



The University of the State of New York

The State Education Department

State Review Officer

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No. 09-074

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:

Mayerson & Associates, attorneys for petitioners, Gary S. Mayerson, Esq., of counsel

Michael Best, Special Assistant Corporation Counsel, attorney for respondent, Emily R. Goldman, Esq., of counsel

DECISION

Petitioners (the parents) appeal from the decision of an impartial hearing officer which denied their request for reimbursement and/or an award of prospective funding for their son's tuition costs at the McCarton Center for Developmental Pediatrics (McCarton Center) for the 2008-09 school year. The appeal must be dismissed.

At the time of the impartial hearing, the student was attending the McCarton Center where he was receiving approximately 22 hours of individual applied behavioral analysis (ABA) instruction, in addition to five individual 45-minute sessions of speech-language therapy per week and two to three individual 45-minute sessions of occupational therapy (OT) per week (Tr. pp. 7, 22, 265, 269, 337, 391-92, 475, 510). Additionally, the student was reportedly receiving five to seven hours per week of home-based ABA instruction (Tr. p. 446). The McCarton Center constitutes the student's pendency placement during the instant proceeding pursuant to an unappealed impartial hearing officer's decision dated October 3, 2008 (Tr. p. 6; Parent Ex. B).¹ The McCarton Center has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7). The student's eligibility for special education services as a student with autism is not in dispute in this proceeding (Tr. pp. 56, 155; see 34 C.F.R. § 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

¹ See 20 U.S.C. § 1415(j); Educ. Law § 4404(4)(a); 34 C.F.R. § 300.518; 8 NYCRR 200.5(m).

The student was reportedly given diagnoses of a pervasive developmental disorder, not otherwise specified (PDD-NOS) and dyspraxia in 2006 (Tr. p. 421). He engages in attention seeking and elopement behaviors, and has reportedly also exhibited some aggressive behaviors including stomping his feet, hitting and hair pulling, in addition to self-stimulatory behaviors and non-conceptual vocalization (Tr. pp. 159, 161, 327-28, 364, 537, 542; Parent Ex. V at p. 2). Although the hearing record reflects that the student's social/emotional behaviors are an area of deficit, the student is able to acknowledge his peers, follow directions, and refrain from taking toys from his peers (Tr. p. 159).

In September 2006, the student was enrolled in a district 12:1+1 kindergarten classroom where he also received related services consisting of three sessions per week of physical therapy (PT) and three sessions of OT per week, as well as two sessions per week of speech-language therapy in a small group and two individual sessions per week of speech-language therapy (Tr. pp. 420, 465; Dist. Ex. 6 at p. 1).² In October 2007, the parents enrolled the student in the McCarton Center, where he received 21.5 hours of ABA instruction per week, five 45-minute sessions of individual speech-language therapy per week, five 45-minute sessions of individual OT per week in addition to five hours per week of home-based ABA instruction (Tr. p. 465; Parent Ex. B at pp. 6-8).³ Around the time that the student started attending the McCarton Center, the staff there developed a behavior plan for him, which targeted a reduction in the following behaviors: person assaults, tantrums, vocal protesting, and non-contextual vocalizations (Parent Ex. OO at p. 7).⁴ Strategies to address the student's maladaptive behaviors included simple correction and differential reinforcement of other behaviors, alternative behaviors and incompatible behaviors (*id.*). The behavior plan proposed a variety of preventative strategies including the use of the token economy, use of a picture schedule and breaks to be offered at 15-minute intervals (*id.*).

In November 2007, the student underwent a private OT evaluation at the McCarton Center that included clinical observation, a parental interview, and administration of the Sensory Profile Caregiver Questionnaire and the Bruininks-Oseretsky Test of Motor Proficiency Second Edition (BOT-2) (Dist. Ex. 6). The evaluators noted that the student exhibited significant deficits in his fine motor, gross motor, visual perceptual, cognitive, and self-care skills (*id.* at p. 6). Administration of the BOT-2 yielded standard (and percentile) composite scores of 24 (1) in fine manual control, 24 (1) in manual coordination, 26 (1) in body coordination, 22 (<1) in strength and agility, and a total motor composite standard score of 20 (<1); all determined to be "well below average" (*id.* at p. 2). The evaluators also reported that results of the Sensory Profile Caregiver Questionnaire revealed "severe sensory integration dysfunction" (*id.* at p. 3). According to the evaluators, the student exhibited a low neurological threshold for tactile, auditory, visual and oral sensory experiences, and a high neurological threshold for vestibular sensory input (*id.* at p. 5).

² The hearing record does not reveal the duration or the frequency of the PT or OT that the student was receiving at that time, nor does it indicate the duration of the group speech-language therapy sessions or the duration of the individual speech-language therapy sessions provided to him (*see* Dist. Ex. 6 at p. 1).

³ A decision dated October 3, 2008 from an impartial hearing officer regarding the parents' claims surrounding the 2007-08 school year indicated that on November 5, 2007, the student was placed at the McCarton Center (Parent Ex. B at p. 5).

