing 1, respondent conceded that it failed to offer the child an appropriate program, and that petitioners were cooperative at all times (id.). The impartial hearing officer found that petitioners met their burden of establishing that the home-based ABA services and school program they chose for the 2004-05 school year were appropriate, that a 12-month program was necessary and that petitioners submitted persuasive proof of payment (id. at pp. 6-7). The impartial hearing officer ordered that respondent reimburse petitioners for the costs of the services described at Hearing 1 (id. at p. 7).

On December 6, 2005 respondent's school psychologist conducted a psychological evaluation and functional behavioral assessment (FBA) of the child at McCarton (Dist. Ex. 6; Parent Ex. S).<sup>1</sup> The school psychologist reported that the child's language skill delays and difficulty with attention and focusing interfered with his social development and academic and cognitive performance (Parent Ex. S at pp. 2, 5-7). Due to the child's difficulty with the "demands of testing," administration of the Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV) and the Wechsler Individual Achievement Test-Second Edition (WIAT-II) were modified or replaced with informal assessment (id. at p. 2). In addition, a token reward system was utilized with the child throughout the assessment (id.). Administration of the Draw-a-Person Intellectual Ability Test for Children, Adolescents, and Adults (DAP:IQ) yielded an IQ score of 71 (3rd

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<sup>1</sup> The term "functional behavioral assessment" means:

the process of determining why a student engages in behaviors that impede learning and how the student's behavior relates to the environment. The *functional behavioral assessment* includes, 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 effective 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.

percentile; Borderline) (id. at pp. 2, 4). On the WIAT-II, the child obtained a word reading subtest standard score (SS) of 60, a spelling subtest SS of 60, and he demonstrated letter discrimination and identification skills by correctly naming 19 letters (id. at p. 4). The school psychologist reported that the child had significant difficulty with phonemic categorization and phonological awareness tasks, and also with writing the letters that correspond with the sounds of the letters in the alphabet (id. at pp. 4-5). When allowed to draw squares to write letters in, the child demonstrated the ability to write his name (id. at p. 5).

The Adaptive Behavior Assessment System-II (ABAS-II) was completed by the child's teacher (Parent Ex. S at p. 5). In eight out of nine adaptive skill areas assessed, the child received a scaled score of 1, and he received a scaled score of 4 in the remaining area (functional academics) (id. at p. 6). By report, the child demonstrated the ability to read his own name, follow a daily classroom schedule, operate electronic devices such as a television, return materials to the appropriate location when done with them and appropriately dispose of lunch-related items (id.). The child was reported to work hard on difficult classroom assignments, control his feelings when he does not get his own way, control anger directed at another person when playing a game, and stop a desired activity when informed that it is over (id.). The child achieved a General Adaptive Composite (GAC) score of 44 (< 1st percentile; Extremely Low) (id.). During an observation of the child in his classroom, he demonstrated the ability to correctly read a sequence of pictures with prompting, wipe his hands in response to a picture cue, correctly count food items upon request, follow a one-step direction, play with a toy, and write his name and trace letters on a board (id. at p. 3). It was observed that the child did not interact with peers and the school psychologist remarked that the child's interactions had an "unrelated" and "detached" quality (Parent Ex. S at pp. 3, 6-7). The school psychologist reported that the child may have difficulty regulating his behavior, which could lead to negative expression of his feelings (id. at p. 7). The school psychologist opined that the child would benefit from a "well-structured, consistent, predictable educational environment with intensive remediation and the appropriate related services" (OT and speech-language therapy) (id.).

The school psychologist reported that, in order to conduct the FBA, he used observation of the child, teacher interview, the psychological evaluation, internal recording data sheets and a review of the child's Committee on Special Education (CSE) file that included school reports, previous assessments and "charts and duration recordings" to analyze the child's behavior (Dist. Ex. 6 at p. 1). The FBA report and the psychological evaluation report identified the behaviors to be assessed as self-injurious (head banging, hand-to-head hitting, throwing himself to the floor), vocal protest (screaming at a high pitch) and biting objects (Dist. Ex. 6; Parent Ex. S at p. 1). The school psychologist reported that the behaviors typically occurred after a directive to perform a task in the classroom (Dist. Ex. 6 at p. 1). Consequences of the behavior included teacher attention and preventative strategies for stopping self-injurious behaviors (id.). The school psychologist hypothesized that the functions of the behaviors were for escape/avoidance, frustration and relief of fear/anxiety (id.). During an approximately 90-minute observation of the child in his classroom, in corridors and in the lunchroom, the child did not exhibit any of the three identified targeted behaviors (id. at pp. 2-3). The child's teacher commented to the school psychologist that the "uneventful" observation did not reflect typical behaviors (Parent Ex. S at p. 3).

By letter dated January 5, 2006, respondent's CSE Chairperson requested that McCarton provide the CSE with information about the child to be used for the child's annual review (Dist. Ex. 7). On January 6, 2006, respondent's special education teacher conducted a classroom

observation of the child (Tr. pp. 529-30; Dist. Ex. 8; see Dist. Ex. 11 at p. 2). With teacher prompting and assistance, the child was observed to find and point to items on a schedule, request help, and write the letters B and N (Dist. Ex. 8 at p. 1). The observation report indicated that the child played with "putty," sat and ate his snack, cleaned up and put his bag away, got out a workbook, and correctly receptively identified pictures, read a single word, counted three blocks and wrote the letters O, L and I (Dist. Ex. 8). The observation report did not indicate that the child engaged in behaviors targeted during the December 2005 FBA (compare Dist. Ex. 6, with Dist. Ex. 8).

In a progress report dated January 11, 2006, the child's speech-language pathologist stated that the child received individual, in-class speech-language therapy five times per week for 60-minute sessions (Dist. Ex. 9 at p. 1). The focus of therapy was to improve the child's receptive, expressive and pragmatic language skills, as well as his play skills and oral-motor/feeding skills (id. at pp. 1-2). At the time of the progress report, the child followed one-step directions with minimal prompting, responded to his name in a 1:1 situation and inconsistently demonstrated the ability to comprehend "wh" questions (id. at p. 1). The child spontaneously produced single words to comment and respond to questions and two-word utterances with modeling and prompting (id. at pp. 1-2). He had difficulty responding to yes/no questions regarding his needs (id. at p. 2). Pragmatically, the child independently greeted peers by name and was able to wait approximately ten seconds for a turn while playing a game with the clinician (id.). According to the progress report, he independently requested desired items using a carrier phrase ("I want \_\_\_") and with a model, commented about items in his environment using a visual board (Dist. Ex. 9 at p. 2). He reportedly had difficulty establishing and maintaining eye contact (id.). The child played with a variety of toys when provided with intermittent modeling (id.). Oral-motor skills were characterized by difficulty with bilabial contact, poor oral-motor strength and motor planning skills (id.). The speech-language pathologist reported that the child had made "continual progress" and recommended that, in addition to the five in-class speech-language therapy sessions per week, the child also receive therapy four times per week outside of the classroom (id. at p. 3).

