The University of the State of New York

The State Education Department
State Review Officer
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No. 09-013

Application of a STUDENT WITH A DISABILITY, by his parent, 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:
DLA Piper LLP, attorneys for petitioner, Rachel Gutpa, Esq., Keren Tenenbaum, Esq., and Anne Hardcastle, Esq., of counsel

Michael Best, Special Assistant Corporation Counsel, attorney for respondent, Tracy Siligmueller, Esq., of counsel

DECISION

Petitioner (the parent) appeals from the decision of an impartial hearing officer which denied her request for funding of her son's tuition costs at the Rebecca School for the 2008-09 school year based on equitable considerations. Respondent (the district) cross-appeals from those portions of the impartial hearing officer's decision which determined that the district failed to offer the student a free appropriate public education (FAPE) for the 2008-09 school year and that the parent satisfied her burden of proving that the Rebecca School was an appropriate placement for the student during the 2008-09 school year. The appeal must be dismissed. The cross-appeal must be sustained in part.

At the time of the impartial hearing, the student was attending kindergarten at the Rebecca School, a school which the Commissioner of Education has not approved 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]).

The hearing record reflects that the parent first identified the student's special needs when he was 2.9 years of age, due to his inability to speak to other children in his day care class and his tendency "to act out like hitting and grabbing" (Tr. p. 229). After being evaluated, the student began receiving speech-language therapy, occupational therapy (OT), and physical therapy (PT) services at home until he turned three years of age (Tr. pp. 229-30). Between the ages of three and five years, the student attended a preschool program and received speech-language therapy twice

per week in a 1:1 setting, as well as ten hours of special education itinerant teacher (SEIT) services per week (Tr. pp. 287-89; Parent Ex. I at p. 1).

The parent subsequently requested that the student be considered by the district for special education, and, on March 3, 2008, the district conducted a psychoeducational evaluation of the student (Parent Ex. I). The evaluator observed that the student appeared "distracted" and "uncooperative," and that his speech was "difficult to understand and at time[s] appeared to be unintelligible" (id.). She noted that the student demonstrated difficulty remaining seated, paced around the room, and required "frequent refocusing and repetition of directions to tasks," all of which contributed to the student's "inability to fully complete the tasks asked of him" (id.).

With respect to his cognitive functioning, the district administered the Wechsler Preschool and Primary Scale of Intelligence – Third Edition (WPPSI-III), which yielded a full scale IQ score of 60 (extremely low range), a verbal IQ score of 70 (borderline range), and a performance IQ score of 61 (extremely low range) (Parent Ex. I at p. 2). In the realm of academic performance, the student's scores on the Wechsler Individual Achievement Tests – Second Edition (WIAT-II) placed him in the average range for reading (standard score of 91) and in the extremely low range for math (standard score of 66) (id. at pp. 2-3).[1]

The parent responded to questions posed to her as part of the Childhood Autism Rating Scale (CARS) (Parent Ex. I at p. 3). Her responses revealed that the student experienced difficulty holding a reciprocal relationship with other people; that he was not easily engaged and did not initiate engagement with others; that his social skills were not well developed; that he preferred to play independently rather than interact with his peers; and that he experienced difficulty remaining in those situations in which he elected to engage with peers (id.). The evaluator posited that the CARS "revealed that [the student] does exhibit some characteristics of [a]utism," but recommended that the parent consult a pediatrician for a formal assessment of the student (id.).

The evaluator also examined the student's adaptive behavior, utilizing the parent's responses on the Adaptive Behavior Assessment System – Second Edition (ABAS-II) (Parent Ex. I at p. 4). The evaluator concluded that the student's conceptual skills fell in the extremely low range (0.5 percentile), his social skills fell in the borderline range (6th percentile), and his practical skills fell in the below average range (9th percentile) (id.).

On March 31, 2008, the Committee on Special Education (CSE), consisting of a school psychologist who also acted as a district representative, a regular education teacher, a special education teacher, an additional parent member, and a social worker, convened to develop an educational program for the student's 2008-09 school year (Tr. p. 230; Parent Ex. H at pp. 1-2).[2,3]

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[1] The evaluator noted in her report that the student refused to complete the math subtest portion of the WIAT-II, and she commented that "therefore[e] it is unknown what his true math abilities are" (Parent Ex. I at p. 3).

[2] The parent stated that she attended the March 31, 2008 CSE meeting (Tr. p. 239); however, the March 31, 2008 individualized education program (IEP) does not contain her signature (see Parent Ex. H at p. 2).

[3] The hearing record contains a duplicative copy of the March 31, 2008 IEP (see IHO Ex. II). However, the duplicative copy of the March 31, 2008 IEP also contains several pages of a subsequent IEP dated June 3, 2008 (compare IHO Ex. II at pp. 5-6, 11-13, with Parent Ex. L at pp. 3-7). Because the hearing record contains no reference to IHO Ex. "II," I will cite to Parent Ex. "H" when referencing the March 31, 2008 IEP, and to Parent Ex. "L" when referencing the June 3, 2008 IEP.

The CSE recommended that the student receive a classification of speech or language impairment, and the CSE developed an individualized education program (IEP) recommending a 12:1+1 special class in a community school, related services consisting of pull-out speech-language therapy three times per week for 30 minutes per session in a 1:1 setting, and testing accommodations consisting of extended time and special location (Parent Ex. H. at pp. 1-2, 5, 12, 14).