⁴ According to the exhibit, the behavior plan was in effect during the period of September 2007 through August 2008 (Parent Ex. OO at p. 7).

The evaluators noted that the student avoided eye contact, noisy situations, and getting his hands messy (id.). Regarding the student's gross motor skills, the evaluators observed that the student presented with low muscle tone and slightly increased range of motion throughout his body and that his protective and equilibrium reactions appeared to be fully integrated (id.). Fine motor skills were also reported to be a struggle for the student, and the student demonstrated hand switching when manipulating writing implements during the evaluation (id.). The evaluators noted that the student demonstrated a functional bilateral approach to cutting, and although he initially donned the scissors upside down with his right hand, the student corrected his grasp independently (id. at pp. 5-6).

With regard to the student's cognitive and visual/perceptual functioning, the evaluators found that the student could imitate vertical and horizontal lines and circles, and further indicated that the student's mother advised them that he could write his name, when given specific verbal cues, although he had not generalized that skill (Dist. Ex. 6 at p. 6). Although he was able to complete a nine-piece interlocking puzzle with picture matching, the student required maximum assistance to complete a 12-piece puzzle (id.). The student's visual/perceptual skills were described as poor, and the evaluators further noted that they had difficulty assessing the student's orientation to person, place, and time secondary to limited expressive language (id.). The evaluators also stated that the student showed poor comprehension of novel questions and directions, and that he needed demonstration of single and multi-step instructions throughout the evaluation (id.). In addition, the evaluators characterized the student's problem-solving skills as limited, noting that he asked to use the bathroom when confronted by a challenging task (id.). With regard to the student's self-care skills, he was reported to need minimum assistance for clothing management, but was dependent for all clothing fasteners (id.). The evaluators noted that the student required assistance to wash his hands, face, and body thoroughly and to completely brush his teeth (id.). Goals and objectives were developed for the student and the evaluators recommended an intensive program five times per week for at least 45-minute sessions to facilitate age appropriate skill attainment (id. at p. 7). They also suggested that the sessions should use a sensory integrative approach and take place in a sensory gym, as well as the use of a therapeutic listening program in order to decrease the student's auditory defensiveness (id.).

A January 2008 ABA progress report from the McCarton Center revealed that the student was demonstrating improvements in all areas, including his ability to use and understand language (Dist. Ex. 7 at p. 5). The student's ABA therapist noted that the student was able to form relationships with his teachers and was increasing his ability to appreciate social praise from them (id.). The therapist also noted that the student was beginning to greet others with eye contact (id. at pp. 5-6). Although the therapist opined that the student exhibited a very positive response to the highly structured and individualized behavioral teaching methods, she further indicated that the student continued to require a high degree of structure to display the skills he had learned (id. at p. 6). According to the therapist, the student continued to demonstrate delays in play, interaction, communication, and adaptive skills (id.). Due to the student's varying attention and self-directed behaviors impacting all areas, the therapist advised that the student required adult intervention in order to focus his play and develop new skills (id.). The therapist also noted that the student required a behavior reduction plan, and that behavior protocol had been implemented in order to reduce and extinguish all maladaptive behaviors while increasing appropriate social behavior skills (id.). Recommendations included further individual ABA instruction targeting delaying gratification, social skills, independence, and overall language development (id.).

On May 27, 2008, the district's school psychologist conducted a classroom observation of the student at the McCarton Center, during the student's OT session and ABA instruction (Tr. p. 161; Parent Ex. V). The school psychologist noted that upon completing his OT session, the student independently put on his socks and his shoes (Parent Ex. V at p. 1). Although the student exhibited self-stimulatory behaviors during the ABA lesson, overall, with some difficulty, the student complied with demands (id. at p. 2). The student was capable of making requests and demonstrated the ability to match non-identical pictures and state the presented action (id.). Lastly, the student displayed the ability to imitate actions, including gross motor movement or moving the car on the table (id.).

A June 8, 2009 OT progress report from the McCarton Center, indicated that the student had made improvements with respect to sensory processing and that he also demonstrated progress in his fine and gross motor skills, as well as his visual motor skills (Parent Ex. NN at pp. 1, 3-4). Despite gains in these domains, the student's therapist noted that significant deficits continued to exist and that the student's self-care skills and bilateral coordination were also delayed (id. at p. 4). As a result, the therapist recommended that the student receive five 45-minute sessions of OT per week in a sensorimotor clinic (id.).

A June 9, 2008 speech-language progress report addendum revealed that although the student continued to exhibit difficulty comprehending the concepts for "more" and "most" and understanding pronouns, the student could identify categories, such as food, clothing, and transportation and part/whole relations (Dist. Ex. 4). The therapist also noted the student's ability to follow two-step directions with mastered one-step commands when presented with intermittent verbal repetition (id.). With visual support, the student could request desired items (id.). With respect to his pragmatic language skills, the student could attend to structured language tasks for approximately five to seven minutes before obtaining his reinforcer (id.). The therapist further noted the student's difficulty pairing eye contact with verbal requests (id.). Regarding the student's oral-motor skills, he showed the ability to tolerate varied textures, temperatures, and pressure to the peri- and intra-oral areas of the face, but continued to exhibit trouble rounding his lips for horn blowing and for blowing bubbles (id.).