In a progress report dated January 11, 2006, the child's occupational therapist indicated that the child received individual OT five times per week for 45-minute sessions (Dist. Ex. 10 at p. 1). The OT sessions addressed the child's need to increase frustration tolerance, develop effective coping skills, and improve bilateral coordination, balance/motor planning skills, fine motor and graphomotor skills (Dist. Ex. 10). The occupational therapist reported that the child's frustration tolerance fluctuated depending on environmental factors and the type of demand placed on him, and that increasing the child's frustration tolerance and accessing effective self-coping skills were of primary importance (id. at p. 1). The child was described as making progress toward his goals of improving balance, gross motor and motor-planning activities (id. at pp. 2-4). The child copied all capital letters with a visual model and with assistance in the formation of six letters (id. at p. 4). He worked on forming the numerals 1-5 with varied success (id. at p. 5). The occupational therapist recommended that the child continue to receive OT services at his current level (id.).

On April 7, 2006, respondent's CSE convened for approximately one hour for the child's annual review and to develop an IEP for the 2006-07 school year (Tr. pp. 568-69; Dist. Ex. 11). The child was described in the IEP as a student with autism, who exhibited delays in speech-language and pragmatic skills, poor attention skills and difficulty with behavior regulation (Dist. Ex. 11 at pp. 1, 5). The April 2006 IEP's academic and social-emotional present levels of performance contained information from the December 2005 psychological evaluation report

(compare Dist. Ex. 11 at pp. 3, 4, with Parent Ex. S). The IEP indicated that the child's word reading skills were at a "K.1" instructional level, his spelling skills were at a "Pre-K 5.9" instructional level and his numerical operations skills by teacher estimate were at a "Pre-K" instructional level (Dist. Ex. 11 at p. 3). According to the IEP, the child required "intensive" remediation, frequent review and repetition of instructional materials, and materials broken down into smaller comprehensible units (id. at p. 3). The development of skills, skill acquisition and a consistent, predictable routine were also recommended (id.). The child's behavior required "highly intensive" supervision and a behavior intervention plan (id. at p. 4). The IEP contained approximately 14 annual goals and 69 short-term objectives in the areas of OT, attention, behavior management, handwriting, mathematics, oral-motor function, speech-language, pragmatic skills, phonological awareness, readiness skills and visual matching skills (id. at pp. 6-15). The behavior intervention plan (BIP) stated that the child's self-injurious, darting and tantrum behaviors interfered with his learning (id. at p. 19).<sup>2</sup> The BIP indicated that a behavior modification program would be designed to address the targeted behaviors, and strategies used to extinguish or replace targeted behaviors would include reinforcement of alternative and incompatible behaviors (id.). Both academic and non-academic staff would be responsible for the BIP's implementation (id.). The CSE recommended placement in a full-time 6:1+1 special class program in a special school and the services of a full-time individual crisis management paraprofessional (id. at pp. 1, 18). In addition, the CSE recommended 30-minute individual sessions of both speech-language therapy and OT seven times per week (id. at p. 18).

At the April 2006 CSE meeting, petitioners informed the CSE that they had unsuccessfully attempted to enroll the child in a 1:1 state-approved private charter school, and that they wanted respondent to recommend a 1:1 program for him (Tr. p. 280; see Tr. pp. 291-92, 308). In addition, the child's mother requested a continuation of the ten hours of home-based ABA services that the child was then receiving (Tr. pp. 281-82). She stated that respondent issued petitioners authorization to contract for home-based ABA services, but later retracted the authorization without explanation (Tr. pp. 282-83).

On April 9, 2006, petitioners completed an ELIJA application form (Dist. Ex. 19). Petitioners indicated that, at that time, the child received eight hours per week of home-based ABA services and his school-based program was described as a 1:1 classroom with three other students in the child's age group (id. at pp. 4-5). By letter dated April 17, 2006, petitioners informed respondent's CSE Chairperson that they disagreed with the CSE's April 2006 IEP and that they intended to enroll the child at ELIJA for the 2006-07 school year (Dist. Ex. 14). The letter stated that petitioners would seek tuition reimbursement from respondent (id.).

In early June 2006, petitioners paid ELIJA the child's tuition for both the 2006-07 school year and summer 2007 program (Tr. p. 309; Dist. Ex. 18). By letter dated July 19, 2006, respondent sent petitioners its Final Notice of Recommendation regarding the child's program

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<sup>2</sup> The term "behavioral intervention plan" means "a plan that is based on the results of a functional behavioral assessment and, at a minimum, includes a description of the problem behavior, global and specific hypotheses as to why the problem behavior occurs and intervention strategies to address the behavior" (8 NYCRR 200.1[mmm]).

pursuant to the April 2006 IEP and such notice identified a placement at a specific public school (Dist. Ex. 15).

By letter dated July 25, 2006, petitioners informed respondent that they had not received the child's placement recommendation (Parent Ex. I).<sup>3</sup> Petitioners indicated that they were willing to look at placements recommended by respondent, but if no appropriate placement was offered they would find an appropriate placement for their son and seek reimbursement (*id.*). After petitioners received respondent's Final Notice of Recommendation, they unsuccessfully attempted to visit the proposed placement (Tr. pp. 294-96).

By due process complaint notice dated September 8, 2006, petitioners requested an impartial hearing and alleged that respondent failed to offer the child a free appropriate public education (FAPE) (Parent Ex. A at p. 1).<sup>4</sup> Petitioners sought to adjudicate claims for "pendency, prospective, declaratory, remedial, compensatory and reimbursement relief" related to the child's program and placement for the 2006-07 school year and summer 2007 (*id.*). The due process complaint notice specifically requested pendency for the home-based ABA portion of an unappealed decision in another impartial hearing (Hearing 1), which awarded 15-20 hours of home-based ABA services (*id.* at p. 2).<sup>5</sup> Petitioners alleged numerous deficiencies with the child's 2006-07 IEP and informed respondent that they secured a 12-month placement for him at ELIJA, as well as 12-hours per week of "supplemental, extended-school day and weekend" 1:1 ABA services (*id.* at p. 3). As relief, petitioners requested that respondent reimburse them for tuition at ELIJA, costs associated with transportation and 12 hours per week of home/community-based 1:1 ABA therapy over the course of a 52-week year (*id.*).

The child attended ELIJA during the 2006-07 school year (Parent Exs. D-G). ELIJA was described as a private, non-profit school for children diagnosed with autistic spectrum disorders (Parent Ex. P at p. 1). The school was composed of five students, ages seven to ten years old, five ABA instructors and two head teachers (Tr. pp. 57, 250). The child's class was composed of two other children ages eight and ten who were also classified as students with autism (Parent Ex. K). According to ELIJA, both of the other students in his class required 1:1 instruction to maintain on-

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<sup>3</sup> Although the Final Notice of Recommendation is dated July 19, 2006, petitioners state that it was not received by them until on or about August 10, 2006 (Tr. pp. 294-95). Respondent's school psychologist testified that it is the CSE's practice to mail the Final Notice of Recommendation out the day that it is generated and although "very unlikely," it was possible that it was mailed on a date other than the date on the letter (Tr. pp. 546-47, 571).

