



The University of the State of New York

The State Education Department

State Review Officer

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No. 09-015

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

Appearances:

Skyer, Castro, Cutler & Gersten, attorneys for petitioners, Lara Damashek, Esq., of counsel

Michael Best, Special Assistant Corporation Counsel, attorney for respondent, Karyn R. Thompson, Esq., of counsel

DECISION

Petitioners (the parents) appeal from the decision of an impartial hearing officer which denied their request for respondent (the district) to provide and prospectively fund their son's 20 hours per week of special education itinerant teacher (SEIT) services at the Riverdale Nursery School and Family Center (Riverdale) for the 2008-09 school year. The district cross-appeals from that portion of the impartial hearing officer's decision ordering the district to reimburse the parents for the costs of their son's home-based applied behavioral analysis (ABA) program for the 2008-09 school year. The appeal must be dismissed. The cross-appeal must be sustained.

At the time of the impartial hearing, the student was attending Riverdale preschool in an integrated classroom that contained 15 students aged four to six years, a regular education teacher, an assistant teacher, two SEITs, and an "occasional" assistant teacher (Tr. pp. 162-63, 165). Approximately 40 percent of the students in the integrated classroom were students with disabilities, while the remaining 60 percent were typically developing students (Tr. p. 161). While attending Riverdale, the student also received 20 hours per week of SEIT services in his preschool classroom, 15 hours per week of home-based ABA services, and related services of six 60-minute sessions per week of speech-language therapy, four 60-minute sessions per week of occupational therapy (OT), and three 60-minute sessions per week of physical therapy (PT) pursuant to an interim decision on pendency, dated July 24, 2008, in this matter (IHO Interim Order on Pendency at pp. 2-3; see Tr. pp. 1-12). The Commissioner of Education has not approved Riverdale as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR

200.1[d], 200.7). The student's eligibility for special education programs and services as a student with an other health impairment is not in dispute in this appeal (34 C.F.R. § 300.8[c][9]; 8 NYCRR 200.1[zz][10]).

The student has been diagnosed as having agenesis of the corpus callosum, general hypotonia, and ptosis of the right eye (Dist. Exs. 6-7). As a result of his diagnoses, the student exhibits ataxic movements, delays in gross and fine motor skills, and significant difficulty with balance, coordination, and motor planning (Tr. p. 67; see Dist. Exs. 6 at p. 1; 7 at p. 1).¹ The student also exhibits significantly delayed social skills, expressive and pragmatic language skills, and attentional difficulties (see Dist. Ex. 9 at p. 1). In addition, the student demonstrates severe deficits in auditory processing characterized by increased response time and difficulty following multistep directions (see Dist. Exs. 5; 9 at p. 1). In May 2008, the student's classroom teacher estimated the student's reading and reading comprehension skills to be at a fourth grade level and described his math skills as "advanced" (Dist. Ex. 5).

Following the student's diagnosis and upon recommendation by his pediatrician, the parents sought the provision of special education services through Early Intervention (EI) services (Tr. p. 109). At six months of age, the student initially received PT services (id.). By the time the student reached two years of age, he received PT, OT, speech-language therapy, and special education services through EI (Tr. pp. 109-10). For the 2005-06 school year, the parents enrolled the student in Riverdale's preschool, where he continued to receive OT, PT, speech-language therapy, and approximately six hours per week of SEIT services through the Committee on Preschool Special Education (CPSE) (Tr. pp. 111-12). During summer 2006, the parents observed the student becoming "very isolated in his play" and not "following directions" (Tr. p. 113). Due to their concerns, the parents consulted with a private ABA therapist (ABA supervisor), who recommended that the student receive 15 hours of behavioral therapy per week (id.; see Tr. pp. 280, 283-84).² For the 2006-07 school year, the parents continued the student's placement at Riverdale preschool in a "Threes program" with 20 hours per week of SEIT services, related services, and the implementation of 15 hours per week of the home-based ABA program (Tr. pp. 112-13). The parents sought and obtained funding through the district for the student's 2006-07 program, including 15 hours per week of the home-based ABA program, by impartial hearing (Tr. p. 114). For the 2007-08 school year, the student continued to attend Riverdale preschool in an inclusion classroom containing 12 to 13 students with 20 hours per week of SEIT services, related services, and 15 hours per week of the home-based ABA program (Tr. pp. 114-15). As a result of an impartial hearing for the 2007-08 school year, an impartial hearing officer found that the district denied the student a free appropriate public education (FAPE) and ordered the district to reimburse

¹ At the impartial hearing, the student's physical therapist described "ataxia" as "difficulty coordinating muscles for voluntary or purposeful movement," which resulted from the student's condition of agenesis of the corpus callosum (Tr. p. 67).