On June 16, 2008, the Committee on Special Education (CSE) convened to develop the student's program for the 2008-09 school year (Parent Ex. C). The student's mother, a district school psychologist, who also served as district representative, a district special education teacher, and an additional parent member attended the meeting (Tr. pp. 72-74, 153-54, 422; Parent Ex. C at p. 2). The student's ABA instructor from the McCarton Center also participated in the June 2008 CSE meeting by telephone throughout the duration of the meeting which lasted between 1.5 and two hours (Tr. pp. 74, 81, 92, 201; Parent Ex. C at p. 2). The June 2008 CSE recommended continued eligibility for special education services as a student with autism and a 12-month program with placement in a 6:1+1 classroom combined with related services consisting of five individual 45-minute sessions of OT per week, five individual 45-minute sessions of speech-language therapy per week, and three individual 30-minute sessions of PT per week, in addition to a behavior management paraprofessional (Tr. pp. 74, 155, 182; Parent Ex. C at pp. 1-2, 19). The June 2008 CSE also advised discontinuing health paraprofessional services to the student, as well as the provision of group speech-language therapy sessions, based on reports and discussions that took place during the CSE meeting indicating that the student required 1:1 support (Tr. pp. 76-77, 132; Parent Ex. C at p. 2, 19). Academic performance and learning characteristics depicted in

the June 2008 individualized education program (IEP) revealed that the student had made progress in his learning and that he demonstrated readiness skills, including the ability to wait and attend to task (Parent Ex. C at p. 3). The June 2008 CSE noted that the student displayed an increased ability to attend to task, and that he could independently and successfully complete inset puzzles (*id.*). According to the June 2008 IEP, the student showed the ability to match objects and pictures, and sequence patterns (*id.*). Although the June 2008 CSE noted that the student exhibited speech-language delays, the CSE found that the student followed verbal commands and made eye contact when called upon (*id.*).

Based on teacher estimates, the student's reading, writing, and math skills were deemed to be at pre-kindergarten level (Parent Ex. C at p. 3). Academic management needs included use of the following supports and services: speech-language therapy, verbal/visual supports, redirection and prompting, social praise, and a behavior management paraprofessional (*id.*). Paraprofessional services were proposed for the student in order to assist with implementing his behavioral intervention plan (BIP) and to help the student transition to a new setting, given that the June 2008 CSE opined that the student would require assistance at all times in and out of the classroom (Tr. p. 76). With regard to the student's social/emotional needs, the June 2008 CSE indicated that the student acknowledged and tolerated positive touch from his peers and followed directions (Parent Ex. C at p. 4). The June 2008 IEP revealed that the student exhibited non-contextual vocalizations, tantrums, vocal protests, and aggressive behavior, which interfered with instruction, thereby necessitating the development of a BIP (*id.*). Gross and fine motor difficulties were also noted on the June 2008 IEP; however, the June 2008 CSE noted that the student was able to use scissors (*id.* at p. 6). Annual goals and short-term objectives were developed in the areas of OT, PT, speech-language therapy, behavior, adaptive physical education, and readiness skills (*id.* at pp. 7-15). Pre-academic goals were developed for the student because the student's teacher from the McCarton Center stated that the student was continuing to acquire those skills (Tr. p. 78). According to the hearing record, all of the goals were discussed during the June 2008 CSE meeting, and were developed based on reports from the McCarton Center and information from the student's teacher (Tr. pp. 78-80, 123, 162). The provision of individualized parent training was also discussed during the CSE meeting (Tr. pp. 83, 200-01). The June 2008 CSE advised the student's mother that she could visit the placement site to inquire about the availability of parent training and express what type of training the parents would need (Tr. pp. 200-01). The June 2008 CSE considered and rejected placement of the student in a 12:1 classroom and a 12:1+1 classroom, determining that the student required a small, structured class setting to address his delays (Tr. pp. 81, 163; Parent Ex. C at p. 17).

Also on June 16, 2008, a functional behavioral assessment (FBA) and a BIP were prepared for the student by the district's school psychologist (Tr. pp. 100, 160; Dist. Ex. 1; Parent Ex. C at p. 19). The district's school psychologist testified that the information on which she based the FBA and BIP was obtained from the discussion at the CSE meeting, documentation from the McCarton Center, and her observation of the student (Tr. pp. 162-63). Behaviors that were identified as interfering with the student's learning included non-contextual vocalizations, tantrums, vocal protests, and aggressive behaviors (Tr. p. 161; Dist. Ex. 1; Parent Ex. C at p. 19). Positive reinforcement, social praise, use of a token economy, use of a visual schedule, breaks, and ignoring were among the strategies proposed to address the student's behaviors (Tr. p. 162; Parent Ex. C at p. 19).