<sup>4</sup> The term "free appropriate public education" means special education and related services that--

- (A) have been provided at public expense, under public supervision and direction, and without charge;
- (B) meet the standards of the State educational agency;
- (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and
- (D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

(20 U.S.C. § 1401[9]).

<sup>5</sup> Petitioners' attorney stated that another impartial hearing pertaining to the 2005-06 school year was "under consideration" by a different impartial hearing officer (Tr. pp. 6-7).

task behavior and to implement the behavior reduction plan, and were characterized as "early/intermediate level learners" (*id.*).

The impartial hearing (Hearing 2) commenced on December 15, 2006, and after four days of testimony, concluded on January 31, 2007. By decision dated February 28, 2007, the impartial hearing officer found that petitioners had not met their burden of persuasion, and respondent had offered the child a FAPE (IHO Decision at p. 9). The impartial hearing officer also found that, although draft goals and objectives had been prepared prior to the CSE meeting, petitioners were given an opportunity to fully participate in the CSE meeting and their participation was not significantly impeded by the draft IEP (*id.* at p. 10). Further, the impartial hearing officer found that respondent's recommended placement was likely to provide the child with educational benefit because the child would have received 1:1 instruction for some part of the school day, he would have had a crisis management paraprofessional, and respondent's teacher would have been able to objectively measure the goals and objectives in the student's IEP (*id.* at p. 11). The impartial hearing officer also ordered respondent to issue a related services authorization for 12 hours per week of OT and speech-language therapy (*id.*).

Petitioners appeal and request reversal of the impartial hearing officer's determination that respondent offered the child a FAPE. Specifically, petitioners contend that: 1) respondent's CSE failed to review the child's present levels of performance at the CSE meeting; 2) respondent failed to offer individualized parent training and counseling since none of the services offered would have been home-based; 3) the April 2006 IEP's goals and objectives are insufficient because they are not objectively measurable, it is unclear who measures progress, some are inappropriate for the child, and they were developed without input from all CSE members; 4) the IEP was predetermined by the CSE; 5) the CSE did not consider petitioners' request for 1:1 full day instruction; 6) petitioners were excluded from meaningful participation at the CSE meeting; 7) the BIP was insufficient because it was developed by one person without input from the April 2006 CSE, and it lacked a corresponding FBA because the FBA used to develop the BIP was "stale," the BIP is vague with regard to implementation, and the BIP did not clearly define the child's behaviors; 8) respondent failed to offer home-based 1:1 teaching for the child and home-based parent training; 9) the proposed 6:1+1 program would not have met respondent's "intensive" program requirement or the child's 1:1 instructional needs; and 10) the child would have been inappropriately grouped in the proposed 6:1+1 program. Petitioners also request a determination that ELIJA was an appropriate placement and that the equities favor tuition reimbursement. In addition, petitioners request reimbursement for the costs of community and home-based ABA services and transportation between home and ELIJA. Petitioners further request a determination of the child's pendency regarding home-based ABA services.

Respondent asserts in its answer that petitioners have not demonstrated that the child's IEP was inappropriate or that respondent did not provide the child a FAPE. Respondent argues that it complied with the procedural requirements regarding the development of the child's IEP, the offered placement was substantively proper and appropriate, and the child's IEP was reasonably calculated to confer an educational benefit to the child in the least restrictive environment (LRE). Respondent further contends that ELIJA is not an appropriate placement for the child because it is not in the LRE and it failed to provide him with OT. Finally, respondent alleges that the equities do not favor petitioners because they failed to cooperate with respondent and act in good faith.

The central purpose of the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) is to ensure that students with disabilities have available to them a FAPE (20 U.S.C. § 1400[d][1][A]; see Schaffer v. Weast, 126 S. Ct. 528, 531 [2005]; Bd. of Educ. v. Rowley, 458 U.S. 176, 179-81, 200-01 [1982]; Frank G. v. Bd. of Educ., 459 F.3d 356, 371 [2d Cir. 2006]). A FAPE includes special education and related services designed to meet the student's unique needs, provided in conformity with a written IEP (20 U.S.C. § 1401[9][D]; 34 C.F.R. § 300.17[d]; see 20 U.S.C. § 1414[d]; 34 C.F.R. § 300.320).<sup>6</sup>

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a child 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 (Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359 [1985]; Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). 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 (Burlington, 471 U.S. at 370-71). "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 child a FAPE (id.; see 20 U.S.C. § 1412[a][10][C][ii]; 34 C.F.R. § 300.148).

A FAPE is offered to a child 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, 427 F.3d at 192). While school districts are required to comply with all IDEA procedures, not all procedural errors render an IEP legally inadequate under the IDEA (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 procedural violations are alleged, an administrative officer may find that a child did not receive a FAPE only if the procedural inadequacies (a) impeded the child'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 child, 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]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007]).

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 child 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

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<sup>6</sup> The Code of Federal Regulations (34 C.F.R. Parts 300 and 301) has been amended to implement changes made to the Individuals with Disabilities Education Act, as amended by the Individuals with Disabilities Education Improvement Act of 2004. The amended regulations became effective October 13, 2006. In this case, none of the new provisions contained in the amended regulations are applicable because all the relevant events occurred prior to the effective date of the new regulations. However, for convenience, citations herein refer to the regulations as amended because the regulations have been reorganized and renumbered.



'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 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 LRE (20 U.S.C. § 1412[a][5][A]; 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.6[a][1]; see Walczak, 142 F.3d at 122). The LRE has been described as "one that, to the greatest extent possible, satisfactorily educates disabled children together with children who are not disabled, in the same school the disabled child would attend if the child were not disabled" (Carlisle Area Sch. v. Scott P., 62 F.3d 520, 535 [3d Cir. 1995]). In determining an appropriate placement in the LRE, the IDEA requires that special classes, separate schooling or other removal of children with disabilities from the regular educational environment may occur only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily (20 U.S.C. § 1412[a][5][A]; see 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.6[a][1]; see also Walczak, 142 F.3d at 122; Bay Shore Union Free Sch. Dist. v. T., 405 F. Supp. 2d 230, 239-40 [E.D.N.Y. 2005]; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 144 [N.D.N.Y. 2004]). Further, "[e]ven in cases in which mainstreaming is not a feasible alternative,' the statutory preference for a least restrictive placement applies" (Walczak, 142 F.3d at 132, quoting Sherri A.D. v. Kirby, 975 F.2d 193, 206 [5th Cir. 1992]). Federal and state regulations also require that school districts ensure that a continuum of alternative placements be available to meet the needs of children with disabilities for special education and related services (34 C.F.R. § 300.115; 8 NYCRR 200.6). The continuum of alternative placement includes instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions; and the continuum makes provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement (34 C.F.R. § 300.115[b]; 8 NYCRR 200.6).