² The hearing record refers to the student's home-based behavioral therapy program as either a "behavioral therapy" program or as an "ABA" program (see Tr. pp. 113, 136; Parent Ex. B at p. 33). To avoid confusion and for consistency in this decision, I will refer to the student's home-based behavioral services as his home-based "ABA" program or services. In addition, I will refer to the individuals who provided the student's home-based ABA program as "ABA therapists" (see Tr. pp. 280, 283-84, 289-92). The ABA therapist who provided the initial consultation during summer 2006 eventually became the supervisor of the student's home-based ABA program (see id.).

the parents for the costs of their son's 12-month educational program, including 20 hours per week of SEIT services, 15 hours per week of the home-based ABA program, and related services (see Parent Ex. B at pp. 1-33).

In preparation for the 2008-09 school year, the parents—with the assistance of Riverdale's director and the student's ABA supervisor—visited or applied to approximately 10 to 12 general and special education public and private schools during the 2007-08 school year (Tr. pp. 115-17, 142-43, 158-61, 297-99; see Parent Exs. E; G at p. 1; H at pp. 1-2; I at pp. 1-5). According to the hearing record, the student was not accepted into any of the programs explored by the parents (Tr. pp. 118-19; see Parent Exs. H-I).

On May 29, 2008, the Committee on Special Education (CSE) convened to conduct the student's annual review and to develop his individualized education program (IEP) for the 2008-09 school year (Parent Ex. C at p. 1). Attendees included a school psychologist (who also acted as the district representative), a regular education teacher, a special education teacher, a bilingual social worker, an additional parent member, and the parents (id. at p. 2). According to the school psychologist's testimony at the impartial hearing, the CSE primarily relied upon May 2008 progress reports submitted by the student's then-current classroom teacher at Riverdale, his speech-language pathologists, his physical therapist, and his occupational therapist in order to develop the 2008-09 IEP (Tr. pp. 326-27, 330, 332-42, 355; see Dist. Exs. 5-7; 9).³ He also testified that the CSE had a SEIT progress report, dated February 2008, available at the annual review (Tr. pp. 361-62; Dist. Ex. 8). The classroom teacher's progress report noted that the student made "steady progress during the school year" (Dist. Ex. 5). She reported on the student's emerging play skills, his improved ability to "take turns with teacher prompts," and his increased ability to attend to task (id.). The teacher indicated that, at times, the student exhibited impulsivity during large group activities, but could be redirected back to task with teacher prompts (id.). With respect to his cognitive skills, the teacher reported that the student read on a "fourth grade level with comprehension" and further, that he exhibited "advanced mathematics skills and understanding" (id.). The teacher did note, however, that the student required "extra response time for oral directions or questions" and that his "spontaneous language" was "consistently emerging" (id.). The progress report included annual goals related to improving the student's auditory processing, play skills, attention, expressive language, and fine-motor skills (id.).

The speech-language progress report indicated that the student demonstrated "nice progress" during the school year, although he continued to exhibit "significant challenges to his overall language, specifically his expressive and pragmatic skills" (Dist. Ex. 9 at p. 1). The evaluators reported that despite the student's above average academic skills, his distractibility and impulsivity negatively affected his performance in the classroom and impeded the student's "ability to participate in group tasks, and maintain a reciprocal conversation" (id.). According to the report, the student required adult intervention to facilitate peer interactions (id.). Due to "severe auditory processing deficits," the student required increased processing time to respond to orally presented information (id.). They did note, however, an improvement in the student's processing speed (id.).

³ The student's 2008-09 IEP mistakenly refers to the May 8, 2008 progress report as the "SEIT progress report" (Parent Ex. C at p. 3). In his testimony, the school psychologist clarified that the May 8, 2008 progress report noted in the student's IEP actually referred to the progress report submitted by the student's then-current Riverdale classroom teacher (Tr. pp. 332-42; see Dist. Ex. 5).

The evaluators indicated that expressively, the student communicated in sentences, but that he required "prompts to express a variety of pragmatic functions including requesting desired items and actions, gaining attention and assistance, and responding to questions" (*id.*). Although the student exhibited difficulty with articulation and oral-motor skills, the evaluators described the student's overall speech as "intelligible to the familiar listener" (*id.* at pp. 1-2). The evaluation report included annual goals and short-term objectives developed by the speech-language pathologists, which targeted the student's areas of need in auditory comprehension, expressive language skills, and play and social skills (*id.* at p. 2).

