



The University of the State of New York

The State Education Department State Review Officer

No. 08-056

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, attorney for petitioner, Karyn Thompson, Esq., of counsel

The Law Office of Steven L. Goldstein, attorney for respondents, Steven L. Goldstein, Esq., of counsel

DECISION

Petitioner (the district) appeals from the decision of an impartial hearing officer which found that it did not offer a free appropriate public education (FAPE) to the student for the 2007-08 school year and ordered it to pay for respondents' (the parents') costs for the student's tuition at the Rebecca School for the 2007-08 school year and July and August 2008. The appeal must be sustained in part.

At the outset, I will address the procedural matters arising on appeal. First, the parents request dismissal of the petition, asserting in their answer that the district did not personally serve the notice of petition, petition and memorandum of law upon the parents nor did the district serve the same upon the parents in the manner authorized by a State Review Officer. In its reply, the district requests that the petition not be dismissed for improper service and argues, among other things, that the parents had actual notice of the petition, timely responded to the petition, and have not been prejudiced by any service irregularities. State regulations require personal service of a petition for review on a respondent (8 NYCRR 275.8, 279.1[a]^{1,2}; Application of the Dep't of

¹ Part 279 of the Regulations of the Commissioner of Education governs the practice on review of hearings by a State Review Officer. Section 279.1(a) provides that the provision of Parts 275 and 276 shall govern the practice on such reviews, except as provided in Part 279.

² Personal service may be waived upon agreement of the parties (see Application of the Dep't of Educ., Appeal No. 07-037; Application of the Bd. of Educ., Appeal No. 04-058).

Educ., Appeal No. 07-037; Application of the Dep't of Educ., Appeal No. 05-082; Application of the Bd. of Educ., Appeal No. 01-048). If respondent cannot be found upon diligent search, petitioner may effectuate service by delivering and leaving the petition, affidavits, exhibits, and other supporting papers at respondent's residence with some person of suitable age and discretion between six o'clock in the morning and nine o'clock in the evening, or as otherwise directed by the Commissioner³ (8 NYCRR 275.8[a]; Application of the Dep't of Educ., Appeal No. 08-006).

In the instant matter, the district's process server made numerous attempts to personally serve the parents with the petition (Reply Ex. 3). After unsuccessful attempts to personally serve the petition upon the parents, the district sent a copy of the petition and supporting papers to the parents by overnight United Parcel Service delivery and then sought permission from a State Review Officer for an alternative method of service (Answer Ex. A). A State Review Officer approved the district's request for alternative service, authorizing the district to serve the parents by affixing a copy of the petition and memorandum of law to the parents' door and mailing an additional copy to the parents' known address (Answer Ex. B; see 8 NYCRR 275.8[a]). Although it is unclear from the hearing record whether the district's process server properly "affixed" a copy of the petition and other papers to the parents' door as authorized by a State Review Officer (see Answer Ex. C at ¶ 14; Reply at ¶ 16; Reply Ex. 3 at p. 1), the hearing record reveals that the parents acknowledged receipt of the notice of petition, petition and memorandum of law via United Parcel Service delivery and regular mail (Answer Ex. C at ¶¶ 6-7). The hearing record further reveals that the parents effectively responded to the district's allegations in a timely manner upon receipt of the petition. Accordingly, in the exercise of my discretion, I will not dismiss the petition in this case for improper service (see Application of the Bd. of Educ., Appeal No. 07-087; Application of the Dep't of Educ., Appeal No. 07-037).

Second, the parents argue that the district failed to properly name the parents as the respondents in the caption of the district's petition and requests that the petition therefore be dismissed on this ground. The district argues that a reading of the pleadings "does not leave any question that the parents of [the student were] the intended respondents" (Reply ¶ 24). Although the caption of the district's petition identifies only the student as the respondent, I find that it is clear upon reviewing the petition who the intended respondents were and that the parents were able to answer the petition and interpose defenses. Accordingly, I decline to dismiss the appeal merely for the failure to identify the parents by name in the caption (see Application of a Child Suspected of Having a Disability, Appeal No. 93-7).

Turning to the student's educational history, the hearing record indicates that the student was diagnosed with moderate autism prior to turning three years old (Dist. Ex. 14 at p. 1; Parent Exs. JJ at p. 1; LL at p. 2). At the time of the impartial hearing in February and March 2008, the student was attending the Rebecca School where the parents had unilaterally enrolled her since September 2006 (Tr. pp. 140-41, 403, 416, 432; Parent Ex. PP). The Commissioner of Education has not approved the Rebecca School as a school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7). The student's eligibility for special education programs and services and classification as a student with autism are not in dispute in this appeal (34 C.F.R. § 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

³ Pursuant to 8 NYCRR 279.1(a), "references to the term commissioner in Parts 275 and 276 shall be deemed to mean a State Review Officer of the State Education Department, unless the context otherwise requires."

In August 2006, the student was assessed by a psychologist at the Rebecca School (Tr. pp. 151-52; Parent Ex. XX). Administration of the Functional Emotional Assessment Scale (FEAS) yielded the following student scores: self-regulation and interest in the world (nine points awarded); forming relationships attachment and engagement (three points awarded); two-way, purposeful communication (one point awarded); behavioral organization, problem solving, and internalization (zero points awarded); representational capacity (zero points awarded); and representational differentiation (zero points awarded) (Parent Ex. XX at pp. 7-10). As part of the FEAS administration, the student's mother's skills as a caregiver were also assessed (Parent Ex. XX). The total child score was 13 and the total FEAS scale score was 35 (id. at pp. 10, 11). Both the student and her mother were judged to be deficient in all areas with the exception of caregiver self-regulation and interest in the world, which was credited as being normal (id. at p. 11).