The burden of persuasion in an administrative hearing challenging an IEP is on the party seeking relief (see Schaffer, 126 S. Ct. at 531, 536-37 [finding it improper under the IDEA to assume that every IEP is invalid until the school district demonstrates that it is not]).

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs, establishes annual goals related to those needs, and provides for the use of appropriate special education services (Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

The IDEA and the Regulations of the Commissioner of Education provide that an IEP must, among other things, include a statement of present levels of academic achievement and functional performance, including a description of how the child's disability affects his or her involvement and progress in the general curriculum (20 U.S.C. § 1414[d][1][A][i][I][aa]; 8 NYCRR 200.4[d][2][i][a]; see also 34 C.F.R. § 300.320[a][1][i]). The IDEA and state regulations also require that the IEP include measurable annual goals, including academic and functional goals, designed to meet the child's needs arising from his or her disability, to enable the child to be involved in and progress in the general curriculum (20 U.S.C. § 1414[d][1][A][i][II][aa]; 8 NYCRR 200.4[d][2][iii][a][1]; see also 34 CFR § 300.320[a][2][i][a]). For a student who takes a New York State alternative assessment, the state regulations provide that "the IEP shall include a description of the short-term instructional objectives and/or benchmarks that are the measurable intermediate steps between the student's present level of performance and the measurable annual goal" (8 NYCRR 200.4[d][2][iv]; see also 34 C.F.R. § 300.320[a][2][ii]).

As an initial matter, petitioners assert that respondent agreed, under the IDEA's pendency provisions, to provide the child 12 hours per week of home-based ABA services. I concur and find that respondent agreed to provide the child 12 hours per week of home-based ABA services during the pendency of this dispute (Tr. pp. 6-10; see 34 C.F.R. § 300.518; 8 NYCRR 200.5[m]).

Petitioners next assert that respondent failed to review the child's "present levels" at the April 2006 CSE meeting. As discussed in more detail below, the record reflects that petitioners actively participated during the CSE meeting; therefore, they were afforded an opportunity to raise questions or concerns regarding the proposed present levels of performance. In addition, the school psychologist testified that the April 2006 CSE considered McCarton's behavior reduction plan, charting of the child's behaviors, OT and speech-language therapy progress reports, and respondent's social history, psychoeducational evaluation, FBA, and school observation report in order to develop the child's IEP (Tr. pp. 523-24, 526-32; Dist. Exs. 1; 3; 6; 8-10; Parent Ex. S).

The record reveals that the IEP appropriately identified and addressed the child's present levels of performance. Respondent's December 2005 psychological evaluation report identified the child's difficulty with establishing and maintaining eye contact, comprehending instructions, attending and focusing, interacting with peers, phonemic categorization and awareness skills, letter writing skills, academic abilities in word reading and spelling skills and adaptive behavior skills (Parent Ex. S at pp. 2-6). McCarton's January 2006 speech-language progress report indicates that receptive language skill needs addressed in therapy included increasing attention to structured language tasks, following 2-step directives, comprehending "wh" questions and responding to his name (Dist. Ex. 9 at p. 1). The child needed to improve his expressive language skills in the areas of expanding vocabulary, increasing mean length of utterance, responding to "wh" questions and yes/no questions based on self-needs and improving his ability to comment (id. at pp. 1-2). Pragmatic skill needs identified in the psychological evaluation report included improving overall social communication, turn-taking, commenting and requesting skills (id. at p. 2). The child demonstrated difficulty with oral-motor skills, characterized by difficulty with bilabial contact and labiofacial control, poor oral-motor strength and motor planning skills (id.). The January 2006 OT progress report identified long term goals in the areas of increasing frustration tolerance; developing effective self-coping skills; and improving bilateral coordination, balance, motor-planning, fine motor and gnomotor skills (Dist. Ex. 10 at pp. 1-2, 4).

The December 2005 psychological evaluation report, FBA and McCarton's November 2005 behavior reduction plan identified the child's behaviors that interfered with his ability to learn (Dist. Exs. 3; 6; Parent Ex. S). These documents described the child's self-injurious behaviors, such as head banging, hand-to-head hitting, and throwing himself on the floor (Dist. Exs. 3 at p. 1; 6 at p. 1; Parent Ex. S at p. 1). Other documented behaviors included vocal protest characterized by high pitched screaming, darting and biting objects (Dist. Exs. 3 at p. 1; 6 at p. 1; Parent Ex. S at p. 1).

As stated above, the April 2006 IEP contained approximately 14 annual goals and 69 short-term objectives (Dist. Ex. 11 at pp. 6-15). The annual goals and short-term objectives specifically correlate to the needs identified during the evaluation and in the child's progress reports. Annual goals and short-term objectives were designed by the CSE to improve the child's coordination, body awareness and control; attention goals were developed to address the child's need to focus and complete specific tasks; and a behavior management goal was developed to increase the child's ability to verbalize feelings in response to frustration (id. at pp. 6-7). The IEP included annual goals and short-term objectives to improve the child's handwriting legibility, math concepts, and pre-reading skills (id. at pp. 8-9, 14-15). Speech-language annual goals and short-term objectives address the child's needs in the area of improving oral-motor strength, range of motion and function (id. at p. 10). A communication annual goal and subsequent short-term objectives specifically relate to the child's need to improve expressive and receptive language abilities and eye contact skills (id. at p. 11). The IEP includes pragmatic language, phonological awareness, expressive vocabulary and word retrieval skill annual goals and short-term objectives that specifically address the needs identified in the above evaluative and progress documentation (id. at pp. 11-13).

Respondent's CSE recommended a 6:1+1 special class program in a special school with a full-time 1:1 crisis paraprofessional, a BIP, and individual sessions seven times per week of both speech-language therapy and OT (Dist. Ex. 11 at pp. 1, 18-19). The school psychologist testified that the CSE recommended an appropriate program that met the child's educational and behavioral needs because it considered the evaluative information described above, as well as parental concerns and statements made by McCarton's assistant director regarding the child's behavior (Tr. pp. 529-30, 532-33, 547). The CSE determined that the child needed a "well-structured education environment" to address his behavior and to provide him with intensive academic remediation (Tr. p. 533). The CSE recommended "quite frequent" speech-language and OT services due to the child's "marked difficulty" with language and need for "intensive assistance" for OT deficits (Tr. pp. 534-35). The school psychologist opined that the program recommendation of a 6:1+1 special class and a full-time paraprofessional met the child's behavioral needs (Tr. p. 538). He further opined that the services recommended by the CSE were adequate to provide the child with support to make "appropriate gains and progress" (Tr. p. 576).