In the PT progress report, the student's physical therapist indicated that the student walked "independently" and demonstrated "significant improvement in his ability to negotiate obstacles and uneven surfaces" (Dist. Ex. 6 at p. 1). According to the report, the student ascended and descended stairs independently, but required supervision for safety purposes as his "movement [could] become unpredictably disorganized and unsafe" (*id.*). The physical therapist primarily used "Cuevas MEDEK" (CME) therapy and exercises with the student to improve his balance and coordination (*id.* at pp. 2-4). She noted that the student required continued physical therapy services to "address multiple sensory-motor issues associated with agenesis of the corpus callosum," which included the following areas of need: "overall significant gross motor developmental delay, decreased body awareness, decreased motor planning, decreased safety awareness, ataxia, decreased object manipulation, decreased static and dynamic balance, and sensory integration dysfunction" (*id.* at p. 4). Her report included annual goals and short-term objectives related to navigating the community and riding a bicycle (*id.* at pp. 4-5).

In the OT progress report, the student's occupational therapist reported that the student made "outstanding improvement of his upper body and upper extremities motor control, resulting in dramatic progress in his gross motor abilities" (Dist. Ex. 7 at p. 1). The report indicated that the student also exhibited improvement in his fine-motor skills, his ability to tolerate sensory stimulation, and his ability to follow simple and complex verbal directions (*id.* at pp. 1-2). The occupational therapist noted that the student continued to exhibit difficulty with bilateral fine-motor tasks, motor planning tasks, and with the regulation or modulation of his responses to sensory input (*id.*). The occupational therapist recommended to continue the student's OT services and included annual goals and short-term objectives that targeted the student's needs in the areas of graphomotor skills, upper-extremity control skills, and fine-motor control skills (*id.* at p. 4).

In the February 2008 progress report drafted by the student's SEITs, they reported that the student exhibited "slow, steady progress" toward his "IEP goals" (Dist. Ex. 8 at p. 1). According to the report, the SEITs' services focused on helping the student "navigate his classroom, follow class routines/schedule[s], use toys/games/activities appropriately and attend to whole group activities" (*id.*). The SEITs estimated the student's functional areas to be within the following developmental levels: cognition, 4.0-4.6; social/emotional, 3.6-3.10; and communication, 3.6-4.0 (*id.*). The SEITs described the student's language comprehension skills as "higher" than his expressive language skills (*id.*). In addition, the SEITs noted that the student displayed "inconsistent" behaviors and skills, and further, that he continued to be challenged by his ability to self-regulate and focus (*id.*). The progress report included annual goals to develop the student's areas of need in expressive and pragmatic language, play skills, and classroom routines and transitions (*id.* at p. 2).

In drafting the student's IEP, the CSE used the information contained in the progress reports to develop the student's academic and social/emotional present levels of performance, indicating that the student "demonstrated noticeable improvements in all areas of language and communication" and that "overall" the student's speech was "intelligible to the familiar listener" (Parent Ex. C at pp. 3-4). The CSE described the student's cognitive skills as "well beyond his age," noting that he read and comprehended "on a fourth grade level" and had "advanced" math skills (*id.* at p. 3). As to the student's social/emotional performance, the CSE described the student as "a bright, happy, and loving child" who exhibited "age-appropriate" behavior (*id.*). In the IEP section related to the student's health and physical development, the CSE documented the student's diagnoses of agenesis of the corpus callosum and hypotonia, that he exhibited "delays in gross motor, fine motor, . . . equilibrium difficulties" and "ataxic-like movements," and that he required adaptive physical education (*id.* at pp. 5-6).⁴ For the student's annual goals and short-term objectives, the CSE directly inserted pages drafted by the student's occupational therapist and physical therapist into the IEP, and directly transcribed the annual goals and short-term objectives drafted by the student's speech-language pathologists into the IEP (compare Parent Ex. C at pp. 7-11, with Dist. Exs. 6 at p. 5; 7 at p. 4; 9 at p. 2). The annual goals and short-term objectives targeted the student's areas of need in fine-motor skills, gross-motor skills, play and social skills, speech-language, and feeding skills (Parent Ex. C at pp. 7-12).

Based upon the information presented, the CSE recommended placement in a 10-month collaborative team teaching (CTT) classroom with the following weekly related services: six individual 30-minute sessions of speech-language therapy (separate location); four individual 30-minute sessions of OT (separate location); four individual 30-minute sessions of OT (in-class location); and six individual 30-minute sessions of PT (separate location) (Parent Ex. C at pp. 1, 13-14). The CSE also recommended one daily session of health paraprofessional services to assist the student with feeding (*id.* at pp. 11, 14).