A November 14, 2006 report by the student's head teacher at the Rebecca School indicated that the student had progressed since entering the Rebecca School (Dist. Ex. 12 at p. 1). The teacher reported that the student responded well to a visual schedule, had difficulty with transitions and schedule changes and was hyper-sensitive to sound (id.). The teacher indicated that the student craved proprioceptive and vestibular input and that, in addition to occupational therapy (OT), the student was taken to the sensory gym in order to help regulate her sensory system (id.). According to the student's teacher, the student was able to maintain a state of regulation and shared attention some of the time (id. at p. 2). The student did not consistently engage in relationships with others (id.). The teacher indicated that the student showed inconsistency in the area of two-way purposeful communication, noting that the student could open and close circles of communication during sensory activities, but at other times was echolalic (repeating the last words said) (id. at p. 3). The teacher further asserted that the student's ability to engage in two-way purposeful problem solving interactions required strengthening (id.). The teacher offered the following goals: the student will initiate and sustain interaction with her classroom peers and more consistently with staff members, the student will become more flexible and eager to engage in a wider variety of activities, the student will begin to answer "why" questions, and the student will "develop stronger foundations in levels 1-4"⁴ so that she can move on to higher level symbolic and critical thinking abilities (id. at pp. 3-4).

A November 14, 2006 speech-language therapy progress report from the Rebecca School indicated that the student was working at the Functional Emotional Developmental Levels of shared attention and regulation, engagement and relating, and the beginnings of purposeful two-way communication (Dist. Ex. 13 at p. 1). The therapist indicated that the student's playfulness often took the form of defying adults, and that when the student spontaneously initiated an interaction, it was generally to get a need met (id.). The therapist reported that the student appeared to enjoy one-to-one attention; but did not initiate two-way exchanges, appear interested in peers or seek out interactions with them (id.). With regard to receptive language, the therapist noted that the student's ability was difficult to assess because she was bilingual and had limited expressive

⁴ The Rebecca School utilizes the Developmental Individual Difference Relationship-based (DIR) model. The DIR model "proceeds from the core belief that relationships are the foundation of learning. DIR considers each child's functional emotional development levels, how the child processes information and the learning relationships that enable him or her to progress" (Parent Exs. MM at p. 2; NN at p. 3). According to the program director there are nine developmental levels of DIR, which are as follows: regulation, shared attention, back and forth communication, shared social problem-solving, symbolic thinking, building logical bridges between ideas, multi-causal thinking, grey area thinking, and self-reflective thinking (Tr. pp. 113, 114-15).

output (id.). With regard to expressive language, the therapist noted that the student's language consisted primarily of one to two words utterances, used little spontaneous language in school and relied on gestures more than words to communicate (id.). The goal of therapy was to increase the student's receptive and expressive vocabulary and assist her in producing longer and more frequent spontaneous verbal utterances (id.). The therapist reported that, despite some improvement, the student continued to present with severe pragmatic language deficits (id.). According to the progress report, the student did not participate in back-and-forth communication exchanges for more than one or two circles (id.). The therapist noted some oral motor /articulation concerns, particularly reduced range of motion of the oral musculature and a general lack of sensory awareness of the face and oral motor cavity (id. at p. 2). The therapist offered goals to improve the student's receptive, expressive and pragmatic language skills (id.).

During November and December 2006, the student underwent a psychological evaluation at the Rebecca School for the purpose of establishing a baseline level of cognitive and behavioral development and to assess the student's individual sensory system functioning (Dist. Ex. 14 at p. 1). A bilingual classroom assistant was present throughout the assessment and assisted the evaluator with translation (id. at p. 2). The evaluator reported that the student appeared highly distractible and had difficulty maintaining focus during the assessment (id.). She noted that the student appeared to attempt to follow the evaluator's requests when she was more attentive and when language-based instructions were supported by visual components (id. at p. 7). Administration of the Weschler Intelligence Scale for Children-Fourth Edition (WISC-IV) yielded a full scale IQ score of 41 (below the 1st percentile), placing the student in the extremely low range of cognitive functioning (id. at p. 3). The evaluator cautioned that this score should be interpreted with extreme caution and noted that the WISC-IV may not be a valid instrument for gaining a comprehensive assessment of the student's cognitive ability given her diagnosis of autism, limited verbal skills and bilingualism (id. at pp. 3-4). The evaluator noted that staff reports and qualitative testing observations indicated that the student was clever, creative and able to complete many tasks, such as cleaning up a game or completing a classroom worksheet (id. at p. 5). According to the evaluator, the student also demonstrated problem solving skills (id.). The Vineland Adaptive Behavior Scales-Second Edition (Vineland-II), as completed by the student's mother, yielded an adaptive behavior composite of 66 (1st percentile), which was in the low range (id.). The student's mother reported that the student could write short paragraphs, and that she was sometimes able to read second grade material and alphabetize lists of words (id.).

Based upon the foregoing, the evaluator opined that an alternate test of cognitive ability, especially one that takes into account the student's bilingualism and/or relies on visual or other non-verbal tasks and instructions, may be a more valid assessment of the student's intellectual functioning (Dist Ex. 14 at p. 7). The evaluator concluded that continued OT might be able to address the student's difficulties with sensory processing and, therefore, decrease her self-stimulatory behaviors and distractibility (id. at p. 8). Additionally, the evaluator opined that continued speech-language therapy may be beneficial for the student's speech production and language development (id.). The evaluator recommended "a developmentally attuned program" with a small student/teacher ratio that would provide the student with sensory emotional regulation (id.).