Based on my review of the April 2006 IEP, I concur with the impartial hearing officer that the IEP was likely to confer educational benefit (IHO Decision at p. 12). The child's IEP properly described his needs, set out annual goals in all appropriate areas of need, included short-term instructional objectives for each goal as a part of his alternate assessment program, recommended appropriate academic management strategies and a full-time paraprofessional to address his behavior, and provided related services in appropriate areas.

Moreover, the special education teacher in respondent's proposed class stated that he has taught for 14 years and worked with students with autism for the past four years (Tr. pp. 379-80,

385; see Tr. p. 435). He testified that his 2006-07 class was composed of himself, two paraprofessionals and five children ages eight to eleven, all of whom were eligible for special education services as students with autism (Tr. pp. 380-81). The placement also offered crisis intervention teacher services, described as a specific special education teacher who assists children in crisis (Tr. pp. 412, 429). Children participate in activities that focus on life and community skills and are instructed in simple meal preparation, hygiene, self-feeding and table manner skills (Tr. pp. 384, 407, 417-18). The special education teacher described how he teaches math and reading and encourages expressive language with students in his classroom (Tr. pp. 386-88, 500-01). The children are provided with the opportunity to socially interact with each other during "center" time, and are encouraged to pair up with a peer (Tr. p. 407). Other opportunities for social interaction occur during "listening" time and meals (Tr. pp. 407-08).

The special education teacher testified that he uses both ABA and "TEACCH" methodologies with the children in his class, depending on their skill level (Tr. pp. 393-94). The site coordinator/crisis intervention teacher (site coordinator) testified that "expert coaches" regularly visit the classrooms to observe teachers, determine what their needs are and provide workshops to advance their knowledge about TEACCH and ABA (Tr. pp. 411, 433-34). Teachers maintain data "folios" on each child to record ABA or TEACCH progress (Tr. p. 421). Both the special education teacher and site coordinator testified that the program could implement use of ABA upon parental request, if it was determined that it would meet the child's needs (Tr. pp. 394-95, 421).

The site coordinator opined that the child would be appropriately placed at her school because his IEP was "not very dissimilar" from other children who were placed in the 6:1+1 classes at her school (Tr. pp. 427-28). Based on the foregoing, I concur with the impartial hearing officer that the IEP was likely to confer educational benefit.

With respect to petitioners' assertion that the IEP did not contain any provision for parent training and counseling, state regulations provide for parent counseling and training for the purpose of enabling parents of children with autism to perform appropriate follow-up intervention activities at home (8 NYCRR 200.13[d]). Parent counseling and training is defined as: "assisting parents in understanding the special needs of their child; providing parents with information about child development; and helping parents to acquire the necessary skills that will allow them to support the implementation of their child's individualized education program" (8 NYCRR 200.1[kk]).

The April 2006 IEP does not reference the provision of parent counseling and training as defined in 200.13[d] (Tr. pp. 453-54; Dist. Ex. 11). I note that the site coordinator testified that the placement recommended for the child offers parent training in the form of a parent coordinator who "regularly" provides information to parents regarding resources for finding help at home, informational workshops, summer camps and after-school activities (Tr. pp. 422-23, 452-53). Parent meetings are also held, resulting in a network of communication, and parents are able to work with the parent coordinator regarding a specific concern (Tr. p. 423). Also, the record suggested that the parent coordinator is available to offer parent training or support outside of typical school-day hours (Tr. p. 455). The special education teacher testified that he was in contact with his students' parents one to three times per week in addition to parent teacher conferences and conferences regarding progress toward a student's report card (Tr. pp. 388-89). He stated that he provides parents with "tools" to use at home including communication materials and information

about school-based behavior management techniques that may work at home (Tr. pp. 389-90). While I agree with petitioners that parent counseling and training should have been identified on the child's IEP, in light of the testimony that respondent's recommended program for petitioners' son included parent counseling and training services, I find that respondent's failure to list parent counseling and training and the services that it would provide petitioners on the IEP did not impede the child's right to a FAPE (see Matrejek, 471 F. Supp. 2d at 419; Application of a Child with a Disability, Appeal No. 07-010; Application of a Child with a Disability, Appeal No. 06-102).

I turn next to petitioners' contentions that the child's goals and objectives are insufficient because they are not objectively measurable and are not appropriate for the child. The school psychologist opined that the annual goals are measurable and that a teacher could implement them and assess whether or not the child could achieve the goals (Tr. p. 541). The record contained information about how the child's goals would be implemented by the special education teacher (Tr. pp. 401-06). For example, the annual goal of understanding numbers 1-10 and place value would be implemented using manipulatives that represent each number, exercise sheets, counting items on paper, and circling or coloring items that represent the number referenced (Tr. pp. 403-04). To address expressive language goals, the special education teacher consults with the speech-language pathologist to determine ways to elicit language (Tr. pp. 404-05). He also uses picture symbols, technology devices, speaking into a microphone and encouraging verbalizations to increase expressive vocabulary and word retrieval skills (id.).

I disagree with petitioners' claim that the "not all" of annual goals and short-term instructional objectives in the IEP were appropriate for the child. There are approximately 14 annual goals and 69 short-term objectives in the child's IEP. I first note that petitioners point to no particular annual goal or specific short-term instructional objective with respect to this assertion. The child has global, significant delays in a number of areas. I have reviewed the record and find that the short-term objectives in the April 2006 IEP were appropriately related to the child's needs, and the accomplishment of such short-term objectives would result in meaningful improvement in light of the child's disability.

I do not agree with petitioners' assertion that the April 2006 IEP was inadequate because "many" of the proposed annual goals and short-term objectives were not "objectively measurable." As indicated above, the annual goals on the child's IEP were appropriate as they were relevant to the child's areas of significant need as indicated by evaluations in the record (Dist. Exs. 6, 8-10; Parent Ex. S) and all areas of significant need had annual goals attached to them (Dist. Ex. 11 at pp. 6-15). I also find, however, that the annual goals were vague and not measurable (see Application of a Child with a Disability, Appeal No. 99-92; Application of a Child with a Disability, Appeal No. 98-75; Application of a Child with a Disability, Appeal No. 95-15). Nonetheless, most of the short-term instructional objectives in the IEP were behaviorally specific and measurable and clarified those annual goals by providing the requisite specificity to enable the child's teachers to understand the CSE's expectations. Although in some instances the child's short-term objectives should have been more objectively measurable, the record reflects that the goals and objectives were an accurate reflection of the child's present performance levels at the time the IEP was developed. Lack of specificity in some short-term objectives did not, in this instance, result in a loss of educational opportunity for the child nor did it deprive the child of educational benefits under the IEP (Application of the Bd. of Educ., Appeal No. 05-058; Application of the Bd. of Educ., Appeal No. 04-068). Therefore, a FAPE was not denied (Application of a Child with a Disability, Appeal No. 05-076; Application of the Bd. of Educ., Appeal No. 04-031;

Application of a Child with a Disability, Appeal No. 03-102; Application of a Child with a Disability, Appeal No. 03-095; Application of the Bd. of Educ., Appeal No. 02-025; Application of a Child with a Disability, Appeal No. 99-92; Application of a Child with a Disability, Appeal No. 99-6; Application of a Child with a Disability, Appeal No. 98-75; Application of a Child with a Disability, 95-15).