By final notice of recommendation (FNR) dated June 18, 2008, the district recommended a specific district school for the student (Dist. Ex. 2). By letter dated June 27, 2008 to the CSE chairperson, the student's mother advised the district that she was rejecting the recommended program, but was seeking a related services authorization (RSA) for PT during summer 2008 (Parent Ex. R at p. 1). Around that time, the student's mother testified that the parents visited the recommended district school (Tr. p. 433; see Parent Ex. Q at p. 1). By letter dated June 30, 2008, the parents advised the district's placement officer that the proposed placement and program were inadequate and inappropriate and did not meet the student's individual needs (Parent. Ex. Q at p. 1). The parents further indicated that the CSE had failed to propose a transition plan, and that the placement lacked the full-time and appropriate supports as well as parent training that the student's program needed on a regular basis (id.). The parents added that their son would continue to receive private ABA instruction, parent training, speech-language therapy, OT, and supervision through the McCarton Center and other providers, and that they would be seeking reimbursement from the district (id.). With respect to PT, the parents advised the district that they would continue to accept an RSA (id.).

In September 2008, a behavior reduction plan was developed for the student by the McCarton Center staff to improve the student's social behavior by reducing his non-compliant behaviors (Parent Ex. G at p. 1). According to the behavior plan, the student's non-compliant behaviors included elopement, falling to the floor, hitting and/or kicking, crying or refusal of physical guidance during transitions (id.). Preventative strategies and interventions included the use of praise as well as tangible reinforcement and prompting (id.). According to the behavior reduction plan, "Antecedent-Behavior-Consequence" (ABC) data collection would be collected daily and frequency data graphed daily (id. at p. 2).

By decision dated October 3, 2008, an impartial hearing officer determined that the student was denied a free appropriate public education (FAPE) for the 2007-08 school year and that the student's home-based program and placement at the McCarton Center were appropriate to meet his educational needs (Parent Ex. B at pp. 9-11). As a result, she awarded reimbursement to the parents for summer 2007 and the 2007-08 school year for 25 hours of individual ABA instruction at the McCarton Center, 15 hours of home-based and community based ABA instruction, two hours per week of ABA supervision, two hours per week of parent training, five individual 45-minute sessions of speech-language language therapy, five individual 45-minute sessions of OT, and two hours per week of team meetings (id. at p. 11).

On October 6, 2008, through their attorney, the parents filed a due process complaint notice seeking tuition reimbursement for the McCarton Center for the 2008-09 school year, services pursuant to pendency, and other relief (Parent Ex. A). Specifically, the parents contended, among other things, that the June 2008 IEP was procedurally and substantively deficient because: (1) the district failed to properly assess the student's present levels of performance; (2) the district failed to give meaningful consideration to the private evaluations secured by the parents; (3) the district failed to offer a specific placement during the June 2008 CSE meeting; (4) the proposed placement was not appropriate for the student, nor was it reasonably calculated to meet his individual needs; (5) the district failed to recommend an appropriate transition plan for the student, despite the recommendation to transfer him from a 1:1 setting to a 6:1+1 setting; (6) the district failed to recommend any extended day services for the student, despite the student's need for them in order to generalize skills across settings; (7) the district's BIP was inadequate; (8) the goals and

objectives listed in the June 2008 IEP were not developed with meaningful parent participation; (9) the goals and objectives contained in the challenged IEP were not clear, unambiguous, sufficiently challenging or individualized for the student; (10) in violation of 8 NYCRR 200.13(d), the district failed to offer individual parent training and counseling; and (11) the district engaged in impermissible predetermination in developing the student's program (id. at pp. 2-4).

On October 8, 2008, the CSE reconvened for the purpose of the discussing the provision of special education transportation for the student (Parent Ex. D at pp. 1-2). The October 2008 CSE decided to offer the student air-conditioned transportation as well as limited travel time (id.).

Over a four-day period beginning on October 14, 2008 and ending on October 17, 2008, two speech-language pathologists from the McCarton Center conducted a comprehensive speech-language evaluation of the student (Parent Ex. F). The evaluators provided the student with reinforcers and short breaks throughout each session to maintain his attention and conducted the testing at a fast pace to help him focus on the task at hand (id. at p. 1). Administration of the Pre-School Language Scale-4 (PLS-4) yielded age equivalent scores of 3-5 in auditory comprehension, 3-1 in expressive communication, and 3-1 in total language, although the evaluators noted that the results should be interpreted with caution (id. at p. 2).⁵ The evaluators determined that the student presented with severe receptive/expressive/pragmatic language delays (id. at p. 5). The evaluators found that the student had difficulty comprehending pronouns, negation in sentences, inferences, categories of objects, time concepts, expanded sentences, qualitative concepts, and spatial concepts (id.). The student also demonstrated difficulty responding to questions about hypothetical events, using adjectives to describe objects, naming objects when they were described, responding to "why" questions, naming categories and repeating sentences (id.). The evaluators characterized the student's utterances as repetitive and imitative, and further noted that in order to attend to all tasks presented, the student needed significant prompting and reinforcement (id.). The student's articulation and oral motor skills were also judged to be reduced (id.). Recommendations included five weekly individual 45-minute sessions of speech-language therapy and a reevaluation in one year to assess the student's growth and progress (id.).