In the realm of academic performance, the March 31, 2008 IEP noted that the student's results on the WIAT-II administered on March 3, 2008, placed him in the 27th percentile for word reading and in the 1st percentile for math reasoning (Parent Ex. H at pp. 3-4). The March 31, 2008 IEP further noted that the student "performed in the average range on tasks [that] require him to name alphabet letters, identify and generate letter sounds and rhyming words. He performed in the extremely low range with mathematical problems" (id.). With respect to the student's present academic performance, the March 31, 2008 CSE opined that the student, age 4.8 at the time, presented with a "severe receptive and expressive language delay," commenting that: "According to the results of the ZPSLS-4, receptive and expressive language skills are emergent at the 1.11-2.4 year level of development" (id. at p. 5). The CSE observed that the student demonstrated "weaknesses in the establishment of a significant receptive and expressive vocabulary repertoire, executing simple commands and effectively using complex utterances at age expectancy," and that "[s]ignificant deficits in auditory processing are apparent. Knowledge of early concepts is restricted. Behavior noteworthy for a significantly restricted attention span" (id.). The March 31, 2008 CSE recommended that the student receive speech-language therapy three times weekly, as well as open play tasks and "structured tasks that provide visual and verbal cues to elicit task completion" (id.).

In the social/emotional performance category, the March 31, 2008 IEP commented that the student "at times appears aloof," "requires frequent redirection," "can be unfocused and need [sic] encouragement to continue with tasks," and "when he does not want to do something he will give up and refuse" (Parent Ex. H at p. 6). Although the March 31, 2008 CSE determined that the student's behavior did not seriously interfere with instruction or require the development of a behavioral intervention plan (BIP), it did opine that he would benefit from a "structured environment" (id.). The March 31, 2008 IEP also enumerated two annual goals and six short-term objectives in reading, one annual goal and three short-term objectives in math, one annual goal and three short-term objectives in auditory comprehension skills, one annual goal and four short-term objectives in semantic skills development, and one annual goal and five short-term objectives in expressive language skills (id. at pp. 8-11).

Subsequent to the March 31, 2008 IEP, on April 20, 2008, the parent produced the student for a private diagnostic psychiatric evaluation (Parent Exs. J; K; Tr. pp. 10, 233).[4] The examining psychiatrist noted "very abnormal pragmatics and frequent babbling" in the student's speech and overall "very limited" language abilities (Parent Exs. J at p. 3; K at p. 3). Although able to copy a

[4] The hearing record contains two Parent Exhibits, "J" and "K," both of which bear the title "Diagnostic Psychiatric Evaluation." Both documents confirm an evaluation date of April 20, 2008, and both bear the signature of the same evaluating psychiatrist (compare Parent Ex. J at pp. 1, 4, with Parent Ex. K at pp. 1, 4). Both documents are essentially identical in content except for the fourth pages of each, which differ in the psychiatrist's recommendations and initial treatment plans listed (compare Parent Ex. J at p. 4, with Parent Ex. K at p. 4). Additionally, Parent Ex. "J" contains a notation that the evaluation report was dictated on April 29, 2008, but Parent Ex. "K" does not contain a dictation date (compare Parent Ex. J at p. 4, with Parent Ex. K at p. 4).

circle, the student was unable to copy a triangle or a square, to perform any math operations or read any written words, and was frequently unable to follow commands, while demonstrating limited insight and judgment (id.). The student received an Axis I diagnosis of a pervasive developmental disorder, not otherwise specified (PDD-NOS), which also indicated a need to rule out an attention deficit hyperactivity disorder (ADHD), an Axis II diagnosis of mild mental retardation, an Axis III diagnosis of mild asthma, Axis IV diagnoses of family strife and "school setting," and on Axis V, received a score of 40 out of 100 on the Global Assessment of Functioning Scale (GAF) (Parent Exs. J at p. 4; K at p. 4).[5]

Both private psychiatric evaluations contained in the hearing record reflected recommendations and proposed treatment plans (Parent Exs. J at p. 4; K at p. 4). The private evaluator recommended in both reports that the parent seek an evaluation of the student by a pediatric neurologist "given the presence of multiple soft neurologic signs including toe walking and tripoding" (id.). The examining psychiatrist further suggested in both reports the potential benefit of a medication trial in the future to address the student's ADHD symptoms (id.). However, while the examining psychiatrist acknowledged in both reports the importance of "an appropriate school setting" in assisting the student to reach his full potential, each report suggested a different methodology for accomplishing this (see Parent Exs. J at p. 4; K at p. 4). One of the reports posited that "ABA [applied behavioral analysis] therapy preferably as a part of his school curriculum would be a useful tool in maximizing his function" (Parent Ex. J at p. 4). In the other report contained in the hearing record, however, the examining psychiatrist opined that the student would "likely require" OT and PT in the future, adding that: "A DIR [Developmental Individual Difference Relationship-based] approach would best assist him in achieving his maximum level of function. [The Rebecca School] would be an ideal setting to provide all the services he needs to succeed" (Parent Ex. K at p. 4). [6]

Consistent with the March 31, 2008 IEP, on May 22, 2008, the district forwarded a final notice of recommendation (FNR) to the parent, recommending a 12:1+1 program in a community school, located across the street from the parent's address, with speech-language therapy as a related service (Parent Ex. B; see Tr. pp. 250-51). The parent rejected the school because upon contacting the school she was reportedly advised by the special education director that she could not guarantee that she would be able to provide both speech-language therapy and OT for the student during the entire school year (Tr. pp. 251-52). Additionally, on May 22, 2008, the student's enrollment application at a non-public elementary school submitted by the parent was rejected (Tr. pp. 249-50; Parent Ex. A).

On June 3, 2008, the CSE, consisting of a school psychologist who also acted as a district representative, a regular education teacher, a special education teacher, an additional parent member, a social worker, and the parent, convened pursuant to parental request and recommended that the student's classification be changed to that of a student with autism (Parent Ex. L at pp. 1-2). The CSE recommended a 12-month program consisting of a 6:1+1 special class in a special school and speech-language therapy three times per week for 30 minutes per session in a 1:1 setting

[5] According to the evaluating psychiatrist's report, the GAF scale ranges from a score of "0" (denoting "severely impaired") to a score of "100" (indicating "superior functioning in all areas") (Parent Exs. J at p. 4; K at p. 4).