Petitioners assert that the IEP was developed without input from all CSE members. The school psychologist testified that the annual goals were developed in draft form prior to the April 2006 CSE meeting (Tr. p. 574). It is permissible under the IDEA for school district personnel to bring a draft IEP to the IEP meeting, provided the parents are informed it is a draft subject to review and parents have the opportunity to make objections and suggestions (see Nack v. Orange City Sch. Dist., 454 F.3d 604, 610 [6th Cir. 2006] ["predetermination is not synonymous with preparation"]; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 147-48 [S.D.N.Y. 2006] [a school district should not be precluded from suggesting an outcome at a CSE meeting]; Application of a Child with a Disability, Appeal No. 05-087; Application of a Child with a Disability, Appeal No. 02-029; Application of a Child with a Disability, Appeal No. 01-073). Petitioners do not allege that respondent did not inform them the IEP was in draft form and I am not persuaded that petitioners were precluded from meaningfully participating in the formulation of the child's IEP because respondent presented a draft IEP.

The school psychologist testified that the annual goals in the April 2006 IEP were developed based upon goals that were recommended in progress reports that the CSE received from McCarton, his conversations with the teachers at McCarton and discussion with one of respondent's special education teachers (Tr. pp. 539-40, 574; see Dist. Exs. 9-10).<sup>7</sup> He testified that he believed the assistant director of McCarton participated in the formulation of the annual goals and had opportunity to discuss them at the April 2006 meeting (Tr. p. 540). While the child's mother stated that the proposed annual goals were not discussed at the April 2006 CSE meeting, the school psychologist testified that he believed the proposed annual goals were discussed, and respondent's special education teacher asked petitioners to review the annual goals and inform the CSE of any requested changes (Tr. pp. 285-86, 540, 567-68). The school psychologist stated that there was opportunity for CSE members to raise concerns regarding the annual goals at the meeting, and that petitioners had "meaningful opportunity" to participate in that conversation (Tr. pp. 540-41). As previously discussed, the record reveals that the CSE reviewed evaluative reports, including those provided by the private school that the child attended, to determine the child's needs and develop annual goals to meet the child's needs. Petitioners attended and participated in other aspects of the CSE meeting as evidenced by the discussion of their requests that the child remain in a 1:1 program and for home-based services (Tr. pp. 280-82). Although the child's mother alleges that she was not asked if she had any "comments or concerns" regarding the annual goals, the record does not show that she was precluded from discussing this issue at the April 2006 CSE meeting (Tr. p. 286). Therefore, I will not disturb the impartial hearing officer's credibility finding which credited the testimony of the school psychologist that petitioners were given an opportunity to be full participants at the CSE meeting (IHO Decision at p. 10).

Petitioners further allege that the CSE engaged in "impermissible predetermination" in that it did not take into consideration petitioners' request for 1:1 full-day instruction, therefore, they

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<sup>7</sup> The school psychologist testified that some of the annual goals contained in the April 2006 IEP were developed from McCarton's "educational progress report;" however, this report is not in the record (Tr. p. 539).

were excluded from meaningful participation at the meeting. As stated above, the CSE determined the child's program recommendation after consideration of the evaluative information provided to it, parental concerns, and statements made by McCarton's assistant director regarding the child's behavior (Tr. pp. 532-33). The child's mother attended the April 2006 CSE meeting and testified that she requested that the child remain in a 1:1 instructional environment (Tr. pp. 278, 280). She stated that respondent indicated why it would not make that recommendation at the CSE meeting (Tr. p. 281). The school psychologist testified that if the CSE believed that the child required a more restrictive staffing ratio than what was recommended, it would have referred him for placement in a state approved non-public school (Tr. p. 544). As stated above, the record reflected that petitioners participated in a discussion regarding their desire for the child to remain in a 1:1 program. Although school districts must provide an opportunity for parents to participate in the development of their child's IEP, mere parental disagreement with a school district's proposed IEP and placement recommendation does not amount to a denial of meaningful participation (see Sch. for Language and Communication Dev. v. N.Y. State Dep't of Educ., 2006 WL 2792754, at \*7 [E.D.N.Y. Sept. 26, 2006] ["Meaningful participation does not require deferral to parent choice"]; Paolella v. District of Columbia, 2006 WL 3697318, at \*1 [D.C. Cir. Dec. 6, 2006]). The IDEA guarantees "an 'appropriate' education, 'not one that provides everything that might be thought desirable by loving parents'" (Walczak, 142 F.3d at 132, quoting Tucker, 873 F.2d at 567 [citations omitted]; see Grim, 346 F.3d at 379). Therefore, I concur with the impartial hearing officer's findings that the draft IEP did not significantly impede petitioners' opportunity to participate and petitioners were given an opportunity to be full participants at the CSE meeting (see Application of a Child with a Disability, Appeal No. 06-111).

Petitioners assert that the BIP was insufficient on a number of grounds, the first of which is because it was allegedly developed by one person without input from the CSE. However, the school psychologist testified that he drafted the child's BIP at the CSE meeting after discussion with the child's teacher and parents and with updated information about the child provided by McCarton's assistant director (Tr. pp. 565-67; see Tr. pp. 537-38). At the meeting, petitioners were provided with a copy of the IEP to review and the opportunity to respond to it (Tr. pp. 566-67). As discussed above, petitioners demonstrated that they participated in discussions about other aspects of the child's program during the CSE meeting, and did not show that they were precluded from discussing concerns that they had regarding the proposed BIP. Second, petitioners contend that the BIP was insufficient because it lacked a corresponding FBA, and the FBA dated December 2005 used to develop the BIP was "stale." I disagree. The site coordinator testified that an FBA is conducted when the current behavior plan is ineffective (Tr. p. 445). Although ELIJA's education director testified that a new FBA is necessary each time a BIP is developed, the record did not reflect that the child's behaviors changed significantly from those reported by McCarton in November 2005 or the FBA conducted in December 2005 until the CSE meeting in April 2006 (Tr. pp. 29, 31, 106-07, 530, 532; Dist. Exs. 3 at p. 1; 6 at p. 1). Third, petitioners allege that the BIP did not clearly define the child's behaviors. The IEP, inclusive of the BIP, identified the child's behaviors as "inappropriate expression of frustration," self-injurious behaviors (throwing himself on the floor, head-banging), vocal protest, and darting behaviors (Dist. Ex. 11 at pp. 4, 19). These behaviors were also described in the December 2005 FBA and psychological evaluation of the child, conducted by the school psychologist who developed the child's BIP (Dist. Ex. 6 at pp. 2-3; Parent Ex. S at p. 1). All of the aforementioned documentation was considered by the CSE at the April 2006 meeting (Tr. pp. 526-32; Dist. Exs. 3; 6; Parent Ex. S). For the foregoing reasons, I find that the CSE had sufficient information regarding the child's behaviors and that the BIP and corresponding documentation appropriately defined the child's behaviors.