In November 2006, a Rebecca School OT progress report indicated that the student was hyper-sensitive to auditory, tactile and visual input and that during times of over-stimulation, she would put her fingers in her ears, hands over her eyes and crouch on the floor (Dist. Ex. 15 at p.

1). The therapist noted that the student often became deregulated and had difficulty engaging and relating (id.). According to the therapist, the student often sought deep proprioceptive input (jumping or crawling) and was self-directed in using sensory equipment (id.). The therapist reported that the student's level of attention and engagement improved following vestibular activities (id.). The therapist noted that the student required movement breaks throughout the day and moved in and out of the classroom (id.). The occupational therapist offered the following goals for the student: improve sensory processing and regulation needed for shared attention and regulations, improve motor planning and sequencing for improved participation in fine and gross motor tasks, and improve functional developmental capacities for increased interactions with peers and adults in home and school environments (id.).

On January 25, 2007, the student's speech therapist at the Rebecca School attempted to assess the student's language skills using a standardized test, but was unable to do so due to the student's lack of response (Dist. Ex. 11 at p. 1). There is no indication that the therapist attempted to conduct a bilingual assessment, as recommended by the Rebecca School psychologist (Dist. Ex. 11). As to the student's receptive language, the therapist maintained that this was difficult to assess because the student was bilingual and had limited expressive output (id. at p. 1). According to the therapist, the student's expressive language consisted of primarily one to two word utterances, but the student imitated some three to four word phrases spontaneously and upon request (id.). In addition, the student had begun to make some specific verbal requests and answer some concrete "wh" questions when strong visual/contextual support was provided (id.). The therapist reported that the student had made some progress in her pragmatic skills, but continued to present deficits, such as failing to consistently seek out people to help her attain desired items or activities, and failing to regularly initiate communication (id. at p. 2). According to the evaluation report, the student's articulation could not be accurately assessed due to the paucity of verbal output (id.). The therapist reported that a minor interdental lisp had been noted, as well as, tongue thrusting at rest and during speech (id.). The therapist recommended that the student continue to receive individual speech-language therapy at least four times per week to address deficits in expressive, receptive and pragmatic language (id.).

On February 1, 2007, the student was observed at the Rebecca School by a district special education teacher (Dist. Ex. 16). The teacher first observed the student in a gym class of six students staffed by a teacher, an occupational therapist and four teacher assistants (id. at p. 1). The special education teacher observed that, with assistance, the student was able to imitate a variety of yoga positions (id.). In computer class, the student was able to choose a computer as directed by the teacher and, with assistance, select a computer program (id.). According to the observer, the student appeared to be comfortable working on the computer (id.). When the program became difficult, the student became a little confused and lost interest (id. at p. 2). The observer reported that the student could associate a sentence phrase with a picture combination and follow directions with a lot of prompting (id.). The observer further noted that the student was able to participate in activities with initial guidance and was then able to work on her own, if provided with sequential steps beforehand (id.). Finally, the observer noted that the student did not seem to have much interest in her peers (id.).

A March 1, 2007 Rebecca School OT progress report indicated that the student displayed sensory processing and modulation difficulties and that she was easily distracted by external stimuli and became over-stimulated in noisy environments (Dist. Ex. 10 at p. 1). The therapist opined that the student's inability to process sensory information impacted her ability to sustain

shared attention and regulation (id.). The therapist reported that the student sought vestibular, tactile, and proprioceptive input to help improve her regulation skills (id.). According to the occupational therapist, when given continuous vestibular input, the student became calmer and more regulated to engage in two-way purposeful communication (id.). The therapist indicated that upon receiving continuous deep pressure input the student was able to self-regulate and engage in limited purposeful two-way communication (id.). The therapist reported that the student craved light touch activities, such as tickling, which was an activity that helped regulate the student and allowed her to engage in purposeful two-way communication (id.). The therapist recommended that the student continue to receive individual OT three times per week (id. at p. 2). She opined that the student's therapy program should include an individualized sensory diet, including a classroom program to support the treatment goals of the therapist (id.).

On March 5, 2007, the district's Committee on Special Education (CSE) convened for the student's annual review and to develop her individualized education program (IEP) for the 2007-08 school year (Dist. Ex. 3). Participants included the student's parents; the district representative, who was also the school psychologist; the school social worker; a district special education teacher; an additional parent member; the special education teacher from the Rebecca School; and a translator (Dist. Exs. 3 at p. 2; 7). According to the student's mother, she and the student's teacher from the Rebecca School were both able to express their opinions at the CSE meeting (Tr. p. 437). The meeting minutes from the March 5, 2007 CSE meeting indicate that the CSE considered the student's medical, school, related services and student observation reports, along with input from the committee members, including the student's parents, to formulate the student's IEP (Tr. pp. 44-47, 50-51; Dist. Ex. 7).

The student's March 5, 2007 IEP indicated that the student could generally follow through with simple, routine commands when given extra time and visual and gestural cues and that the student responded well to picture boards with prompting (Dist. Ex. 3 at p. 3). According to the IEP, the student relied on gestures more than words to communicate and could answer some simple yes/no questions (id.). By teacher estimate, the student's reading comprehension was at a first grade level, her decoding skills were at a third grade level, and her ability to complete numerical operations was at a second grade level (id.). The IEP indicated that the student was most responsive to playful obstruction and affective modeling and expansion (id. at p. 4). The IEP further indicated that the student's language development and social skills were severely limited and that she did not interact with her peers (id.). The IEP concluded that the student's behavior did not seriously interfere with instruction and could be addressed by a special education teacher (id.). A behavior intervention plan (BIP) was not developed for the student (id.). The student's IEP goals included identifying objects, increasing pre-math skills, improving sensory processing and regulation for shared attention, improving motor planning and sequencing for improved participation in fine and gross motor tasks, improving functional developmental capacities for increased interactions with peers and adults, and increasing comprehension of two-step directions (id. at pp. 6-10).