[6] The hearing record reveals that the Rebecca School utilizes the DIR model, which concentrates on six developmental levels that students on the autism spectrum must master, and considers how the student processes information and the learning relationships that enable him or her to progress (Tr. pp. 67-68).

(id. at pp. 1-2, 5, 7). The CSE noted the student's "global delays" and opined that the student "[n]eeds a highly structured small class setting" (id. at pp. 3, 5, 7). The June 3, 2008 IEP shows that the CSE considered the April 20, 2008 psychiatric evaluation in arriving at its recommendations (id. at p. 3).

Additionally, on June 3, 2008, the parent filed a due process complaint notice alleging that the district "never recommended sp[ecial] ed[ucation] over the past 4 years" (Parent Ex. M). In her complaint, she proposed placement of her son "in the Rebecca School utilizing the DIR model to address his educational needs appropriately" (id.). On June 4, 2008, the parent obtained a doctor's prescription requesting that OT and PT services be provided to the student (Parent Exs. N; O). The hearing record reveals that the district received this prescription on an undetermined date, and, upon receipt, initiated requests for the district to conduct OT and PT evaluations (Tr. pp. 51-54).[7]

On June 16, 2008, by letter to the parent, the Rebecca School accepted the student for the 2008-09 school year (Parent Ex. P at p. 1). By letter dated June 17, 2008, the district acknowledged receipt of the due process complaint notice, apprised the parent of a resolution session scheduled for June 25, 2008, and answered the due process complaint notice (Parent Exs. Q at p. 1; R; see 8 NYCRR 200.5[i][4]).[8] In its answer to the parent's due process complaint notice, the district advised the parent that the student's classification was changed to autism based upon the June 3, 2008 CSE's consideration of the private psychiatric evaluation conducted on April 20, 2008; that the CSE considered a general education placement for the student, but rejected it because it was deemed "not supportive enough;" and that the CSE deemed "a Day Treatment placement [to] be too restrictive at this time" (Parent Ex. R at pp. 1-2). The district also acknowledged that "[n]o placement offer has been made, as of yet, due to the recent date of the [June 3, 2008] IEP being challenged" (id. at p. 3).

Consistent with the June 3, 2008 IEP, on June 24, 2008, the district forwarded an FNR to the parent, recommending a 6:1+1 special class in a specialized school and speech-language therapy services in a 1:1 setting (Parent Ex. C). The FNR contained the name, address, and telephone number of the "offered school," the address and telephone number of a district contact person with instructions for the parent to contact her if she agreed with the recommendations, and advised the parent that if the district did not hear from her before July 9, 2008, the recommended program and related services would become effective (id.). On June 26, 2008, the parent rejected the recommended program in the offered school by handwritten notation on the FNR (Tr. pp. 255-56; Parent Ex. C; see Parent Ex. D). In an undated letter to the district, the parent advised that "[t]he reason for the rejection will be discussed in the next meeting scheduled by your office or at the Impartial hearing or Mediation" (Parent Ex. D).

[7] According to the hearing record, the district's protocol required a prescription in order to request that the district conduct OT and PT evaluations; the evaluations would then be considered by the CSE in determining whether or not such services were appropriate (Tr. pp. 53-54). The parent maintained that she submitted "all required documentation for the evaluations" to the district via facsimile on June 4, 2008 (Tr. pp. 264-65; see Parent Ex. E).

[8] On June 23, 2008, the parent requested that the resolution hearing be rescheduled for July 3, 2008 (Parent Ex. S).

By letter to the district dated July 2, 2008, the parent withdrew her due process complaint notice without prejudice, reserving her right to resubmit the due process complaint notice after the completion of the OT and PT evaluations (Parent Ex. E). By letter to the district dated July 9, 2008, the parent referenced a July 2, 2008 telephone call to the district representative allegedly denying her request to visit the recommended district school on the ground that the school "was no longer an option to me due to the rejection letter that I faxed to [the district] on 6/26/08 because the seat was given back to District 75"(Parent Ex. F).[9] The parent further inquired as to whether or not another District 75 program would be offered for her to observe prior to the beginning of the 2008-09 school year (id.).

On September 9, 2008, the parent paid a deposit of $2,500 to the Rebecca School and the student began attending the program (Tr. pp. 265-66, 308; see Tr. p. 82; Parent Ex. P at p. 2).

The parent filed a second due process complaint notice dated September 19, 2008, through her attorney (Parent Ex. X). She alleged therein that the district had failed to conduct OT and PT evaluations of the student pursuant to the prescriptions she had previously furnished, and that the district based the recommendations in the June 3, 2008 IEP and the recommended program solely on the results of the private psychiatric evaluation (id. at p. 2). The parent further alleged that the district's recommended school was inappropriate (id.). The complaint advised the district that the parent had unilaterally placed the student at the Rebecca School for the 2008-09 school year and requested reimbursement for tuition payments made to the Rebecca School for the 2008-09 school year, funding for the balance of the tuition for the 2008-09 school year, and transportation to and from the Rebecca School (id.).