By due process complaint notice dated June 3, 2008, the parents alleged that the district failed to offer their son a FAPE for the 2008-09 school year based upon both procedural and substantive violations (Parent Ex. A at pp. 1, 3-5). As a result, the parents advised the district that the student would remain in his preschool placement in a 12-month program during the 2008-09 school year and would continue to receive the special education services as contained in the last-agreed upon IEP, dated August 2006, as well as his home-based ABA program (*id.* at p. 1). The parents challenged the composition of the CSE, the CSE's recommendation for placement in a 10-month CTT classroom with related services and a health paraprofessional, the annual goals and short-term objectives developed by the CSE, and the CSE's alleged failure to rely on proper evaluative data, to adequately address the student's behavioral needs, and to recommend extended school year (ESY) services for summer 2008 (*id.* at pp. 3-5). In addition, the parents asserted that an impartial hearing officer's unappealed decision and order for the student's 2007-08 school year constituted the student's pendency placement during the instant proceedings (*id.* at pp. 2-3, 5; see Parent Exs. B; D). As proposed relief, the parents sought an order directing the district to prospectively fund the student's unilateral program, consisting of a 12-month program with 20

⁴ To describe the student's health and physical development, the CSE directly inserted one page drafted by the student's physical therapist into the IEP and then added in the management needs section that the student needed to continue OT and PT (compare Parent Ex. C at p. 5, with Dist. Ex. 7 at p. 3; see Tr. pp. 350-51).

hours per week of SEIT services, 15 hours per week of home-based ABA services, and related services of four 60-minute weekly sessions of OT, three 60-minute weekly sessions of PT, and six 60-minute weekly sessions of speech-language therapy (Parent Ex. A at pp. 2-3, 5-6; see Parent Ex. D at pp. 1, 20).

On July 24, 2008, the parties proceeded to an impartial hearing, which concluded on November 18, 2008, after four days of testimony (Tr. pp. 1, 378). On the second day of testimony, September 26, 2008, the district conceded that it had failed to offer the student a FAPE for the 2008-09 school year, as the district had not, to date, offered the student a site placement or location in which to implement his 2008-09 IEP (Tr. pp. 49-55, 118). The parents also clarified that while they were not seeking reimbursement for the tuition costs associated with the student's enrollment at Riverdale, they were seeking prospective funding for the student's SEIT services and his home-based ABA program (Tr. pp. 45-46, 130-37). The parties also reached a partial resolution of the parents' claims when the district stipulated to provide the parents with Related Service Authorizations (RSAs) to fund the student's PT services (three hours per week) and OT services (four hours per week) for the 2008-09 school year (Tr. pp. 94-104). The impartial hearing continued with the presentation of both testimonial and documentary evidence (Tr. pp. 1-464; Dist. Exs. 1-9; Parent Exs. A-M).

In her decision, dated December 17, 2008, the impartial hearing officer denied the parents' request for 20 hours per week of SEIT services and payment for those services, but granted their request to be reimbursed for the student's 15 hours per week of home-based ABA services (IHO Decision at pp. 21-24). The impartial hearing officer also determined that the parents sustained their burden to establish the appropriateness of their request for six 60-minute sessions per week of speech-language therapy services (id. at p. 21). In analyzing the parents' request for SEIT services, the impartial hearing officer noted the SEIT's role providing academic instruction to the student, "helping him navigate the school, working on socialization, providing carryover to the home, and interacting with his other providers and parents" (id. at p. 22). The impartial hearing officer noted that according to the testimony, the SEIT supported the student's independence while assisting with his significant distractibility and socialization issues (id.). In light of the student's significant social delays and distractibility, the impartial hearing officer agreed with the parents' rationale for placing their son in a small, integrated classroom setting with typically developing students (id.).

Weighing the evidence, however, the impartial hearing officer concluded that given the student's advanced cognitive abilities, his age, the nearly 1:1 ratio of the special education component of his integrated classroom, and that the student received his academic instruction essentially in an individual setting, the student's placement in a preschool setting supported by SEIT services was overly restrictive and inappropriate especially in light of the student's "academic potential and need to model children his own age" (IHO Decision at pp. 22-23). In her decision, the impartial hearing officer further noted that she based her conclusion about the SEIT services, in part, upon the lack of specific evidence regarding the student's academic curriculum, and in part, upon the testimony provided by a district witness who questioned the "efficacy" of having the student interact with younger classmates (id. at p. 22). Thus, she concluded that the continuation of the provision of SEIT services in the context of the student's preschool program was not appropriate (id. at p. 23).