Ultimately, the March 5, 2007 CSE recommended that the student be classified as having autism and placed in a 6:1+1 special class in a specialized school (Dist. Ex. 3 at pp. 1, 2, 11). Related service recommendations included individual OT three times per week for 30 minutes, individual speech-language therapy two times per week for 30 minutes and speech-language therapy once per week for 30 minutes in a dyad (id. at p. 13). Additionally, the CSE recommended discontinuing the services of a crisis management paraprofessional (id.). The March 5, 2007 IEP

indicated that the student would participate in alternative assessment (id.). A 12-month school year program, special education transportation and monolingual services with ESL (English as a second language) were also recommended (id. at p. 1). Minutes from the March 5, 2007 CSE meeting indicated that the parents disagreed with the CSE's recommendation for a 6:1+1 program and that the parents wanted the student to stay at the Rebecca School (Dist. Ex. 7).

A June 4, 2007 Final Notice of Recommendation (FNR) indicated that the student was offered a special class at one of the district's schools with related services of individual OT, individualized speech-language therapy and group speech-language therapy for the 2007-08 school year (Dist. Ex. 6).

On July 11, 2007, the student's father signed a 12-month contract with the Rebecca School for the student's enrollment for the 2007-08 school year (Dist. Ex. 18 at pp. 1-2). On July 12, 2007, the parents made a \$5000 payment to the Rebecca School (Parent Ex. RR).⁵

In a due process complaint notice dated November 5, 2007, the parents requested an impartial hearing alleging that the district failed to offer the student a FAPE (Parent Ex. A at p. 1). Namely, the parents asserted that: (1) the March 5, 2007 CSE was not duly constituted; (2) the March 2007 IEP was based upon unreliable information; (3) the proposed goals in the March 2007 IEP were insufficient and inappropriate and could not be implemented in the recommended program; (4) the district failed to conduct a functional behavior assessment (FBA) of the student; (5) the district failed to consider developing a BIP for the student; (6) the March 2007 IEP failed to include a transitional support plan; (7) the March 2007 IEP failed to include appropriate promotional criteria; (8) the parents were denied the right to meaningfully participate in the development of the student's March 2007 IEP; (9) the CSE impermissibly predetermined the student's program; (10) the district failed to recommend an appropriate physical education program for the student; (11) the district's recommended placement is inappropriate; (12) the March 5, 2007 CSE failed to recommend appropriate related services for the student; (13) the district failed to offer a program to the student for July and August 2007; (14) the Rebecca School is appropriate for the student; and (15) equitable considerations supported the parents' claims (id. at pp. 2-10, 13). The parents sought transportation for the student to and from the Rebecca School as well as the student's tuition costs at the Rebecca School for the 2007-08 school year and July and August 2008 (id. at pp. 13-14).

The impartial hearing began on February 12, 2008 and concluded on March 28, 2008, after three days of testimony (Tr. pp. 1, 197, 354). At the impartial hearing, the district presented documentary evidence and offered the testimony of a district school psychologist, who also served as the district representative at the March 5, 2007 CSE meeting; a clerical worker from the district; and the Assistant Principal of the recommended placement (Tr. pp. 39, 201, 221). The parents presented documentary evidence and offered the testimony of the Rebecca School's program director, the student's teacher at the Rebecca School, a social worker from the Rebecca School and the student's parents (Tr. pp. 104, 297, 358, 401, 414).

⁵ I note that the hearing record contains duplicative exhibits. For purposes of this decision, only Parent exhibits were cited in instances where both a Parent and District exhibit were identical. I remind the impartial hearing officer that it is her responsibility to exclude evidence that she determines to be irrelevant, immaterial, unreliable or unduly repetitious (8 NYCRR 200.5[j][3][xii][c]).

By decision dated May 19, 2008, the impartial hearing officer found that the district failed to offer the student a FAPE for the 2007-08 school year, that the parents met their burden of persuasion to demonstrate that the Rebecca School was appropriate for the student, and that equitable considerations weighed in the parents' favor for an award of tuition (IHO Decision at pp. 8, 9, 10-11). Specifically, the impartial hearing officer concluded that the standard articulated by the United States Supreme Court in Board of Education v. Rowley, 458 U.S. 176 (1982), for determining whether a FAPE has been offered to a student only applies to "the education of children who are in regular education classroom and curriculum" (id. at p. 5). Accordingly, the impartial hearing officer determined that the Rowley standard did not apply to the student in the instant matter and she elected to apply a "self-sufficiency standard" which she concluded required a "higher standard of educational benefit" (id. at pp. 5-6). Under this "higher standard," the impartial hearing officer determined that the district did not offer the student a FAPE because it failed to offer services based upon a research based methodology, and include on the student's IEP "a statement of the special education and related services . . . , based on peer-reviewed research to the extent practicable," failed to provide speech-language therapy in compliance with section 200.13 of the State regulations; failed to provide adapted physical education (APE), failed to provide related services without the parents having to secure those services through related service authorizations (RSA), and failed to have "high expectations' to prepare [the student] to lead a productive and independent adult life to the maximum extent possible" (id. at p. 8). The impartial hearing officer ordered the district to fund the student's 12-month tuition at the Rebecca School for the 2007-08 school year, including July and August 2008 (id.).