On September 26, 2008, while the student was already enrolled at the Rebecca School, the district forwarded another FNR to the parent, recommending a special class program at a different district special school, with speech-language therapy three times per week for 30 minutes per session in a 1:1 setting (Parent Ex. G; see Tr. pp. 266-68). The parent visited the recommended school and ultimately rejected it because the school did not employ the DIR methodology (Tr. pp. 269-70).[10]

An impartial hearing convened on November 25, 2008 and concluded on December 3, 2008, after two days of testimony. In her decision dated December 18, 2008, the impartial hearing officer determined that the student could have derived educational benefits from the district's 6:1+1 special program recommended in the June 3, 2008 IEP (IHO Decision at p. 14). However, despite finding that the district's program would have been appropriate, the impartial hearing officer concluded that the district denied the student a FAPE because the June 24, 2008 FNR forwarded to the parent did not actually offer the student the special school placement (id.). Additionally, she opined, the district failed to inform the parent that the special education school was located within the same physical building as the general education school (id.). The impartial hearing officer also concluded that the district's failure to conduct OT and PT evaluations pursuant to the parent's request contributed to the district's failure to offer the student a FAPE (id.).

[9] While not identified in the hearing record, the reference is presumably to the Department of Education's Special Education District 75 (see http://schools.nyc.gov/Offices/District75/default.htm.).

[10] The hearing record does not indicate on what date(s) the parent visited or rejected this school.

The impartial hearing officer next determined that the Rebecca School was an appropriate placement for the student because the student received small class instruction appropriate to his developmental levels, sensory input, speech-language therapy, OT, and parent training; and because the hearing record evidenced progress made by the student in his language and socialization since his entry into the Rebecca School program (IHO Decision at p. 15).

When considering the equities; however, the impartial hearing officer concluded that equitable considerations did not favor the parent (IHO Decision at pp. 15-17). First, the impartial hearing officer reasoned that the parent acted "unreasonably" in rejecting the school recommended in the June 24, 2008 FNR without first investigating it (id. at p. 16). She attached "little weight" to the parent's testimony on this issue, and opined that the hearing record demonstrated that the parent had already predetermined that she would enroll the student at the Rebecca School at the time of the June 3, 2008 CSE meeting because the parent indicated her intention to enroll the student at the Rebecca School three weeks prior to receiving the June 24, 2008 FNR, and the Rebecca School accepted the student eight days before the parent received the FNR (id.). The impartial hearing officer further determined that the parent's testimony was "contradicted by the documents in evidence, by the credible testimony of other witnesses, and by her own testimony" (id.). Second, the impartial hearing officer determined that the parent failed to indicate her reasons for rejecting the proposed program and school in any of her communications to the district (id.). Third, the impartial hearing officer surmised that notwithstanding the district's failure to offer the student a FAPE initially via its defective June 24, 2008 FNR, had the parent made reasonable inquiry, she eventually would have learned of the existence of the special education school (id. at p. 17). Fourth, the impartial hearing officer determined that the district's failure to conduct OT and PT evaluations could have been remedied and such services could have been provided on-site at the district school (id.).

The impartial hearing officer ultimately denied the parent's funding request for the Rebecca School, and ordered the district to conduct OT and PT evaluations within 30 days of her decision, and to reconvene the CSE after said evaluations (IHO Decision at p. 17).

The parent appeals from the impartial hearing officer's decision. First, the parent argues that contrary to the erroneous finding of the impartial hearing officer, she provided the CSE with notice of her intention to enroll the student at the Rebecca School in compliance with 20 U.S.C. § 1412(a)(10)(C)(iii)(I). Second, the parent contends that contrary to the erroneous finding of the impartial hearing officer, she fully cooperated with the CSE and the hearing record evidences that she gave due consideration to each of the public schools offered. Furthermore, she maintains that even if she did consider enrolling the student in the Rebecca School at the time of the June 3, 2008 CSE meeting, contrary to the impartial hearing officer's decision, such consideration is not a ground for denial of tuition reimbursement. She seeks reversal of that portion of the impartial hearing officer's decision denying funding of tuition costs and transportation to and from the Rebecca School for the 2008-09 school year. The parent attaches additional documentary evidence to her petition and asks that a State Review Officer consider this evidence on appeal.

The district submits an answer and a cross-appeal, countering that: (1) prospective tuition is not an available remedy under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482); (2) the impartial hearing officer erroneously determined that the district denied the student a FAPE because the "clerical error" on the June 24, 2008 FNR and the district's failure to timely conduct OT and PT evaluations constituted de minimis procedural defects that did not ultimately deny the student a FAPE; (3) the impartial hearing officer erroneously

determined that the parent satisfied her burden of proving that the Rebecca School was an appropriate placement for the student for the 2008-09 school year; and (4) the parent's request that a State Review Officer consider the additional documentary evidence attached to her petition should be denied because it was available at the time of the impartial hearing and it is not necessary for a State Review Officer to make a determination in the instant case; and (5) when the parent rejected the district's program and offered school on June 26, 2008, her rejection relieved the district of its responsibility to offer the student a FAPE.

The parent answers the district's cross-appeal, asserting that the impartial hearing officer correctly determined that the district failed to offer the student a FAPE for the 2008-09 school year and that she met her burden of proving that the Rebecca School was appropriate for the student. She also asserts that the equities support her claim for reimbursement of tuition and transportation expenses, and that a State Review Officer should not consider the district's argument that she is not entitled to funding beyond the $2,500 deposit because the district failed to raise this argument during the impartial hearing.

Neither party appeals that portion of the impartial hearing officer's decision ordering the CSE to conduct OT and PT evaluations of the student within 30 days of the decision and to reconvene thereafter to review these evaluations (IHO Decision at p. 17).[11] An impartial hearing officer's decision is final and binding upon the parties unless appealed to a State Review Officer (34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[j][5][v]; Application of a Student with a Disability, Appeal No. 08-073; Application of the Dep't of Educ., Appeal No. 08-025; Application of a Student with a Disability, Appeal No. 08-013; Application of a Child with a Disability, Appeal No. 07-050; Application of a Child with a Disability, Appeal No. 07-026; Application of a Child Suspected of Having a Disability, Appeal No. 06-092; Application of a Child with a Disability, Appeal No. 06-085; Application of a Child with a Disability, Appeal No. 04-024; Application of a Child with a Disability, Appeal No. 03-108; Application of a Child with a Disability, Appeal No. 02-100). Consequently, that portion of the decision is final and binding on the parties, and the parties are directed to complete these evaluations and conduct a subsequent CSE review meeting if they have not already done so in accordance with the impartial hearing officer's directive.

