The University of the State of New York

The State Education Department
State Review Officer
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No. 09-079

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

Appearances:
Law Office of Anton Papakhin, PC, attorneys for petitioner, Anton G. Papakhin, Esq., of counsel

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

DECISION

Petitioner (the parent) appeals from the decision of an impartial hearing officer which denied her request that respondent (the district) fund her daughter's tuition costs at the Reach for the Stars Learning Center (RFTS) for the 2008-09 school year. The appeal must be dismissed.

At the time of the impartial hearing, the student was enrolled in RFTS in a class with four other students and five teachers in a 1:1 setting (Tr. pp. 232-33; Parent Exs. H; I). RFTS has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (Parent Ex. D; see 8 NYCRR 200.1[d], 200.7). According to the hearing record, the student is reported to have received diagnoses of a pervasive developmental disorder (PDD) and autism, and "demonstrates severe expressive, receptive and pragmatic language delays as well as oral motor delays" secondary thereto (Dist. Exs. 1; 4 at pp. 1, 5).[1] The student's eligibility for special education programs and services as a student with autism is not in dispute in this appeal (see 34 C.F.R. § 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

[1] The hearing record contains multiple duplicative exhibits. For the purposes of this decision, only District exhibits were cited in instances where both a District and a Parent exhibit were identical. It is the responsibility of the impartial hearing officer to exclude evidence that he determines to be irrelevant, immaterial, unreliable or unduly repetitious (8 NYCRR 200.5[j][3][xii][c]; see Application of a Student with a Disability, Appeal No. 09-038; Application of a Child with a Disability, Appeal No. 07-119; Application of the Bd. of Educ., Appeal No. 06-074).

According to the parent, the student was hospitalized for lead poisoning at age 3.5 years, after which the parent stated that the student became non-verbal (Tr. pp. 302-04; Dist. Ex. 4 at p. 1; see Tr. p. 357; Dist Ex. 6 at p. 1).[2] From ages 2.5 years to 4.5 years, the parent revealed that the student received home-based occupational therapy (OT), physical therapy (PT), and applied behavioral analysis (ABA) services (Tr. pp. 301-02). Since September 2005, the student has been enrolled in RFTS, where she has received OT and speech-language services, but not PT services (Tr. pp. 301-02, 357, 387-88; Dist. Exs. 4 at p. 1; 6 at p. 1).[3]

On February 3, 2008, a psychoeducational evaluation was conducted by the district (Dist. Ex. 1). The evaluator described the student as "non-verbal, demonstrating virtually no receptive and expressive language skills" (id. at p. 2). The report noted the student's difficulty focusing, need for constant supervision, and fleeting eye contact; characterized her gross motor skills as "delayed;" and reported that she was not toilet trained (id. at p. 3). Although the evaluator advised that "attempts to measure cognitive skills using the Wechsler Primary and Preschool Scale of Intelligence-Third Edition (WPPSI-III) were not possible due to her lack of language, her fleeting concentration and poor socialization skills," administration of the Vineland Adaptive Behavior Scales, Second Edition (Vineland-II) confirmed that the student's cognitive functioning "in all domains, namely, communication, daily living skills, socialization and motor skills were extremely delayed" (id.). The evaluator added that attempted administration of the Bender Visual-Motor Gestalt Test (Bender-Gestalt) demonstrated limited fine motor and visual motor skills development (id.). The evaluator concluded the report by characterizing the student as "an autistic youngster who needs constant supervision in a small … class which can also provide for her OT, PT and speech and language needs" (id. at p. 4).

On March 5, 2008, the Committee on Special Education (CSE) convened to develop an educational program for the student's 2008-09 school year (Dist. Ex. 2). In attendance were the school social worker who also acted as the district representative, the school psychologist, and a "TA" (id. at p. 2).[4] The director of RFTS, the student's current special education teacher from RFTS, the parent, and her advocate participated in the March 5, 2008 CSE meeting telephonically (id.). The resultant individualized education program (IEP) reflected that the CSE determined that the student was eligible for special education programs and services as a student with autism, and recommended a 6:1+1 special class in a special school and related services consisting of OT twice per week for 30 minutes per session in a 1:1 setting, PT twice per week for 30 minutes per session in a 1:1 setting, and speech-language therapy three times per week for 45 minutes per session in a 1:1 setting (id. at pp. 1-2, 6, 15, 17). The March 5, 2008 IEP specified that the recommendations in the IEP were to take effect on March 19, 2008 through March 20, 2009 (id. at p. 2). The IEP reflected that the student was to receive the recommended programs and services on a 12-month basis (id. at p. 1). The March 2008 IEP also contained a behavioral intervention plan (BIP) that

[2] Although the hearing record contains no documentary information regarding the student's treatment for lead poisoning, the parent testified that the student was hospitalized for ten days, underwent unspecified neurological treatment, and "became brain damaged" as a result of her lead exposure (Tr. pp. 303-04).

[3] According to the hearing record, RFTS neither has a full time physical therapist on staff nor provides PT services to its students (Tr. pp. 387-88).