The district appeals and asserts that the impartial hearing officer erred in finding that it did not offer the student a FAPE for the 2007-08 school year. The district asserts that the impartial hearing officer's award for the student's tuition at the Rebecca School for July and August 2008 is premature. The district further argues that the impartial hearing officer's heightened standard for evaluating the appropriateness of the district's recommended program was improper, but even if it was proper, the recommended program and placement satisfied such a higher standard. The district maintains that its recommended program and placement were procedurally and substantively proper. Specifically, the district argues that its recommended program offered parent training and APE; satisfied the student's language needs; and provided the student with applied behavioral analysis (ABA), which is a research based methodology. Contrary to the impartial hearing officer's conclusion, the district asserts that the student would have received her related services at the school and would not have received RSAs in the recommended placement. Lastly, the district argues that the Rebecca School is not an appropriate placement for the student and that the equities favor the district. The district requests that the impartial hearing officer's decision be annulled in its entirety.

In their answer, the parents admitted and denied the district's allegations and requested that the petition be denied in its entirety. The parents argue that the March 5, 2007 CSE meeting was not duly constituted; that the parents were denied meaningful participation at the March 5, 2007 CSE; that the district did not develop and consider sufficient evaluative materials at the CSE; that the district failed to consider whether to perform a bilingual psychological evaluation, an APE evaluation or an FBA; that the district failed to provide the student with appropriate related services; that the developed goals of the IEP were not appropriate; that the district did not offer a placement for July and August 2007; that the district failed to offer appropriate parent training; and that the recommended placement was not appropriate. The parents further argue that regardless of whether the impartial hearing officer applied an improper standard in assessing

whether the student was offered a FAPE, the evidence in the hearing record indicates that the district denied the student a FAPE.

A 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 FAPE⁶ that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living (20 U.S.C. § 1400[d][1][A]; see Schaffer v. Weast, 546 U.S. 49, 51 [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 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 (Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if a procedural violation is alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; 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 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,

⁶ 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]).

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). A student's educational program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.6[a][1]; see Walczak, 142 F.3d at 132).

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).

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]). 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; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra., 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 C.F.R. § 300.148).

The New York State Legislature amended the Education Law to place the burden of production and persuasion upon the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of production and persuasion regarding the appropriateness of such placement (Educ. Law § 4404[1][c], as amended by Ch. 583 of the Laws of 2007). The amended statute took effect for impartial hearings commenced on or after October 14, 2007 (see Application of the Bd. of Educ., Appeal No. 08-016).

Returning to the instant case, I concur with the determination of the impartial hearing officer that the district failed to sustain its burden to show that it offered the student a FAPE for the 2007-08 school year, but on different grounds than those relied upon by the impartial hearing officer.

First, I concur with the district's contention that the impartial hearing officer erred in the application of the legal standard in determining whether the student was offered a FAPE. The impartial hearing officer maintained that the Supreme Court's standard of a FAPE set forth in the Rowley decision does not apply to the instant case because the student was not attending a general education class or pursuing a general education curriculum (IHO Decision at p. 5). The impartial hearing officer then relied on language in two decisions, Deal v. Hamilton Board of Education, 392 F.3d 840 (6th Cir. 2004) and J.L. v. Mercer Island School District, 2006 WL 3628033 (W.D.

Wash. 2006), as a substitute standard for the Rowley FAPE standard. She erred in not applying the Rowley standard. Neither the 1997 nor 2004 amendments to the IDEA specifically addressed changing the well-settled Rowley standard (see Lessard v. Wilton Lyndeborough. Coop. Sch. Dist., 518 F.3d 18, 28-29 [1st Cir. 2008]; Mr. C. v. Maine Sch. Admin. Dist. No. 6, 538 F. Supp. 2d 298, 300 [D. Me. 2008]). The Second Circuit continues to utilize the Rowley standard (Gagliardo, 489 F.3d at 108, 113). The United States Supreme Court continues to cite to its Rowley decision in recent decisions (see, e.g., Winkelman v. Parma City Sch. Dist., 127 S. Ct. 1994, 2000 [2007]). As such, I am not persuaded that the Rowley standard should not continue to be the applicable standard.

Second, I find that the impartial hearing officer exceeded her jurisdiction by basing her decision on issues that she herself raised sua sponte at the impartial hearing that were not identified in the parents' due process complaint notice. The party requesting an impartial hearing determines the issues to be addressed by the impartial hearing officer (Application of the Bd. of Educ., Appeal No. 07-081; Application of a Child with a Handicapping Condition, Appeal No. 91-40). It is also essential that the impartial hearing officer disclose his or her intention to reach an issue which the parties have not raised as a matter of basic fairness and due process of law (Application of a Child with a Handicapping Condition, Appeal No. 91-40; see John M. v. Bd. of Educ., 502 F.3d 708 [7th Cir. 2007]).

In the instant case, the parents did not assert in their due process complaint notice that the March 5, 2007 CSE failed to discuss research based methodology or include a statement on the student's IEP regarding peer-review research (see Parent Ex. A). A review of the hearing record reveals that the impartial hearing officer asked questions of a district's witness about whether the CSE discussed methodology at its March 5, 2007 CSE meeting (Tr. pp. 97-99) and then relied on this testimony to conclude, among other reasons, that the district's failure to offer research based methodology, failure to discuss research based methodology at the CSE meeting, and the failure to include a statement regarding peer-review research on the student's IEP resulted in a denial of a FAPE (IHO Decision at p. 7). Although an impartial hearing officer has the authority to ask questions of counsel or witnesses for the purposes of clarification or completeness of the hearing record (8 NYCRR 200.5[j][3][vii]), it is impermissible for the impartial hearing officer to raise issues that were not presented by the parties and then base his or her determination on the issues raised sua sponte. The impartial hearing officer should have confined her determination to issues raised in the parents' due process complaint notice (see 20 U.S.C. § 1415[c][2][E], [f][3][B]; 34 C.F.R. §§ 300.508[d][3], 300.511[d]; 8 NYCRR 200.5 [i][7][i], [j][1][ii]; Application of a Child with a Disability, Appeal No. 07-051; Application of a Child with a Disability, Appeal No. 07-047; Application of a Child with a Disability, Appeal No. 06-139; Application of a Child with a Disability, Appeal No. 06-065; Application of a Child with a Disability, Appeal No. 04-019; Application of a Child with a Disability, Appeal No. 03-095; Application of a Child with a Disability, Appeal No. 02-024; Application of a Child with a Disability, Appeal No. 01-024; Application of a Child with a Disability, Appeal No. 99-060).