As for the student's home-based ABA program, the impartial hearing officer found that the parents sustained their burden to establish the appropriateness of these services and granted their request to be reimbursed (IHO Decision at pp. 23-24). She noted that testimonial evidence established that the home-based ABA program addressed the "student's distractibility, impulsivity, and socialization," his toileting issues, and "aid[ed] in the carryover, especially between home and school" (*id.* at p. 23). Of concern to the impartial hearing officer, however, was the parents' failure to offer "objective evaluative evidence" that addressed the "manifestations of the student's disability that warranted" a home-based ABA program or the continuation of the home-based ABA program "at present levels through the end of the current school year" (*id.*). In addition, the impartial hearing officer found the SEIT's testimony "vague as to what she provided at home" and that despite the student's significant socialization needs, the SEIT did not provide sufficient testimony regarding how she addressed this need at home (*id.*). The impartial hearing officer also noted that it was unclear from the hearing record how the ABA program addressed the student's impulsivity (*id.*). However, she also noted that the district failed to "cogently refute[]" the ABA supervisor's testimony that the ABA program fostered the student's social interactions, language usage, and ability to focus (*id.*). Finally, the impartial hearing officer found that the ABA therapists' "work on eye contact, joint attention span compliance, language processing and output, play skills, A[ctivities of] D[aily] L[iving (ADL)] skills and being able to generalize all things taught in school into a natural environment" to be "worthy goals" and thus, determined that the parents sustained their burden to establish the appropriateness of the student's ABA program and awarded reimbursement for up to 15 hours per week of ABA services (*id.* at pp. 23-24).

In her decision, the impartial hearing officer ordered the district to issue an RSA to authorize the student's six 60-minute sessions per week of speech-language therapy services in addition to the RSAs stipulated to by the district regarding the student's OT and PT services; to reimburse the parents upon the presentation of proper proof of payment for the student's 15 hours per week of home-based ABA services at the hourly rates of \$125, \$75, and \$65 respectively to identified ABA therapists; and for the CSE to consider including group counseling services and ESY services in the student's upcoming IEP (IHO Decision at pp. 24-25). The impartial hearing officer denied the parents' request for 20 hours per week of SEIT services (*id.* at p. 24).

On appeal, the parents assert that contrary to the impartial hearing officer's decision, the hearing record contains overwhelming evidence that the 20 hours per week of SEIT services were appropriate to meet the student's special education needs within the context of the preschool classroom setting at Riverdale. The parents contend that the impartial hearing officer dismissed relevant testimonial evidence and demonstrated bias by giving undue weight to the testimony of a district witness in drawing her conclusions regarding the SEIT services. The parents also contend that the impartial hearing officer incorrectly described the reimbursement rates for the student's home-based ABA therapists. As additional documentary evidence submitted for consideration on appeal, the parents attach a psychological evaluation update, dated December 2008 and January 2009. The parents seek to set aside the impartial hearing officer's determination denying the provision of and funding for the costs of their son's 20 hours per week of SEIT services and request an order directing the district to continue to provide and prospectively fund the SEIT services.

In its answer, the district asserts that the impartial hearing officer properly denied the parents' request for 20 hours per week of SEIT services, noting that the parents failed to sustain their burden to establish the appropriateness of these services. The district argues that as a school-

age student, the parents' unilateral placement of their son in a preschool classroom with SEIT services was inappropriate to meet the student's cognitive, social, and emotional needs in the least restrictive environment (LRE), both as a matter of law and facts. In addition, the district asserts that the hearing record establishes that the SEIT's services focused on the student's socialization needs, rather than academic needs, and thus, a paraprofessional could provide the same assistance for the student's socialization needs in the classroom. The district objects to the consideration of the additional documentary evidence attached to the parents' appeal, stating that although it was not available at the time of the impartial hearing, it is not necessary in order to render a decision in this matter. As a final argument, the district asserts that the parents are not entitled to prospective funding for the 20 hours per week of SEIT services as a matter of law and because the parents failed to submit any evidence that they lacked the financial resources to maintain a claim for prospective funding.