On November 26, 2008, the student was described in a "School Bus Student Incident Report" as being "completely out of control" (Parent Ex. II). According to the incident report, the student took off his socks and shoes and refused to wear his seatbelt (id.). The student was described as a "jumper," and it was also noted that he refused to get on the bus (id.).

The parties proceeded to an impartial hearing on December 9, 2008, which concluded after five days of testimony on April 7, 2009 (Tr. pp. 1, 495). Both parties presented testimonial and documentary evidence at the impartial hearing (Tr. pp. 1-567; Dist. Exs. 1-7; Parent Exs. A-Z; AA-FF; II-TT). In a decision dated May 27, 2009, the impartial hearing officer denied the parents' request for tuition reimbursement and/or prospective relief for the 2008-09 school year, upon a finding that the student was offered a FAPE for the 2008-09 school year (IHO Decision at p. 14). Specifically, the impartial hearing officer determined that the June 16, 2008 IEP was developed with parent participation, and it reflected discussions and reports concerning the student (id. at p.

⁵ The hearing record reveals that the PLS-4 is intended to assess receptive and expressive language skills in infants and young children from birth to 6 years 11 months and is not standardized on a child of 7.6 years, the age of the student at the time of the evaluation (Parent Ex. F at p. 2).

12). She further found that the district met its statutory and regulatory requirements by developing the IEP in a timely fashion and by advising the parents of the school site for implementation of the IEP within the mandated timelines, while noting that the district's failure to specify the placement during the June 2008 CSE meeting did not rise to the level of a FAPE to the student (id.). With respect to the parents' claim that the district improperly failed to specify the provision of parent training on the June 2008 IEP, the impartial hearing officer determined that because the availability of parent training at the proposed school was discussed during the June 2008 CSE meeting, its omission from the challenged IEP did not impede the student's right to a FAPE (id.). Although the parents maintained that the proposed program failed to take into consideration the student's present levels of performance, the impartial hearing officer determined that the district's special education teacher and school psychologist reviewed reports from the McCarton Center, including a teacher report, speech-language evaluation report, class observation, and an OT evaluation report (id.). She further concluded that together with input from the student's mother and ABA therapist from the McCarton Center, the aforementioned reports provided a clear picture of the student's present levels of performance (id. at p. 13).

The impartial hearing officer also concluded that the FBA developed by the district was not in violation of State regulations (IHO Decision at p. 13). Furthermore, she found that the FBA developed by the district identified the student's behaviors as well as their causes and the interventions that had been previously used (id.). The impartial hearing officer also noted that the information used to develop the district's FBA/BIP was based on the school psychologist's observation of the student, discussions from the CSE meeting, and data and documentation from the McCarton Center (id.). Regarding the parents' allegations surrounding the goals enumerated in the June 2008 IEP, the impartial hearing officer opined that the testimony adduced at the impartial hearing showed that the goals were obtained directly from the student's mother, ABA therapist and his service providers' reports (id.). Next, the impartial hearing officer determined that the district's proposed 6:1+1 class was an appropriate program for the student because it offered a special education program with related services designed to meet his unique needs in a class setting with similarly situated students (id. at p. 14). Lastly, the impartial hearing officer found no evidence in the hearing record to support the parents' claim that the student required a home-based program as a necessary component of a FAPE (id.).

The parents appeal, and seek a reversal of the impartial hearing officer's decision. The parents argue that the June 16, 2008 IEP was procedurally and substantively deficient, and therefore, the student was denied a FAPE. In particular, the parents raise, among other things, the following assertions: (1) that the impartial hearing officer erred in determining that the failure to specify a placement on the IEP did not result in a denial of a FAPE; (2) that the placement recommendation was impermissibly predetermined by a district placement officer; (3) that the June 2008 IEP was deficient because it failed to address the provision of parent training and counseling; (4) that the goals and objectives enumerated in the June 2008 IEP and methods of measurement were not individualized; (5) that the proposed program was not individualized; (6) that the June 2008 IEP failed to provide the student with after-school support; (7) that the June 2008 IEP failed to develop an appropriate transition plan to address the student's change from a 1:1 setting to a 6:1+1 setting; and (8) the district failed to develop an adequate FBA. The parents further allege that the impartial hearing officer gave unwarranted credit to the district's witnesses while ignoring the parents' witnesses. Next, the parents argue that the student's program at the McCarton Center in conjunction with his home-based program was appropriate to meet his special

education needs. Finally, the parents maintain that equitable considerations support their claim for relief.