As noted above, the district asserts several challenges to the impartial hearing officer's determination that the district failed to offer a FAPE to the student for the 2007-08 school year. Based on the hearing record, I find that the impartial hearing officer's rationale did not support her conclusion that the district denied the student a FAPE. However, I need not address each of the district's allegations on appeal because based on the hearing record, I am constrained to reach the

same conclusion as the impartial hearing officer that the district did not meet its burden to show that it offered an appropriate program to the student for the 2007-08 school year.

The parents asserted in their due process complaint notice that the March 5, 2007 CSE based its recommendations on unreliable information and subjective teacher estimates (Parent Ex. A at p. 4). They asserted that it is unclear what evaluations, if any, the CSE relied upon in developing its recommendations (*id.*). The parents further argued that the student's March 5, 2007 IEP did not include an adequate and updated statement of the student's present levels of educational performance and that the goals and short-term objectives in the March 5, 2007 IEP failed to address the student's educational needs (*id.* at pp. 4-5).

During the impartial hearing, the district representative testified that the March 2007 CSE determined that the student should be placed in small specialized class for children with autism (Tr. p. 50). She testified that a class with a 6:1+1 ratio was chosen because "that's the program we have for autistic children" (Tr. pp. 76-77). She further testified that the March 5, 2007 CSE considered reports from the Rebecca School in developing the student's IEP because the Rebecca School staff knew the student very well and the school submitted detailed reports considered by the CSE to be appropriate (Tr. pp. 93-94). However, the Rebecca School reports did not include an assessment or discussion of the student's level of academic functioning (Dist. Exs. 10; 11; 14; 16). In addition, as a result of a psychological evaluation conducted by the Rebecca School in November and December 2006, the psychologist recommended that non-verbal cognitive testing of the student take place, as well as, a bilingual evaluation of the student's language and verbal development (Dist. Ex. 14 at pp. 5, 7). There is no indication in the hearing record that the district sought to conduct additional cognitive testing of the student. At the impartial hearing, the district representative suggested that the private psychologist administered the Vineland-II to the student's mother as a means of assessing the student's development; however, the psychologist acknowledged that the Vineland-II was not a nonverbal test of cognitive development (Tr. pp. 99-101). The district representative further confirmed that she was unaware of any bilingual assessment of the student (Tr. p. 101).

In relying solely on the Rebecca School's assessment of the student's abilities, I find that the March 2007 CSE lacked adequate information to determine the student's cognitive and academic needs. Based on the CSE's review of existing evaluation data and input from the student's parents, the CSE must identify what additional information, if any, is needed to determine whether the student continues to have an educational disability, the student's present levels of performance, whether the student needs special education services, or whether any additions or modifications to the special education services are needed (34 C.F.R. § 300.305[a][2]; 8 NYCRR 200.4[b][5][ii]). If additional information is needed, the school district must administer tests and obtain other evaluation materials to produce the needed information (34 C.F.R. § 300.305[c]; 8 NYCRR 200.4[b][5][iii]). Here, a psychologist recommended non-verbal cognitive testing and a bilingual evaluation of the student, however, there is no indication in the hearing record that the district sought to conduct this additional testing.

This lack of adequate information is reflected in the student's March 5, 2007 IEP, specifically in the present levels of performance and the goals and objectives. The student's March 5, 2007 IEP contains three pages detailing her present levels of performance (Dist. Ex. 3 at pp. 3-5). The first page, titled "Academic Performance and Learning Characteristics," describes the student's language development and gives some insight into the student's learning style, but does

not provide a description of the student's cognitive development or present levels of academic achievement (*id.* at p. 3). The first page includes teacher estimates of the student's reading and math levels, which appear to have come from the student's Rebecca School teacher (Tr. p. 80); however, the hearing record does not indicate the bases for these estimates. The second page of present levels of performance contained in the IEP, titled "Social/Emotional Performance," details the student's social emotional functioning and describes her sensory development (Dist. Ex. 3 at p. 4). The third page of present levels of performance, titled "Health and Physical Development," indicates that the student is healthy, has been diagnosed with autism and does not have any mobility limitations (*id.* at p. 5). The IEP does not further describe the student's motor development or detail the student's difficulty with motor planning (*id.*).

The lack of appropriate evaluations is also reflected in the March 2007 IEP goals and objectives. The student's Rebecca School teacher opined that the IEP goals related to developing pre-math skills and identifying objects were "extremely" below the student's current level of ability and that it would be doing the student "an injustice" to limit her goals to regulation when she was making academic growth (Tr. pp. 332-33). With regard to academics, the hearing record indicates that the IEP developed for the student for the previous school year (2006-07) included both math goals and reading comprehension goals (Parent Ex. W at pp. 6, 8). The student's March 5, 2007 IEP does not include reading goals. When asked about the lack of reading goals on the student's 2007-08 IEP, the district representative opined that the student was not at the level where she required reading goals and, alternately, suggested that a lot of the IEP goals came from the Rebecca School reports and the Rebecca School does not develop reading goals (Tr. pp. 77, 80-82). The district representative testified that the Rebecca School teacher's estimates of the student's reading ability as presented at the time of the March 5, 2007 CSE meeting were not consistent with the teacher reports the Rebecca School teacher generated and that it was hard to reconcile the two (Tr. pp. 80-82). There is no evidence in the hearing record that the CSE attempted to conduct additional testing to ascertain academic levels for the student or otherwise tried to reconcile this discrepancy. In addition, there is no discussion or evidence in the hearing record relative to the academic skills the student had mastered or needed to develop. During the course of the impartial hearing, several witnesses questioned the appropriateness of a math goal on the student's 2007-08 IEP, which called for the student to master pre-math skills when she could reportedly perform numerical operations at a second grade level (Tr. pp. 78-79, 286).