Two purposes of the IDEA are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). While school districts are required to comply with all IDEA procedures, not all procedural errors render an IEP legally inadequate under the IDEA (A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v.

[11] The student receives OT three times per week for 30 minutes per session at the Rebecca School (Tr. p. 92), but there is no indication in the hearing record that the student receives PT.

Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if a procedural violation is alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007], aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an impartial hearing officer's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 130 [2d Cir. 1998]; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see P. v. Newington Bd. of Educ., 546 F.3d 111, 114 [2d Cir. 2008]; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; E.G. v. City Sch. Dist. of New Rochelle, 2009 WL 773960, at *4 [S.D.N.Y. Mar. 16, 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs (34 C.F.R. § 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals related to those needs (34 C.F.R. § 300.320[a][2]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (34 C.F.R. § 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9). Subsequent to its development, an IEP must be properly implemented (8 NYCRR 200.4[e][7]; Application of a Child with a Disability, Appeal No. 08-087).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for the student by his or her parents if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were

appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (Burlington, 471 U.S. at 370-71; Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 C.F.R. § 300.148).

The final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; M.C. v. Voluntown, 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]). With respect to equitable considerations, the IDEA also provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; see S.W. v. New York City Dep't of Educ., 2009 WL 857549, at *13-14 [S.D.N.Y. March 30, 2009]; Thies v. New York City Bd. of Educ., 2008 WL 344728 [S.D.N.Y. Feb. 4, 2008]; M.V. v. Shenendehowa Cent. Sch. Dist., 2008 WL 53181, at *5 [N.D.N.Y. Jan. 2, 2008]; Bettinger v. New York City Bd. of Educ., 2007 WL 4208560, at *4 [S.D.N.Y. Nov. 20, 2007]; Carmel Cent. Sch. Dist. v. V.P., 373 F. Supp. 2d 402, 417-18 [S.D.N.Y. 2005], aff'd, 2006 WL 2335140 [2d Cir. Aug. 9, 2006]; Werner v. Clarkstown Cent. Sch. Dist., 363 F. Supp. 2d 656, 660-61 [S.D.N.Y. 2005]; see also Voluntown, 226 F.3d at n.9; Wolfe v. Taconic Hills Cent. Sch. Dist., 167 F. Supp. 2d 530, 533 [N.D.N.Y. 2001]; Application of the Dep't of Educ., Appeal No. 07-079; Application of the Dep't of Educ., Appeal No. 07-032).

The IDEA allows that reimbursement may be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent CSE meeting prior to removing the student from public school, or by written notice ten business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 C.F.R. § 300.148[d][1]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). Although a reduction in reimbursement is discretionary, courts have upheld the denial of reimbursement in cases where it was shown that parents failed to comply with this statutory provision (Greenland, 358 F.3d at 160; Ms. M. v. Portland Sch. Comm., 360 F.3d 267 [1st Cir. 2004]; Berger v. Medina City Sch. Dist., 348 F.3d 513, 523-24 [6th Cir. 2003]; Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 27 [1st Cir. 2002]); see Frank G. v. Bd. of Educ., 459 F.3d 356, 376 [2d Cir. 2006]; Voluntown, 226 F.3d at 68; Lauren V. v. Colonial Sch. Dist.; 2007 WL 3085854, at * 13 [E.D. Pa. Oct. 22, 2007]).

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; therefore, it applies to the instant case (see Application of the Bd. of Educ., Appeal No. 08-016).

With respect to the appropriateness of the district's recommended program, the private psychiatrist who examined the student in April 2008 testified during the impartial hearing that the student demonstrated behaviors typical of students with autism spectrum diagnoses, and further opined that these students "really need[] a classroom specifically designed to address these kinds of issues" (Tr. pp. 12, 22). He observed that the student exhibited "gross deficits" in socialization, severely limited language and communication, and sensitivity to loud noises and other extreme stimuli, and he believed that the student required a calm, controlled setting in order to learn (Tr. pp. 11, 13-16). When addressing the issue of methodology, the private psychiatrist surmised that the ABA and DIR approaches were "the most effective techniques to help children with these kind[s] of language deficits" (Tr. pp. 32-36; see Parent Exs. J at p. 4; K at p. 4).

The assistant principal of the district's recommended school testified that the school consisted of 12 classes for students with autism, with 6 students per class (Tr. p. 108). She added that the specific recommended special class also included a bilingual special education teacher, a classroom paraprofessional, and a 1:1 crisis paraprofessional assigned to one of the students (Tr. pp. 109-10). She further explained that the recommended school was one of three schools contained within the physical building, and that upon arriving in the morning, students in the recommended class entered through a side door, were picked up by classroom staff, and escorted directly to the cafeteria, after which they ascended their own staircase to their classroom on the building's fourth floor (Tr. pp. 115-16, 165-66). She noted that students in the recommended special class, all of whom had autism, gained exposure to non-disabled general education students through staff-supervised lunch in the cafeteria and "special programs" such as holiday luncheons and bake sales (Tr. pp. 115, 118-19). The assistant principal explained that because students with autism "are not very social" and "don't like a large crowd," these activities were very structured and time-limited so as to prevent the students from "go[ing] off because of the transition" or "get[ting] very antsy" and starting to cry (Tr. pp. 118-19).