The district submitted an answer in which it requested that the impartial hearing officer's decision be upheld, and that the parents' petition be dismissed in its entirety. First, the district argues that the impartial hearing officer properly determined that during the 2008-09 school year, the student was offered a FAPE. The district makes the following arguments, among other things: (1) that the June 2008 IEP was developed by a properly composed CSE; (2) that the June 2008 CSE reviewed and discussed reports from the McCarton Center, in addition to its own classroom observation report concerning the student; (3) that the June 2008 CSE created individualized goals and behavior management strategies designed to appropriately address the student's needs; (4) that each goal enumerated in the June 2008 IEP was discussed for 10-15 minutes at the CSE meeting; and (5) that the goals were also based on reports from the student's related services providers from the McCarton Center. Substantively, the district raises, among other things, the following allegations: (1) that the challenged IEP was reasonably calculated to meet the student's individual needs because the June 2008 CSE determined that a 12-month program in 6:1+1 classroom combined with related services consisting of OT, speech-language therapy, and PT would address the student's needs in the least restrictive environment (LRE) while preventing substantial regression in the student's primary areas of deficit; (2) that in order to help the student transition from a 1:1 program into a 6:1+1 program, the June 2008 CSE recommended the provision of a 1:1 behavior management paraprofessional for the student; (3) that the June 2008 CSE incorporated recommendations from the student's McCarton Center ABA progress report into the IEP; and (4) that the June 2008 CSE also addressed the student's academic management needs, which would in turn provide support and guidance to the student's classroom teacher. The district also contends that the June 2008 CSE developed an FBA and a BIP that complied with State regulations, and was based directly on the McCarton Center's evaluations and behavior reduction plans. Next, the district asserts that the provision of parent counseling and training was discussed during the June 2008 CSE meeting. Regarding parent counseling and training, the district further maintains that the June 2008 CSE advised the parents to discuss their specific parent counseling and training needs with the proposed school. The district adds that the student's proposed school offered individualized parent training. Lastly, the district contends that the proposed school could have successfully implemented the student's IEP, and contrary to the parents' assertions, the failure to specify the placement on the IEP did not rise to the level of a denial of a FAPE to the student. In the alternative, the district argues that it was not required to offer the student a placement recommendation because the parents rejected the June 2008 CSE's program recommendation outright.

With respect to the parents' unilateral placement, the district argues that the parents failed to establish the appropriateness of the private placement for the following reasons: (1) the McCarton Center did not address the student's academic issues; (2) the individual program that the student received at McCarton was overly restrictive; (3) the student did not receive all of the necessary related services at the McCarton Center; (4) the hearing record fails to demonstrate that the McCarton Center was specifically designed to meet the student's unique needs; (5) the hearing record fails to offer specific examples of progress that the student achieved as a result of the program at the McCarton Center; and (6) the parents failed to offer any evidence showing that the student required a home-based ABA program. The district also argues that equitable

considerations weigh against the parents' request for relief. Finally, the district seeks recoupment of monies expended under pendency.

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., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if a procedural violation is alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 252-53 [2d Cir. 2009]; R.R. v. Scarsdale Union Free Sch. Dist., 2009 WL 1360980, at *9 [S.D.N.Y. May 15, 2009]; M.C. v. Rye Neck Union Free Sch. Dist., 2008 WL 4449338, at *11 [S.D.N.Y. Sept. 29, 2008]; see also 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 P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must

also be provided in the 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 Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs (34 C.F.R. § 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. Dep't of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008]), establishes annual goals related to those needs (34 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).

The IDEA requires that an IEP be in effect at the beginning of each school year (20 U.S.C. § 1414[d][2]; 34 C.F.R. § 300.323[a]; see Cerra, 427 F.3d at 194; Tarlowe, 2008 WL 2736027, at *6; Bettinger v. New York City Bd. of Educ., 2007 WL 428560, at *8 n.26 [S.D.N.Y. Nov. 20, 2007]).

The assignment of a particular school is an administrative decision, provided it is made in conformance with the CSE's educational placement recommendation (White v. Ascension Parish Sch. Bd., 343 F.3d 373, 379 [5th Cir. 2003]; see Veazey v. Ascension Parish Sch. Bd., 2005 WL 19496 [5th Cir. Jan. 5, 2005]; A.W. v. Fairfax Co. Sch. Bd., 372 F.3d 674, 682 [4th Cir. 2004]; Concerned Parents & Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751, 756 [2d Cir. 1980]; Tarlowe, 2008 WL 2736027, at *6; K.Y. v. Dep't of Educ., 2008 U.S. Dist. LEXIS 89827, 51 IDELR 78; Application of a Student with a Disability, Appeal No. 08-103; Application of a Child with a Disability, Appeal No. 07-049; Application of the Bd. of Educ., Appeal No. 99-90; Application of a Child with a Disability, Appeal No. 96-51; Application of a Child with a Disability, Appeal No. 93-5; but see A.K. v. Alexandria City Sch. Bd., 484 F.3d 672 [4th Cir. 2007]). The United States Department of Education (USDOE) has noted that it "referred to 'placement' as points along the continuum of placement options available for a child with a disability,⁶ and 'location' as the physical surrounding, such as the classroom, in which a child with a disability receives special education and related services" (Placements, 71 Fed. Reg. 46588 [August 14, 2006]).⁷ This view is consistent with the opinion of the USDOE's Office of Special Education Programs (OSEP), which indicates that the

⁶ See 8 NYCRR 200.6 for New York State's continuum of services.