Based on the above, there is sufficient evidence in the hearing record to conclude that the March 5, 2007 IEP provides insufficient information regarding the student's cognitive and academic functioning and the goals and objectives developed for the student are inadequate. As such, I conclude that the district denied the student a FAPE for the 2007-08 school year.

I turn next to whether the parents' placement of the student at the Rebecca School for the 2007-08 school year was appropriate. A private school placement must be "proper under the Act" (*Carter*, 510 U.S. at 12, 15; *Burlington*, 471 U.S. at 370), i.e., the private school offered an educational program that met the student's special education needs (see *Gagliardo*, 489 F.3d at 112, 115; *Frank G.*, 459 F.3d at 363-64; *Walczak*, 142 F.3d at 129; *Matrejek*, 471 F. Supp. 2d at 419). A parent's failure to select a program approved by the state in favor of an unapproved option is not itself a bar to reimbursement (*Carter*, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (*Carter*, 510 U.S. 7; *Application of the Dep't of Educ.*, Appeal No. 08-025; *Application of the Bd. of Educ.*, Appeal No. 08-016; *Application of the Bd. of Educ.*, Appeal No. 07-097; *Application of a Child with a*

Disability, Appeal No. 07-038; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-105). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S., 231 F.3d at 104). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement..." (Gagliardo, 489 F.3d at 112; Frank G., 459 F.3d at 364 [quoting Rowley, 458 U.S. at 207 and identifying exceptions]). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 365). When determining whether the parents' unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether that placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see also Gagliardo, 489 F.3d at 112). While evidence of progress at a private school is relevant, it does not itself establish that a private placement is appropriate (Gagliardo, 489 F.3d at 115 [citing Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] [stating "evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]]). A "private placement is only appropriate if it provides 'education instruction specifically designed to meet the unique needs of a handicapped child'" (Gagliardo, 489 F.3d at 115 [citing Frank G., 459 F.3d at 365 [quoting Rowley, 458 U.S. at 188-89] [emphasis added]]; R.C. and M.B. v. Hyde Park Cent. Sch. Dist., 07-CV-2806 [S.D.N.Y. June 27, 2008]; M.D. and T.D. v. New York City Dep't of Educ., 07 Civ. 7967 [S.D.N.Y. June 27, 2008])).

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

No one factor is necessarily dispositive in determining whether parents' unilateral placement is reasonably calculated to enable the child to receive educational benefits. Grades, test scores, and regular advancement may constitute evidence that a child is receiving educational benefit, but courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs. To qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special service necessary to maximize their child's potential. They need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction (Gagliardo, 489 F.3d at 112; see Frank G., 459 F.3d at 364-65; see also A.D. and H.D. v. New York City Dep't of Educ., 06 Civ. 8306 [S.D.N.Y. April 21, 2008]).

According to the hearing record in the instant case, the Rebecca School is a 12-month program that serves children with developmental disorders using the DIR-based model (Tr. pp. 111, 307, 367). Approximately 85 students, ages 4 to 16, attend the school (Tr. p. 121). The majority of the students are diagnosed as being on the autism spectrum and have issues with relating and communicating (Tr. pp. 136-37). The school employs the DIR/floortime model

coupled with sensory integration (Tr. p. 312; Parent Ex. NN at p. 3). Teachers at the Rebecca School are required to have either a master's degree in special education or be enrolled in a special education master's degree program (Tr. p. 122). The teachers are also expected to attend DIR conferences and additional training and consultation relative to the DIR model (Tr. pp. 123-24). There is a DIR certification process which takes three years to complete (Tr. p. 172). None of the student's teachers are certified in DIR, nor is her occupational therapist (Tr. p. 173).

According to the program director of the Rebecca School, students on the autism spectrum have "holes" in their development, which create problems with their ability to relate and communicate (Tr. pp. 112, 117). DIR is used to help determine what interventions are needed to help a student fill the "holes" (Tr. p. 117). According to the program director, there are nine developmental levels of DIR, which are as follows: regulation, shared attention, back and forth communication, shared social problem-solving, symbolic thinking, building logical bridges between ideas, multi-causal thinking, grey area thinking, and self-reflective thinking (Tr. pp. 113-16). An assessment process is used to understand the student's strengths and limitations and to help determine appropriate interventions (Tr. p. 118). Interventions designed to help the student move up the developmental ladder include speech therapy, OT, oral motor therapy, and floortime (id.). During play time, a staff member may use playful obstruction to initiate the opening and closing of circles (Tr. p. 119).