The district cross-appeals that portion of the impartial hearing officer's decision directing the district to reimburse the parents for the costs of their son's 15 hours per week home-based ABA program. The district argues that the impartial hearing officer erred in awarding reimbursement in light of her determination that the hearing record failed to contain objective evaluative evidence describing the "manifestations of the student's disability that warranted a program of ABA or its continuation at present levels through the end of the current school year." The district asserts that the parents failed to demonstrate that the home-based ABA services were "necessary to provide the Student with a FAPE." Assuming *arguendo* that the ABA program was appropriate, the district contends that the parents should not be awarded reimbursement for the costs associated with the supervision of the ABA therapists. Finally, the district asserts that equitable considerations favor the district as the parents never intended to place their son in a public school, arguing that the parents had decided by June 3, 2008—the date of their due process complaint notice and only six days after the CSE meeting—that their son would remain in his preschool placement for the 2008-09 school year. The district also asserts that the parents failed to cooperate with the district and failed to allow the district an opportunity to offer the student a public school placement prior to unilaterally placing their son. The district seeks to uphold that portion of the impartial hearing officer's decision denying the parents' request to provide and fund their son's SEIT services, but seeks to annul that portion of the impartial hearing officer's decision directing the district to reimburse the parents for the costs of their son's home-based ABA program.

Before turning to the merits of the appeal, I will address two preliminary matters. First, the parents attached an updated psychological evaluation report to their petition for consideration as additional documentary evidence. The district objects. Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an impartial hearing officer's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of the Dep't of Educ., Appeal No. 08-024; Application of a Student with a Disability, Appeal No. 08-003; Application of the Bd. of Educ., Appeal No. 06-044; Application of the Bd. of Educ., Appeal No. 06-040; Application of a Child with a Disability, Appeal No. 05-080; Application of a Child with a Disability, Appeal No. 05-068; Application of the Bd. of Educ., Appeal No. 04-068). Here, I decline to consider the additional documentary evidence because, although it was not available at the time of the impartial hearing, it is not necessary in order to render a decision in this appeal.

Next, I note that neither the parents nor the district appeals from the impartial hearing officer's decision directing the district to provide the student with six 60-minute sessions per week of speech-language therapy services for the 2008-09 school year or her determination that the district failed to offer the student a FAPE for the 2008-09 school year based upon the district's concession at the impartial hearing (IHO Decision at pp. 18-19, 21). 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[k]). Consequently, the impartial hearing officer's decision directing the district to provide six 60-minute sessions per week of speech-language therapy services and her determination that the district failed to offer the student a FAPE for the 2008-09 school year are final and binding upon the parties (Application of a Student with a Disability, Appeal No. 08-021; Application of the Bd. of Educ., Appeal No. 07-135; Application of a Child Suspected of Having a Disability, Appeal No. 06-092; 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).

Turning now to the merits of the parents' appeal and the district's cross-appeal, two purposes of the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally 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., 2008 WL 5505470, at *4 [2d Cir. Jan. 16, 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]; see also O'Toole v. Olathe Dist. Sch. Unified Sch. Dist. No. 233, 144 F.3d 692, 701 [10th Cir. 1998]). 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 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; 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 implemented (34 C.F.R. § 300.323[c][2]; 8 NYCRR 200.4[e][3],[7]; see Application of a Student with a Disability, Appeal No. 08-087). Also, a FAPE must be available to an eligible student who needs special education and related services even though the student is advancing from grade to grade (8 NYCRR 200.4[c][5]).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (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).

Turning first to the parents' appeal, I find that the impartial hearing officer correctly determined that the parents did not sustain their burden to establish that the 20 hours per week of SEIT services in the preschool setting were appropriate to meet the student's special education

needs (see Educ. Law § 4404[1][c], as amended by Ch. 583 of the Laws of 2007; Gagliardo, 489 F.3d at 112; Walczak, 142 F.3d at 129; Cerra, 427 F.3d at 192; Mrs. B., 103 F.3d at 1121-22; Application of a Student with a Disability, Appeal No. 08-019; Application of the Bd. of Educ., Appeal No. 05-081). In order to meet that burden, the parents must show that the services provided were "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., that the private education services addressed the student's special education needs (see Gagliardo, 489 F.3d at 112; Cerra, 427 F.3d at 192; Walczak, 142 F.3d at 129). Parents are not held as strictly to the standard of placement in the LRE as school districts are; however, the restrictiveness of the parental placement may be considered in determining whether the parents are entitled to an award of tuition reimbursement (Rafferty v. Cranston Pub. Sch. Comm., 315 F.3d 21 [1st Cir. 2002]; M.S. v. Bd. of Educ., 231 F.3d 96, 105 [2d Cir. 2000]).