⁷ The USDOE previously discussed "location" regarding the 1997 amendments to the IDEA, which for the first time required an IEP to identify the "location" of services. In discussing this provision of the 1997 amendments, the USDOE noted that "[t]he 'location' of services in the context of an IEP generally refers to the type of environment that is the appropriate place for provision of the service. For example, is the related service to be provided in the child's regular classroom or in a resource room?" (Content of IEP, 64 Fed. Reg. 12594 [March 12, 1999]). Current provisions requiring that the location of services be identified on an IEP are found at 20 U.S.C. § 1414(d)(1)(A)(i)(VII); 34 C.F.R. § 300.320(a)(7); 8 NYCRR 200.4(d)(2)(v)(b)(7).

assignment of a particular school is an administrative decision provided it is made in conformance with the CSE's educational placement recommendation (Letter to Veazey, 37 IDELR 10 [OSEP 2001]; Application of a Child with a Disability, Appeal No. 07-049).

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 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 law 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).

I will first address a procedural matter before discussing the merits of the instant case. The parents have attached the following documents to the petition: 1) a copy of the underlying May 2009 impartial hearing officer's decision; and 2) the impartial hearing officer's January 2009 order on pendency (Pet. Exs. A-B). The district has also attached to the verified answer a copy of its October 15, 2008 response to the parents' due process complaint notice (Answer Ex. 1). Neither party has raised any objection to the introduction of the additional evidence submitted on appeal. Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an impartial hearing officer's decision if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary to enable a State Review Officer to render a decision (Application of a Student with a Disability, Appeal No. 09-063; Application of a Student with a Disability, Appeal No. 08-077; Application of a Student with a Disability, Appeal No. 08-030; Application of a Child Suspected of Having a Disability, Appeal No. 07-042; Application of a Child with a Disability, Appeal No. 06-058; Application of a Child with a Disability, Appeal No. 05-020). Under the circumstances presented herein, I will accept the additional evidence.

Returning to a discussion of the instant case, upon independent review and due consideration of the hearing record in this matter, I find that the impartial hearing officer, in a thorough and well-reasoned decision, correctly determined that the district offered the student a FAPE for the 2008-09 school year (see Cerra, 427 F.3d at 192; Application of a Student with a Disability, Appeal No. 09-049; Application of a Student with a Disability, Appeal No. 08-144). The impartial hearing officer accurately recounted the facts of the case, and set forth the proper legal standard to determine whether the district offered the student a FAPE for the 2008-09 school

year (IHO Decision at pp. 1-15). The decision shows that the impartial hearing officer carefully considered the testimonial and documentary evidence presented by both parties, and further, that she weighed the evidence in support of her conclusions and properly supported her conclusions with citations to the hearing record (id.)

Moreover, an independent review of the hearing record shows that it supports the impartial hearing officer's determination that the June 2008 IEP was procedurally and substantively appropriate (see IHO Decision at pp. 12-14). Specifically, the hearing record shows that the June 2008 IEP was developed by a properly composed CSE with meaningful parent participation (Tr. pp. 73, 78-79; Parent Ex. C at p. 2). The hearing record reflects that in addition to district personnel, the student's mother, and an additional parent member; the June 2008 CSE included the McCarton Center's assistant director of ABA services and that the CSE meeting lasted approximately two hours (Tr. pp. 74, 92, 154; Parent Ex. C at p. 2).⁸ The hearing record further demonstrates that upon discussion of other potential programs for the student, based on reports from the student's related services providers, the June 2008 CSE recommended a 12-month program in a 6:1+1 classroom with related services consisting of OT, PT, and speech-language therapy; a recommendation that was reasonably calculated to confer educational benefits to the student in the LRE (Tr. pp. 75-82; Parent Ex. C at pp. 1-2, 17). In addition, the hearing record illustrates that the June 2008 CSE recommended the provision of a 1:1 behavioral management paraprofessional for the student to facilitate the student's transition from a 1:1 environment to a 6:1+1 classroom (Tr. pp. 75-76). The June 2008 CSE determined that the 1:1 behavior management paraprofessional would provide the student with individual support, redirection, and positive reinforcement and that the small group setting and small group instruction would provide the student with opportunity for associations and relationships with peers (Tr. pp. 75-76, 182-84). Furthermore, the hearing record supports the impartial hearing officer's finding that the June 2008 CSE developed an FBA and a BIP in accordance with State regulations that was also based on multiple sources of information, including documentation from the McCarton Center (IHO Decision at p. 13; Tr. pp. 161-62; Dist. Ex. 1). The hearing record also reflects that while the district psychologist testified that she would typically conduct an FBA over several weeks, the student had been attending a private placement and therefore, the developed FBA would have been used as a baseline and amended as necessary (Tr. pp. 172-74, 176-78, 205-06). Additionally, the hearing record reveals that the provision of parent training was also discussed with the student's mother during the June 2008 CSE meeting and that the proposed placement would have provided parent training and counseling that was individualized (Tr. pp. 199-200, 238). Lastly, contrary to the parents' assertion, the assignment of a particular school is an administrative decision, provided it is made in conformance with the CSE's educational placement recommendation (see Application