The assistant principal further revealed that the recommended school utilized the Treatment and Education of Autistic and Related Communication Handicapped Children (TEACCH) methodology, which she described as a very "organized," "scheduled," "disciplined," "planned out," and "structured" program that incorporated considerable prompting, repetition, and reinforcement (Tr. pp. 112, 120-22; see Tr. pp. 209-10, 215-24).[12] She explained that TEACCH was not only a method of setting up the classroom, but also a method of teaching the students (Tr. pp. 153-54). Although the classroom activities were the same for all students in the recommended special class, students referred to their own schedules that reflected the specific communication

[12] The hearing record also describes the TEACCH methodology as "structured, clearly defined expectations that are given to students allowing them to individualize tasks by their space, physical space, their scheduling, and a teaching method. Each child has an embedded schedule. It helps to decrease the tantruming when they can predict what's going to happen" (Tr. pp. 209-10).

method used by each student (Tr. p. 121).[13] Students knew in advance all of the activities planned for the day, and because the classroom was divided into designated areas, they knew "what comes first, what comes second, and what comes next" (Tr. p. 154). The purposes of scheduling and structured teaching were to diminish the aggressive behavior occasionally exhibited by nonverbal students who were otherwise unable to express themselves or to communicate, and to create a sense of independence in the students (Tr. pp. 121-22, 154).

The assistant principal also explained how the physical aspect of the recommended program's classroom accommodated autistic students who could become "overwhelmed" by their environment (Tr. pp. 122-23). The recommended class featured limited visual distractions and independent or 1:1 workstations for classroom instruction (Tr. pp. 123-24). Group instruction of the entire class occurred around a "kidney table," thereby ensuring that students were "in close proximity to the teachers and to the staff" (Tr. p. 124). She described a typical day for the students enrolled at the recommended program, and identified a "break" scheduled between every two sessions or activities that focused on students' strengths and assisted them in their transition between activities "without them feeling that they're doing one work after another…" (Tr. pp. 137-41).

The assistant principal discussed how the proposed program, through its utilization of the TEACCH methodology, addressed the needs of students with autism generally, and how it would have addressed the specific needs of the student as identified in the June 3, 2008 IEP (Tr. pp. 153-60). After reviewing the June 3, 2008 IEP, she advised that the student's needs for organization and visual and verbal cues would have been addressed by the structure of the TEACCH methodology, through its use of sensory activities and 1:1 work stations (Tr. pp. 152-53). She explained that each activity engaged in by the class included sensory, visual, and auditory components stating: "Our kids need to see. Our kids need to hear. Our kids need to touch" (Tr. p. 153). The special education teacher of the proposed program added that the student would receive an initial assessment identifying his strengths and needs, thereby enabling his teacher to tailor her subject-specific lessons to fit the student's strengths, to determine the visual cues he required, and to clearly define in his mind his teacher's expectations of him (Tr. pp. 210-11). Based on the strengths and needs that would have been identified in the program's initial assessment and those that were enumerated in the June 3, 2008 IEP, the assistant principal testified that the staff from the recommended program would have developed a schedule for the student that would change as his needs changed (Tr. p. 158). The student would have received 1:1 teaching daily in areas in which he exhibited a need based upon ongoing assessments conducted in the class (Tr. pp. 158-60). As soon as he exhibited independence in an area, the student's schedule would reflect the change (Tr. pp. 159-60).

The assistant principal further testified how the recommended program differentiated and individualized reading and math instruction so that all students could participate at their own levels (Tr. pp. 131-33, 178-83). She described how the physical education component worked in tandem with the students' structured schedules, and was tailored to address each student's physical needs within the confines of the school's own gymnasium (Tr. pp. 133-35). She confirmed the availability of sensory equipment on-site, utilized by classroom teachers and related services

[13] As an example, to communicate the concept of a computer activity, the assistant principal testified that one student's schedule might show a picture of a computer, while another's may contain the word "technology" or "lab," depending on what the particular student understands (Tr. p. 121).

providers alike (Tr. p. 135). The assistant principal also commented on how the recommended program promoted social development, advising that "play time" first taught students how to play with something, and subsequently incorporated other students into the play area to gradually promote socialization (Tr. p. 125). Further opportunities to develop social skills were presented through "snack time" (Tr. pp. 125-26) and through leisure activities that were scheduled, structured, and organized throughout the school day (Tr. p. 185).

The assistant principal emphasized the close collaborative relationship between the teachers and related service providers in implementing the mandates of each student's IEP, noting that "we get everybody who's involved with the [student] or teaches the [student] in having decision making and developing strategies and activities and programs or mak[ing] changes to programs and how to handle and teach to the [students]" (Tr. pp. 126-27). The assistant principal added that a speech-language pathologist collaborated with the classroom teacher to develop activities and skills for each student in the recommended class (Tr. p. 187). According to the special education teacher of the recommended class, this collaborative effort between service providers and teaching staff was also demonstrated through weekly team meetings that discussed "issues and concerns that we may have with the [students] as they come up" (Tr. pp. 195-96). The hearing record also depicts a collaborative approach between school staff and parents, as evidenced by the existence of a parent coordinator who participated in monthly meetings with parents and coordinated workshops on a variety of topics affecting parents whose students attended district schools, including training in ABA and TEACCH, furnishing information about Medicaid, and assisting parents in understanding an IEP (Tr. pp. 197-99). The parent coordinator was also available to meet individually with parents as the need arose (Tr. p. 199). Additionally a "school base[d] support team" comprised of social workers and psychologists was assigned to the building to provide on-site services to students in each of the three schools housed within the building (Tr. pp. 170-71).