After carefully reviewing the hearing record, the decision shows that the impartial hearing officer carefully considered all of the testimonial and documentary evidence submitted by both parties and that she analyzed the evidence with the proper legal authority to determine whether the parents sustained their burden to establish the appropriateness of the SEIT services obtained for their son (IHO Decision at pp. 1-23). In particular, I agree with the impartial hearing officer's ultimate conclusion that although the student requires a small, integrated classroom setting with typically developing students, the preschool setting became overly restrictive and inappropriate with the additional 20 hours per week of SEIT services (see id. at pp. 22-23). As noted by the impartial hearing officer, the evidence establishes that the SEIT services effectively reduced the special education component of the student's integrated preschool setting to a 1:1 environment and provided the student with academic instruction in an individual setting (id.).

In addition to the impartial hearing officer's findings and conclusions, I agree with the district's argument that the provision of a SEIT in the preschool setting—whose services focused primarily on the student's socialization needs rather than his academic needs—offered a maximum level of services that may be appropriately provided by a paraprofessional (see Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). For example, the hearing record indicates that the SEIT helped the student navigate the classroom, express his needs, prevented him from leaving the classroom, and facilitated his social interactions (Tr. pp. 120-21, 123-24). With respect to the student's cognitive skills, the hearing record indicates that both the preschool teachers and the SEIT used various materials to address the student's advanced academic skills in the classroom (Tr. pp. 144-47). However, when asked to describe the SEIT's overall role in the classroom, Riverdale's director testified that due to his attentional issues the SEIT helped the student "stay on target" during a group setting, prompted the student, created "social situations for him," and supplied material and manipulatives to address his "cognitive abilities" (Tr. p. 149). When asked if the student could function in the classroom without SEIT services, Riverdale's director testified that the student needed the SEIT to "maximize his time there" and that the classroom would be overwhelming for him without the SEIT (id.). Riverdale's director also testified that the student attended a portion of his day at preschool without the SEIT and during that time, he received support from other adults in the classroom (Tr. p. 155). She further testified that the student tended to be "more distractible" and would leave activities "if someone isn't helping [the student]" and that the adult support "mostly" addressed the student's attentional difficulties (id.). Notably absent from the hearing record, however, is evidence to support why the student requires a SEIT to provide these services, why the student continues to require the 20 hours per week of individual SEIT services, and how the SEIT services appropriately address the student's

cognitive and academic needs. Therefore, I agree with the impartial hearing officer's conclusion that the parents failed to sustain their burden to establish that the 20 hours per week of SEIT services were appropriate to meet the student's special education needs and thus, the parents' appeal is dismissed.

Moving on to the district's cross-appeal, I find that the impartial hearing officer improperly awarded reimbursement for the costs of the student's 15 hours per week of home-based ABA services (IHO Decision at pp. 23-24). As asserted by the district in its answer, the hearing record lacked sufficient objective evidence to establish that the home-based program was warranted or that it should continue at the present level of services, and further, the evidence in the hearing record was inconsistent with the impartial hearing officer's conclusion that the parents sustained their burden to establish that the home-based ABA program was appropriate to meet the student's special education needs (id.).

Here, the hearing record establishes that the student's ABA supervisor, the student's SEIT, and two other therapists implemented the student's 15 hours per week ABA program (Tr. pp. 289-91, 312-13).⁵ According to the testimony, the ABA supervisor provided 6 hours per week of direct services and supervisory services, the student's SEIT and one other ABA therapist each provided 2 hours of services per week, and the final ABA therapist provided the remaining weekly hours of services (Tr. pp. 255, 282-84, 304). The ABA supervisor testified at the impartial hearing that he received \$125 per hour for his services, the student's SEIT and one other ABA therapist received \$65 per hour, and the remaining ABA therapist received \$75 per hour (Tr. pp. 304-05). The ABA supervisor explained that he dedicated a portion of his six hours per week of ABA services to "coordinating implementation of services in the [student's] classroom" at school, which included discussing services with the student's classroom teacher, his SEIT, two other SEITs working in the student's classroom, and other service providers at the preschool (Tr. pp. 320-23). When asked about his supervisory role regarding the other ABA therapists, the ABA supervisor testified that he was in "constant contact" with the therapists, they participated in "regular team meetings," and conducted telephone conversations "on a regular basis" (Tr. p. 291).