The Rebecca School program director characterized the school as being a "therapeutic environment" (Tr. p. 130). She stated that the classrooms are equipped with FM amplification units (Tr. pp. 130, 132). The Rebecca School has two sensory gyms, a full-sized gym with an adapted physical education teacher, two art rooms and two music rooms, where services are provided by music therapists (Tr. p. 131). The Rebecca School also has a library, a science room and student lounge (Tr. pp. 131-32). The program director reported that school staff develops sensory profiles of the students, determines where their sensory needs are and then creates sensory diets (Tr. p. 133). The program prioritizes sensory integration needs at its first level based on the belief that before students can be taught academics or integration, they must first feel regulated and be able to share their attention with others (Tr. p. 309). At the Rebecca School, behavior is seen as a form of communication (Tr. p. 138). According to the Rebecca School philosophy, if a student is regulated, he or she will no longer need to engage in a certain behavior (Tr. p. 139).

With regard to academics at the Rebecca School, the program director testified that the school takes a hands-on experiential approach (Tr. p. 129). The Rebecca School employs and adapts numerous standard curriculums, such as Everyday Math, Reading Mastery, Balanced Literacy, Lindamood-Bell, Orton Gillingham and Handwriting Without Tears (Tr. pp. 129, 313). According to the program director, the Rebecca School follows, but does not mirror, the New York State learning standards (Tr. p. 130). The program director testified that the Rebecca School looks at standards with regard to the students' functional levels, rather than their ages (id.).

The Rebecca School attempts to group students within a three year chronological range and most classes are within a two year range (Tr. p. 135). A student's functional emotional developmental level, age, verbal ability, sensory profile and academic abilities are considered when determining grouping (Tr. p. 134). With regard to academic abilities, the program director reported that there is enough staff to work one-on-one or two-on-one, so there could be a two to three year range in academics (Tr. p. 135).

The Rebecca School communicates with parents via parent-teacher conferences, weekly communication from the teacher and a social worker that contacts the families weekly (Tr. pp. 139-40, 331). Teachers and social workers make home visits (Tr. p. 140). Parent training is available (Tr. p. 393).

While the parents assert that the March 5, 2007 IEP is based upon unreliable information in that the March 2007 CSE relied upon teacher estimates, which were subjective at best, I find that the Rebecca School program suffers from the same defect (Parent Ex. A at p. 4). I note that it was the Rebecca School that conducted the psychological testing in November and December 2006 in which the evaluator opined that a bilingual language evaluation might be more appropriate for assessing the student's language and verbal development and a non-verbal test of cognitive functioning might provide a more accurate assessment of the student's true cognitive abilities (Dist. Ex. 14 at p. 5). Although the student remained at the private school one year later, there is no record of the Rebecca School conducting non-verbal cognitive testing, nor is there evidence that the Rebecca School attempted to conduct a bilingual evaluation of the student's language and verbal development. In January 2007, a speech-language pathologist from the Rebecca School attempted to evaluate the student's language skills using a standardized assessment; however, there is no indication that she attempted to administer the assessment in Spanish. The standardized testing could not be completed due to the student's lack of response (Dist. Ex. 11 at p. 1).

With regard to the student's emotional needs the hearing record indicates that in August 2007, just prior to the start of the 2007-08 school year, the student's functional emotional skills were assessed through the administration of the FEAS (Parent Ex. XX). It is not clear that the FEAS is an appropriate instrument for assessing this student's skills as the scale is reportedly standardized on three and four year old children (Tr. pp. 152, 179) and at the time of administration the student was ten and eleven years old, respectively. At the time of the hearing, the Rebecca School program director and classroom teacher provided differing estimates of the student's functional emotional level (Tr. pp. 156-57, 193, 344).

With regard to academics, the student's Rebecca School teacher testified that she was uncomfortable estimating the student's academic level at the time she entered her classroom because the student's work was inconsistent and the student was in need of regulation (Tr. p. 346). She opined that staff were unable to access the student's true knowledge base at that time (*id.*). Still, the student's daily schedule at the Rebecca School included three math periods per week, three reading periods per week and three writing/academics periods per week (Dist. Ex. 19). The hearing record does not detail what occurred during these academic sessions. At the time she testified in February 2008, the Rebecca School program director testified that the school was addressing the student's handwriting using the Handwriting Without Tears Curriculum (Tr. p. 190). She further indicated that the student's special education teacher was working with the student on counting and on reading comprehension using Lindamood-Bell's "Visualizing and Verbalizing" program (*id.*). In addition, the student's Rebecca School teacher reported using programs, such as Brain Gym, "Hug N Tug" and "Thinking Goes to School" (Parent Ex. Y at pp. 3-4). None of these curricula are described in the record nor is there a rationale provided for why they were chosen to address this student's needs. The student's Rebecca School teacher reported that staff created individual plans for students in her class based on informal observation (Tr. pp. 318-19). She noted that she was currently using the "Brigance" to gain a more "holistic assessment" of where the students were academically and developmentally (Tr. p. 319); however, neither a copy of the

student's individual plan nor a copy of the student's Brigrance results were entered into the hearing record.

In view of the foregoing, I find that the parents have not met their burden to show that the Rebecca School address the student's special education needs and, consequently, the parent's request for the student's tuition costs at the Rebecca School must be denied.

Having found that the parents failed to meet their burden to prove that the Rebecca School was an appropriate placement for the student for the 2007-08 school year, I need not reach the issue of whether equitable considerations preclude the funding of tuition at the Rebecca School (see M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]).

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

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that unless the parties otherwise agree, within 30 days of this decision, the district shall conduct a non-verbal test of the student's cognitive functioning, a bilingual speech-language evaluation of the student and assess the student's academic functioning, if such evaluations have not been conducted within the past year, and the district shall reconvene a CSE meeting within 30 days of the completion of the evaluations to consider the results of such evaluations; and

IT IS FURTHER ORDERED that the impartial hearing officer's decision dated May 19, 2008 is annulled in its entirety.

Dated: Albany, New York
August 13, 2008

PAUL F. KELLY
STATE REVIEW OFFICER