Petitioners next allege that the BIP is vague with regard to implementation. The BIP states that "a behavior modification program will be designed to address or change the targeted behaviors. . . .Strategies used to extinguish and/or replace targeted behaviors will include the differential reinforcement of alternative and incompatible behaviors. The analysis of pre-existing contingencies or associations (S-R) will be critical in extinguishing inappropriate behaviors" (Dist. Ex. 11 at p. 19). It further recommended that non-academic and academic staff work together to implement the above stated strategies and plan (id.).

The special education teacher testified that the child's BIP was not clear regarding how to differentially reinforce alternate and incompatible behaviors, but that he and other staff who would have worked with the child would have needed to observe him once he was in the classroom (Tr. pp. 509-10). Staff would then work together to extinguish negative behaviors and increase positive behaviors (Tr. p. 510). The special education teacher testified that he has 13 years of experience in creating behavior plans and the record reflected that he had experience with students who exhibit behaviors similar to the child's behaviors (Tr. pp. 481-86, 489). When assessing behavioral needs, the special education teacher testified that he observes the negative behavior, prevents the child from hurting him/herself or others, if necessary, and evaluates what triggered the behavior in order to develop a behavior modification system (see Tr. pp. 397-99). He uses information obtained with the Brigance evaluation to determine what reinforcers are motivating for the child to discontinue the behavior (Tr. pp. 399-400).

The site coordinator testified that school personnel conduct FBAs and teacher interviews, develop BIPs and use rewards for positive behaviors (Tr. pp. 440-43). School personnel observe the child's behavior, chart the antecedents of the behavior and determine what reinforces the child (Tr. pp. 441, 506). The site coordinator testified that the placement utilizes a "very good" positive behavior management system in which points are earned when children exhibit desired behaviors (Tr. p. 419). The behavior plan is implemented by the classroom teacher and is based on a positive reinforcement system (Tr. p. 420). The special education teacher indicated that his students' reinforcement schedule is individualized depending on how long they can sustain focus on an activity (Tr. pp. 488-89). The site coordinator opined that the school-wide and in-class behavior management systems are effective for students with problem behaviors (Tr. pp. 468-69).

While I agree with the special education teacher's testimony that aspects of the BIP were vague with regard to implementation, I note that the CSE proposed that the child move from a 1:1 program to a 6:1+1 program and respondent's staff were not personally familiar with him. As such, the staff would need time to get familiar with the child and see what kind of behaviors he engaged in at respondent's placement. I also note that at ELIJA, the child's behavior reduction plan was established on September 14, 2006, after school had started (Parent Ex. E at p. 1). It would be difficult for respondent to determine in April 2006 the specific strategies necessary to reduce or extinguish the identified behaviors prior to observing the child in his new 2006-07 program. Considering the testimony from the site coordinator and special education teacher regarding their knowledge and familiarity with the BIP process, I conclude that they would have been able to appropriately develop and implement a specific BIP. Under these circumstances, I do not find that the vagueness of the language in the BIP denied the child a FAPE.

Petitioners assert that the proposed 6:1+1 program did not meet respondent's "intensive" program requirement or the child's alleged 1:1 instructional needs. I disagree. The special education teacher stated that the instruction in his class was individualized, and that all students



received 1:1 instruction for at least part of the day (Tr. pp. 387, 395, 480). In addition to 1:1 instruction, the child's IEP recommended full-time individual crisis paraprofessional services (Dist. Ex. 11 at p. 18).<sup>8</sup> This recommendation was made based upon the results of the child's FBA, the updated information about the child from his school that was provided to the CSE at the April 2006 meeting, as well as concerns that his parents raised regarding his self-injurious behaviors (Tr. p. 537). The school psychologist opined that a 6:1+1 program with a 1:1 paraprofessional was an "intensive" program (Tr. p. 555).

Petitioners' contend that the school psychologist stated that the role of the paraprofessional would be to "watch" the child and ensure that he was not a flight risk (Tr. p. 286-87). The record reflected that the role of the paraprofessional was to work with staff to implement the child's BIP "so he can begin to learn and also begin to internalize the external controls of behavioral modification techniques as well" (Tr. pp. 537-38). In addition, the crisis paraprofessional was to provide emotional-social support, assistance with refocusing, redirecting and "everything and anything that a classroom para would do to assist the child," including support for instruction (Tr. pp. 425, 436, 466). The school psychologist testified that the paraprofessional would assist with the child's development in the classroom and monitor his behavior (Tr. p. 563). The crisis paraprofessional would be with the child for the entire school day with the exception of his or her lunch break, at which time the child would be assisted by other school personnel (Tr. p. 425). The paraprofessional's first responsibility is to the child that he or she is assigned to, and the paraprofessional does not assist other students in the class (Tr. p. 476).

The school psychologist testified that the paraprofessional works under the supervision of the special education teacher, who in this instance has had training in ABA and TEACCH methodologies (Tr. pp. 473-74, 551). He stated that the special education teacher would observe the child and his interactions with the paraprofessional in the classroom to determine whether the child was making progress or the paraprofessional required assistance with how to work with him (Tr. pp. 552-53). When asked if respondent's program could accommodate a child who needed 1:1 instruction throughout the school day, the site coordinator responded affirmatively in situations where the teacher was able to modify the instruction, and the child had a 1:1 paraprofessional to provide instructional support (Tr. pp. 465-66). She also testified that paraprofessionals receive instructions from the teacher on an ongoing basis regarding how to interact with a student (Tr. pp. 466-67). In addition to 1:1 crisis paraprofessionals, the proposed classroom had a classroom paraprofessional who assisted the special education teacher by helping the students maintain focus on a lesson and assisting with math lessons and writing activities (Tr. pp. 491-92). The school psychologist opined that the child would benefit from the combination of the special education teacher, the classroom paraprofessional and the child's 1:1 paraprofessional in the special class (Tr. pp. 550-51).

Student skill acquisition is measured by collecting data on each child during each activity and compiling it into a "data folio" (Tr. p. 448). Teachers and related service providers review the data to ensure that a child is progressing (*id.*). The site director opined that the description of the child's academic management needs in the April 2006 IEP is an "ABA-type" description, but clarified that the IEP does not specify whether the ABA or TEACCH methodology would be used with the child (Tr. pp. 449-50; see Dist. Ex. 11 at p. 3). She stated that the methodology

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<sup>8</sup> The terms crisis paraprofessional, paraprofessional and "para" are used interchangeably in the record.

determination would depend on the functional level of the child, his goals, results of teacher assessment and input from the parents (Tr. p. 450).