⁸ Additionally, given that the hearing record does not indicate that the CSE was considering a general education program for the student, the absence of a regular education teacher did result in a denial of a FAPE to the student (Parent Ex. C at pp. 1-2, 16-17; see 34 C.F.R. § 300.321[a][2]; 8 NYCRR 200.3[a][1][ii]; see also M.M. v. New York City Dep't of Educ., 583 F. Supp. 2d 498, 506 [S.D.N.Y. Oct. 21, 2008]; Tarlowe, 2008 WL 2736027, at *3-4). Moreover, contrary to the parents' assertion, a social worker is not a mandated member of the CSE (see 34 C.F.R. §300.321[a]; 8 NYCRR 200.3[a][1]; see M.M., 583 F. Supp. 2d at 506).

of a Student with a Disability, Appeal No. 09-063). Under the circumstances, I also agree with the impartial hearing officer's determination that although a specific placement site was not listed on the student's June 2008 IEP, its omission did not significantly impede parental participation in the development of the student's IEP nor did it rise to the level of a denial of a FAPE (see IHO Decision at p. 12).

In short, based upon an independent review of the entire hearing record, I further find that the impartial hearing was conducted in a manner consistent with the requirements of due process and that there is no need to modify the determinations of the impartial hearing officer (34 C.F.R. § 300.510[b][2]; Educ. Law § 4404[2]). Therefore, I adopt the findings of fact and conclusions of law of the impartial hearing officer (see Application of a Child with a Disability, Appeal No. 06-136; Application of the Bd. of Educ., Appeal No. 03-085; Application of a Child with a Disability, Appeal No. 02-096).

As to the district's request for recoupment of the funds paid during the student's pendency placement, the IDEA and the New York State Education Law require that a student remain in his or her current educational placement, unless the student's parents and the board of education otherwise agree, during the pendency of any proceedings relating to the identification, evaluation, or placement of the student (20 U.S.C. § 1415[j]; Educ. Law §§ 4404[4], 4410[7][c]; 34 C.F.R. § 300.518[a]; 8 NYCRR 200.5[m]; see Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *20 [E.D.N.Y. Oct. 30, 2008]; Bd. of Educ. of Poughkeepsie City Sch. Dist. v. O'Shea, 353 F. Supp. 2d 449, 455-56 [S.D.N.Y. Jan. 18, 2005]; Application of the Dep't of Educ., Appeal No. 08-061; Application of a Student with a Disability, Appeal No. 08-050; Application of the Dep't of Educ., Appeal No. 08-009; Application of a Student with a Disability, Appeal No. 08-003; Application of a Student with a Disability, Appeal No. 08-001; Application of a Child with a Disability, Appeal No. 07-095; Application of a Child with a Disability, Appeal No. 07-062). In addition, during the pendency of administrative and judicial proceedings, a student remains at his current educational placement, "unless the State or local educational agency and the parents or guardian otherwise agree" (20 U.S.C. § 1415[e][3]; Educ. Law § 4404[4]; 34 C.F.R. § 300.518[a]; 8 NYCRR 200.5[m]).

While the district acknowledges that its previous requests to recoup funds it paid pursuant to pendency have been denied in prior appeals to a State Review Officer, the district asserts that the instant case is distinguishable because the parents in the instant case were represented by counsel throughout the impartial hearing process and were on actual notice prior to the first day of the impartial hearing that the district would seek reimbursement of funds. In support of its claim of entitlement to reimbursement of funds paid pursuant to pendency, the district asserts public policy and fairness considerations. I have considered the district's arguments favoring recoupment of funds paid under pendency and find them to be unpersuasive (see Application of a Student with a Disability, Appeal No. 09-032; Application of a Student with a Disability, Appeal No. 09-019; Application of a Student with a Disability, Appeal Nos. 09-008 & 09-010; Application of a Student with a Disability, Appeal No. 08-134; Application of the Dep't of Educ., Appeal No. 08-061; Application of a Child with a Disability, Appeal No. 05-091). Accordingly, I decline to order the parents to reimburse the district for costs incurred by the district in maintaining the student's pendency placement, an expense it was required to pay in order to comply with the pendency provisions of State and federal law (see Murphy v. Arlington Cent. Sch. Dist., 297 F.3d 195 [2d

Cir. 2002]; Bd. of Educ. v. Schutz, 290 F.3d 476 [2d Cir. 2002], cert. denied, 537 U.S. 1227 [2003]; see also 20 U.S.C. § 1415[j]; 34 C.F.R. § 300.51[8]; Educ. Law § 4404[4]; 8 NYCRR 200.5[m]).

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

THE APPEAL IS DISMISSED.

Dated: Albany, New York
September 10, 2009

PAUL F. KELLY
STATE REVIEW OFFICER