The Rebecca School's program director testified that she did not believe that the recommended special class was appropriate for the student because the 6:1+1 setting would not have afforded the student sufficient individualized attention (Tr. pp. 78-80). She also noted the student's auditory sensitivities to loud noises and tactile sensitivities, which occasionally caused the student to "become disregulated [sic] and unable to focus" (Tr. pp. 80-81). However, the hearing record establishes that the TEACCH methodology utilized by the recommended program was rooted in a 1:1 teaching approach (Tr. pp. 216, 220). Furthermore, when asked during the impartial hearing about the extent to which the student would receive 1:1 teaching, the assistant principal of the recommended program explained "[t]he 1:1 comes into play when we see there are areas that need to be developed. For example, if we see that he has problems subtracting, that's where the 1:1 teacher would come in …. They will take time during the day, every single day, to go into 1:1 to develop that skill" (Tr. pp. 123-24, 158-60). I also note that the Rebecca School's program director, when asked if she believed that a TEACCH-based model could provide a meaningful benefit to a student with autism, responded: "Absolutely. I think that it depends on the [student] and what each [student's] needs are" (Tr. pp. 85-87).

With regard to the student's difficulties with noise, the assistant principal confirmed that the recommended program was located on the fourth floor of the school building, directly above two other schools located on the three floors below (Tr. pp. 115-16). When asked if the students were exposed to noise from the other schools' students, she responded: "No. The only noise that we get in our specific site mostly is our own noise. It would be our own children either having

issues transitioning …. So basically the noise they hear is their own peers. And … it does not bother them …" (Tr. pp. 119-20, 172). When asked during cross-examination how she would handle a student that was "severely bothered by noise" in the recommended program, she responded "… we teach them how to transition and deal with the issues of the noise" (Tr. pp. 171-72).

I agree with the impartial hearing officer that the hearing record establishes that the district's program would have offered the student an appropriate education in the LRE for the 2008-09 school year. The student would have been assigned to a kindergarten class in which all of the students had autism (Tr. pp. 113-15),[14] and were taught by kindergarten teachers on staff who received ongoing training during the course of the year "in all areas pertaining to either [a]utism, IEPs, behavior, ABA, [or] TEACCH" (Tr. pp. 112-13, 172-74). During the impartial hearing, the special education teacher of the recommended class conceded that she had never met the student (Tr. p. 208), but she had reviewed the student's levels of academic performance as enumerated in the March 31, 2008 IEP (Parent Ex. H at pp. 3-5) and posited that the student would have been an appropriate candidate for her class because his performance levels were similar to those of the students already enrolled (Tr. pp. 202-05).[15] Additionally, the assistant principal of the recommended program testified that notwithstanding the fact that the class now consisted of both kindergarten and first grade level students, "I can tell you all my first graders that are sitting in that class right now are not working at the first grade level. They're more at the kindergarten level" (Tr. p. 178). Furthermore, she emphasized that the class took a "differentiated learning" approach, whereby teachers planned lessons based upon the mandates and functional needs of each student as enumerated in their respective IEPs (Tr. pp. 177-83).[16] With regard to the student's social/emotional performance, when asked to consider the private psychiatrist's description of the student as set forth in the June 3, 2008 IEP (Parent Ex. L at p. 3), the assistant principal again opined that the student would be appropriate for her program and that he could make meaningful progress therein (Tr. pp. 205-07). Her opinion was echoed by the testimony of the district's school psychologist, who was called as a witness by the parent during the impartial hearing (Tr. p. 55).

With respect to related services, the hearing record demonstrates that the June 3, 2008 IEP recommended speech-language therapy with a frequency and duration identical to that the student was receiving in his current placement at the Rebecca School (compare Parent Ex. L at p. 7, with Tr. p. 92). However, the June 3, 2008 IEP did not recommend OT, which the student is receiving at the Rebecca School three times per week for 30 minutes per session (id.). I note that the hearing record lacks any evidence establishing that the student required OT in order to receive educational

[14] The hearing record reflects that at the time the district forwarded the June 24, 2008 FNR, the student would have been placed in a kindergarten class (Tr. pp. 113-14). The assistant principal testified that in September 2008, because there were not enough students to fill the seats in the kindergarten classes, both of the school's kindergarten classes became "bridge classes," including two kindergarten and four first grade students in one class and one kindergarten and five first grade students in the other (Tr. pp. 108-09, 113-14, 174-76).

[15] The parent's attorney objected to the introduction of testimony pertaining to the March 31, 2008 IEP, which recommended a different educational program in a 12:1+1 setting (Tr. pp. 202-03; Parent Ex. H at pp. 1-2). However, the impartial hearing officer permitted the district to introduce testimony limited to the "levels of performance" contained in the March 31, 2008 IEP (Tr. pp. 202-03).

[16] For example, in reading, the teacher would read one story to the six students (Tr. p. 179). The staff would then "engage" each of the students through post-reading activities designed to address each of the students' individual needs and performance levels as enumerated in their IEPs (see Tr. pp. 178-80; see also Tr. pp. 180-83).

benefits related to a functional limitation. The hearing record is also devoid of any documentary or testimonial evidence suggesting that the student could not have been successfully educated in the district's recommended program.

Based upon a careful review of the evidence contained in the hearing record, I agree with the impartial hearing officer and conclude that the district's recommended special education program and speech-language services in the proposed June 3, 2008 IEP, at the time it was formulated, was reasonably calculated to enable the student to receive educational benefit in the LRE (Viola v. Arlington Cent. Sch. Dist., 414 F. Supp. 2d 366, 382 [S.D.N.Y. 2006] citing to J.R. v. Bd. of Educ. of the City of Rye Sch. Dist., 345 F. Supp. 2d 386 at 395 n.13 [S.D.N.Y. 2004]; see Cerra, 427 F.3d at 195; see also Mrs. B., 103 F.3d at 1120; Application of a Student with a Disability, Appeal No. 09-034; Application of the Dep't of Educ., Appeal No. 08-045; Application of a Student with a Disability, Appeal No. 08-029; Application of a Child with a Disability, Appeal No. 07-030; Application of a Child with a Disability, Appeal No. 06-112; Application of a Child with a Disability, Appeal No. 06-071; Application of the Bd. of Educ., Appeal No. 06-010; Application of a Child with a Disability, Appeal No. 05-021).