The site coordinator testified that some children in the 6:1+1 class could not perform in a group setting, but that it was a goal they worked toward (Tr. pp. 464-65). When providing group instruction to students at different academic performance levels, the special education teacher stated that he positions students with similar levels next to each other and situates paraprofessionals with the students who require more assistance (Tr. pp. 480-81). In addition, the special education teacher testified that the speech-language pathologist provided in-class large group instruction sessions in addition to providing therapy in a separate location, which is what was recommended for the child (Tr. pp. 392-93). The site coordinator testified that the related service providers maintain close contact with the teachers and regularly review the students' goals and how they could be implemented in the classroom (Tr. p. 419).

I find that petitioners have not met their burden of persuasion that the child required full-time 1:1 instruction, or that the 1:1 services that the child needed could not have been provided by a paraprofessional. The proposed program would have collected data on the child's performance and has historically used ABA methodology. The special education teacher's testimony about his ability to utilize the services of paraprofessionals to instruct students at different instructional levels was unrefuted by petitioners. I note that the record reflects that, although supervised, at times the child completed tasks independently and there were periods of time when he did not exhibit behaviors that interfered with his learning (Tr. pp. 51-52; Dist. Exs. 6 at pp. 2-3; 8). The CSE recommended the child receive frequent individual OT and speech-language therapy services with potential for carryover into the classroom (Tr. pp. 534-35; Parent Ex. C).

Petitioners assert that the child would have been inappropriately grouped in the proposed 6:1+1 program. The site coordinator testified that the composition of classes is determined by the age of the students and by their functional abilities (Tr. pp. 421-22). As of September 2006, the reading levels of the students in his class ranged from pre-K to emerging first grade, and the math levels from pre-K to emerging first or second grade (Tr. p. 381). The child's IEP stated that his reading, writing and math levels were at a pre-K to kindergarten level, which was consistent with three out of five students in the proposed class (Tr. pp. 396, 478-79). The special education teacher testified that the academic management needs identified on the child's April 2006 IEP "describes what I do in my classroom every day" and that addressing the child's needs was consistent with assisting the other children in his classroom (Tr. pp. 396-97; Dist. Ex. 11 at p. 3).

Regarding the language skill level of the children in the proposed class, three students were nonverbal or demonstrated very limited expressive speech skills, one exhibited echolalia with some spontaneous speech to make statements or request items and one student was considered to be higher functioning in that he verbally communicated with the teacher and others in the classroom (Tr. pp. 477-78). In January and September 2006, the child's expressive language ability was characterized by single word use and two- to four-word phrase use with prompting (Tr. pp. 116-17; Dist. Ex. 9 at pp. 1-2).

All of the students in the proposed class received the related services of OT, physical therapy and speech-language therapy (Tr. p. 383). The CSE recommended that the child receive OT and speech-language therapy, which could have been provided at respondent's placement (Tr. p. 418; Dist. Ex. 11 at p. 18). At least one of the other children in the class received full-time 1:1

paraprofessional services, which was also recommended for the child (Tr. pp. 385-86; Dist. Ex. 11 at p. 18).

The special education teacher testified that some of the children in his class exhibited behaviors similar to those behaviors the child exhibits (Tr. pp. 482-83; Dist. Ex. 6; Parent Ex. S at p. 1). The special education teacher described one student who required "a lot of support" and paraprofessional assistance due to tantrum behaviors, "aggressive" behaviors toward others in the classroom and who required assistance in order to focus (Tr. pp. 382, 490-91). Some students in the class were described as having limited "focus-time," demonstrating attempts to leave the activity or exhibiting self-stimulation behaviors during instructional sessions (Tr. p. 481). The special education teacher stated that either he or another adult in the classroom redirects the students back to the task (Tr. pp. 481-82). The record shows that the need to redirect students occurs approximately five to ten times in a 45-minute lesson (Tr. p. 481). The record also reflected that the child exhibited similar needs and frequency of redirection (Tr. pp. 35-36; see Dist. Ex. 3). The child's IEP stated that he required a "well-structured, consistent, predictable educational environment" to meet his social-emotional and behavioral needs (Dist. Ex. 11 at p. 4). The special education teacher stated that his classroom met that description (Tr. p. 397).

I am not persuaded that the child would have been inappropriately grouped in respondent's proposed placement. Upon review of the record, I find that the students in the proposed placement appeared to be well matched to the student's academic, expressive language, behavioral and related service needs.

Petitioners allege that respondent failed to offer home-based 1:1 teaching for the child and home-based parent training. The site coordinator stated that she was not aware of whether instructors from respondent's proposed program conducted home visits for the purpose of modeling interventions (Tr. p. 453). However, the record suggested that the parent coordinator is available to offer parent training or support outside of typical school-day hours (Tr. p. 455). She stated that teachers work closely with parents so that they are "on the same page" with which behavioral strategies are used at home and school (Tr. p. 454). In addition, the special education teacher provides his students with homework that is related to what they worked on in class (Tr. pp. 387-88). The special education teacher testified that he requests data or observations regarding behaviors a student exhibits at home and communicates with parents about what behavior management techniques are used with the student at school (Tr. pp. 504-05). Moreover, an independent reading of the record reveals that it does not contain evaluative data to support petitioners' contention that the child requires home-based 1:1 instruction in order to receive a FAPE. Based upon a review of the record, I find that petitioners have not shown that home-based 1:1 teaching for the child and home-based parent training are necessary to provide the child a FAPE (see Application of a Child with a Disability, Appeal No. 06-131).

In summary, the procedural errors asserted were either not supported by the record, or did not rise to the level of a denial of a FAPE. There is no showing that any procedural error impeded petitioners from meaningfully participating in the formulation of their son's IEP, impeded the child's right to a FAPE or caused a deprivation of educational benefits (see Cerra, 427 F.3d at 194). Further, I conclude that the IEP was reasonably calculated to enable the child to receive educational benefit (Viola v. Arlington Cent. Sch. Dist., 414 F. Supp. 2d 366, 382 [S.D.N.Y. 2006]; Application of the Bd. of Educ., Appeal No. 06-010; Application of a Child with a Disability, Appeal No. 05-021). Therefore, I concur with the impartial hearing officer's finding that

respondent offered the child an appropriate program for the 2006-07 school year. Having determined that the child was not denied a FAPE for 2006-07 school year, it is not necessary for me to consider the appropriateness of the program petitioners obtained for their son, or whether the equities support their claim for tuition reimbursement (see Mrs. C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]).

I have considered petitioners' remaining contentions and find them to be without merit.

**THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.**

**IT IS ORDERED** that, pursuant to the parties' agreement, respondent shall reimburse petitioners for the cost of 12 hours per week of home-based ABA services for the child during pendency upon petitioners' submission of proof of payment for such expenses, unless the parties agree otherwise.

**Dated:**           **Albany, New York**  
                      **June 14, 2007**

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**PAUL F. KELLY**  
**STATE REVIEW OFFICER**