In his testimony, the ABA supervisor described the student's behavior deficits as including both compliance and attention issues, and further, that he exhibited difficulty with "eye contact, joint attention span compliance, language processing and output, [and] play skills" (Tr. pp. 284-85). According to his testimony, the student's home-based ABA program focused on addressing the student's social skills deficits since July 2008 (Tr. p. 288). He described the basic "scheme" of the ABA program as working on skills in a discrete format and then introducing those skills into a "natural environment" (Tr. p. 289). When asked to describe the strategies used in the ABA program, the ABA supervisor stated that the therapists manipulated "what's going on around [the student] to increase desired behaviors" and decrease negative behaviors (Tr. pp. 292, 295-96). As an example, he testified that the therapists initially paired the student's favorite activities with "social praise" to develop his desire for adult interaction, which had progressed, at the time of the impartial hearing, to a strategy used to develop his desire to interact with other children (Tr. p. 296). The therapists also used the ABA program to teach the student that he would be able to

⁵ According to the hearing record, the ABA supervisor also worked at Riverdale as a special education consultant (Tr. pp. 282-83).

engage in a highly desirable activity or with a desired item after he completed the target activity or routine (Tr. pp. 292-94). When asked how the student progressed using that strategy, the ABA supervisor testified that the student "respond[ed] to a behavioral approach" and that the therapists changed the ABA program based upon the student's wants and needs (Tr. p. 294).

During the 2008-09 school year, the ABA supervisor testified that the student worked on improving his attention span, joint attention skills, social reciprocity, use of functional language, compliance, ADL skills, as well as his ability to follow auditory directions, develop a "repertoire" of play skills, and to generalize skills from home to "natural environments" (Tr. pp. 288-89, 295, 303-04; see Tr. p. 122). As to his progress, the ABA supervisor testified that the student exhibited a "basic increase in skill levels over the last three years" and that since July 2008, the student demonstrated progress in his use of functional language, attention skills, and length of utterances (Tr. pp. 294-96, 306-09). However, he also noted that the ABA program was not "data driven" and that the therapists assessed the student's progress through "objective observation and interaction with the parent" (Tr. p. 306). When asked why the student continued to require 15 hours of home-based ABA services, the ABA supervisor testified that despite making "a great deal of progress," the student's "underlying behavioral issues" still existed (Tr. pp. 296-97).

Thus, I note that while the hearing record provides a very general description of the student's home-based ABA program, the hearing record is devoid of evidence regarding the services provided by two of the student's ABA therapists. In addition, the hearing record contains insufficient evidence regarding why the student continues to need 15 hours per week of a home-based ABA program or how the ABA program is designed to specifically meet the student's special education needs. The testimonial evidence provided by the student's SEIT and the ABA supervisor is vague and fails to sufficiently describe the methods and strategies used by the ABA therapists to address the student's identified needs. Moreover, although the hearing record contains testimonial evidence about the student's progress, the hearing record fails to contain any objective evidence of the student's progress in the ABA program, such as progress reports, written teacher reports, or any measurable data to support the testimony about the student's observed progress (see Application of a Student with a Disability, Appeal No. 08-151). Based on the foregoing, a review of the hearing record reflects that the evidence describing the ABA services provided to the student during the 2008-09 school year is vague and fails to articulate how the program is specifically tailored to address the student's unique special education needs (see Matrejek v. Brewster Cent. Sch. Dist., 2008 WL 3852180, at *2 [2d Cir. Aug. 19, 2008]; Application of a Student with a Disability, Appeal No. 08-151; Application of a Student with a Disability, Appeal No. 08-013; Application of the Dep't of Educ., Appeal No. 08-092 [finding that the parents failed to meet their burden to establish the appropriateness of a private placement, where the hearing record offered general information about the unilateral placement, rather than information regarding the educational services provided to the student or how the educational services at the private placement met the student's identified special education needs]). Accordingly, the parents failed to sustain their burden to establish the appropriateness of the home-based ABA program and as such, are not entitled to an award of reimbursement for the costs associated with that program.

Having determined that the parents failed to sustain their burden to establish with respect to the student's home-based ABA services, the necessary inquiry is at an end and I need not reach the issue of whether equitable considerations support the parents' claim (see Burlington, 471 U.S. 359; Gagliardo, 489 F.3d at 115; 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 in light of my determinations, I need not reach them.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS SUSTAINED.

IT IS ORDERED that the impartial hearing officer's decision is annulled to the extent that it found that the parents sustained their burden to establish that the student's 15 hours per week of home-based ABA services met the student's special education needs; and

IT IS FURTHER ORDERED that the impartial hearing officer's decision is annulled to the extent that it ordered the district to reimburse the parents for the costs of the student's 15 hours per week of home-based ABA services.

Dated: **Albany, New York**
 March 19, 2009

PAUL F. KELLY
STATE REVIEW OFFICER