I now turn to the district's argument that the impartial hearing officer erroneously determined that a clerical mistake on the June 24, 2008 FNR and the district's failure to timely conduct OT and PT evaluations in accordance with the parent's request deprived the student of a FAPE.[17] Addressing the former determination, the parties do not dispute that the school recommended in the June 24, 2008 FNR was a clerical mistake (see Parent Ex. C; Answer ¶ 71). However, the district argues that this mistake constituted a harmless error. According to the hearing record, the June 24, 2008 FNR identified the correct program and related service, namely a 6:1+1 special class in a special school and speech-language therapy services in a 1:1 setting, but did not clearly indicate that the class was located within the public school building identified on the FNR (Parent Ex. C). An important issue is whether the information on the June 24, 2008 FNR was insufficient such that the student was denied a FAPE in this case.

The parent testified that she received the June 24, 2008 FNR and telephoned the listed contact person at the recommended school listed on the FNR (Tr. pp. 253-55, 300). The parent testified that she rejected the recommended school because there was "background noise" at the school when she called and no one was available to speak to her (Tr. pp. 256-57). The parent contended that later on June 26, 2008, after her conversation with the contact person at the school recommended on the FNR, she also telephoned the CSE contact person listed on the FNR and informed her of the substance of her conversation with the contact at the school (Tr. pp. 300-01). The parent denied that the CSE contact person advised her of the existence of the special education program in the same building as the school listed on the FNR, but advised the parent that if she wanted to reject the program recommended on the FNR, she would have to do so in writing (Tr. p. 301), which the parent ultimately did on the same day (Tr. pp. 255-57; see Parent Exs. D; F).[18]

The hearing record establishes that the timing of the parent's rejection of the June 24, 2008 FNR stemmed from her dissatisfaction with the background noise and her inability to speak with a special education contact person during her telephone call to the school recommended on the

[17] I note that the FNR that is the subject of this appeal as framed by the parties and addressed by the impartial hearing officer is the June 24, 2008 FNR.

[18] The CSE contact person listed on the June 24, 2008 FNR did not testify during the impartial hearing.

FNR. The hearing record contains no evidence suggesting that the parent's rejection of the school recommended on the FNR resulted from her knowledge that a clerical mistake had been made on the FNR, or that the parent was even aware of that fact. The impartial hearing officer determined that the parent "had already determined that she wished to enroll [the student] at the Rebecca School" at the time of the June 3, 2008 CSE meeting (IHO Decision at p. 16); therefore, I find that the clerical error contained in the June 24, 2008 FNR was a harmless error because the parent did not intend to place the student in a public school program. Based on the evidence contained in the hearing record, I do not find that the clerical error contained in the June 24, 2008 FNR resulted in a denial of a FAPE to the student in this case.

Addressing the latter determination relative to the failure of the district to conduct OT and PT evaluations, the parent asserted during the impartial hearing that the student needed both OT and PT (Tr. p. 252). The private psychiatrist also posited in one of his two reports that the student "will likely require" PT and OT (Parent Ex. K at p. 4; but see Parent Ex. J at p. 4 [same psychiatrist makes no reference to PT or OT in his recommendations and initial treatment plan for the student]).[19] However, the psychiatrist's evaluation report does not state that the student requires OT or PT services in order to benefit from his educational program for the 2008-09 school year. Further, there is no indication in the hearing record that the student receives PT services at the Rebecca School. Absent documentary or testimonial evidence establishing that the student required OT and PT in order to receive educational benefits, I do not find the impartial hearing officer's determination that the district's failure to timely conduct OT and PT evaluations deprived the student of a FAPE to be supported by the evidence in the hearing record.

Based on the foregoing, I conclude that neither the clerical mistake on the June 24, 2008 FNR nor the district's failure to timely conduct OT and PT evaluations deprived the student of a FAPE. Furthermore, I find that the hearing record supports a conclusion that the district offered the student a FAPE in the LRE for the 2008-09 school year. Having determined that the district offered the student a FAPE in the LRE for the 2008-09 school year, I need not reach the issue of whether the Rebecca School was appropriate for the 2008-09 school year or whether equitable considerations favored the parent, and the necessary inquiry is at an end (M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134; Application of a Student with a Disability, Appeal No. 09-034; Application of a Student with a Disability, Appeal No. 08-157; Application of the Dep't of Educ., Appeal No. 08-045; Application of a Child with a Disability, Appeal No. 07-030; Application of a Child with a Disability, Appeal No. 05-038; Application of a Child with a Disability, Appeal No. 03-058).

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

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

[19] When examined during the impartial hearing, the private psychiatrist testified that he considered Parent Ex. "K" to be his "final draft" of the evaluation report (Tr. pp. 22-24), but he was unable to definitively recall whether he made his revised recommendation before or after the student started at the Rebecca School (id.).

IT IS ORDERED that the impartial hearing officer's decision dated December 18, 2008 is hereby annulled to the extent that it determined that the district failed to offer the student an appropriate program for the 2008-09 school year; and

IT IS FURTHER ORDERED that, if it has not already done so, the district shall conduct occupational therapy and physical therapy evaluations of the student and reconvene its CSE within 30 calendar days to review said evaluations consistent with the impartial hearing officer's decision.

Dated: **Albany, New York**
May 15, 2009

PAUL F. KELLY
STATE REVIEW OFFICER