[4] The hearing record does not define "TA.."

identified the student's "tantrumming [sic], putting pressure on her eyes, [and] self-injurious behavior," which would be addressed through a token system (id. at p. 18).[5]

On May 21, 2008, the district forwarded a Final Notice of Recommendation (FNR) to the parent, recommending placement of the student in a specific special class in a district special school in accordance with the March 5, 2008 IEP (Dist. Ex. 3). The district advised the parent that if it did not hear from her before June 5, 2008, it would effectuate the recommended placement (id.).[6]

On June 24, 2008, RFTS conducted its annual speech-language evaluation of the student (Dist. Ex. 4). The evaluator opined that the student exhibited "severe receptive, expressive, and pragmatic language delays as well as oral motor delays secondary to her diagnosis of PDD/Autism," and recommended speech-language therapy five times weekly, 60 minutes per session (id. at p. 5).

On July 25, 2008, RFTS issued an educational progress report relative to the student (Dist. Ex. 5). The report acknowledged progress across all target areas, including communication, cognition, activities of daily living, and social and play skills (id.). However, the evaluator noted the persistence of self-injurious (such as "eye poking") and self-stimulatory (such as "flicking" and tapping on surfaces, and unspecified visual and vocal stimulations) behaviors, and observed that the student continued to exhibit "delays in cognition, communication, social play, and activities of daily living," and strongly recommended continuing her educational program in a 1:1 model "to increase [her] abilities" and "to help her develop attention and behavioral controls" (id. at pp. 1, 4-5).

On July 28, 2008, RFTS conducted an OT evaluation of the student (Dist. Ex. 6). The evaluators observed "significant sensory processing and regulatory deficits as well as gross and fine motor acquisition skills" (id. at p. 5). The evaluators strongly recommended that the student receive OT services five times per week for 45 minutes per session in a 1:1 setting (id.).

On August 15, 2008, the parent, through her advocate, forwarded correspondence to the district rejecting the district's recommended placement and advising the district that she intended to enroll the student at RFTS for the 2008-09 school year and that she would be seeking "reimbursement and/or direct payment for the [student's] tuition for the 2008-09 school year" (Parent Ex. M). Three days later, on August 18, 2008, the parent executed an enrollment contract

[5] According to the hearing record, the March 5, 2008 CSE reviewed the February 3, 2008 psychoeducational evaluation (Dist. Ex. 1) and speech-language and occupational goals that were prepared by RFTS and forwarded to the CSE (Tr. pp. 59-61; see Dist. Ex. 2 at pp. 11-14).

[6] The FNR contained in the hearing record contains a handwritten notation which reads "I visited the recommended placement and did not find it appropriate for [the student]. I will be enrolling the student in [RFTS] and will be requesting an impartial hearing" (Dist. Ex. 3). The document does not include a signature below the notation or any indication of the author. The parent testified that she visited the recommended placement "I think, maybe June [2008]," accompanied by her husband and the director of RFTS (Tr. pp. 306-08, 320-21), but the transcript is unclear as to whether or not the parent authored the notation on the FNR. The director of RFTS confirmed that she accompanied the parent on her visit to the recommended placement (Tr. pp. 374-75), but denied writing the notation on the May 21, 2008 FNR (Tr. p. 381).

with RFTS covering the student's 2008-09 school year (Parent Ex. E). The student began the 2008-09 school year at RFTS on September 8, 2008 (Parent Ex. J).[7]

On November 19, 2008, the district conducted an assistive technology evaluation of the student (Dist. Ex. 7). The evaluative report indicated that the evaluation, which was requested by a supervisor of speech-language pathologists at RFTS, was intended to "determine whether or not [the student] requires an upgrade in her augmentative communication device in order to meet her current IEP goals, and if so, what type of device would best meet her educational and community needs" (id. at p. 1; see Tr. p. 288). The evaluators assessed the student's ability to utilize a "mini-mo voice output communication aid" (VOCA) (Dist. Ex. 7 at pp. 1-3).[8] The evaluators concluded that the student "demonstrated the ability to effectively use a dynamic display voice output communication aid using direct selection," as well as "the ability to become increasingly independent with the use of such a device, given the appropriate supportive environment" (id. at p. 3). In consideration of the foregoing, the evaluators surmised that the current "low tech solutions do not meet [the student's] needs. She demonstrated higher level receptive language abilities and good understanding of categorization and navigation" (id.). Consequently, the evaluators opined that "[b]ased on the findings of this evaluation and interviews with school staff it is recommended that [the student] requires the use of new dynamic display VOCA to access her curriculum and make her wants/needs known clearly to peers and staff" (id.). The evaluators further recommended that assistive technology be added to the student's IEP, and that the district procure a DynaVox V for the student's use in the recommended placement (id. at pp. 4-6).

On November 26, 2008, the parent, through her advocate, filed her due process complaint notice with the district (Parent Ex. A). She alleged therein that the district failed to offer the student a free appropriate public education (FAPE)[9] for the 2008-09 school year, insofar as the CSE allegedly failed to develop an IEP "reasonably calculated to allow the student to achieve academic, social and emotional progress" (id. at p. 1). The parent indicated that she had received an FNR from the district, visited the recommended 6:1+1 placement, and rejected it because she "was informed that this program could not provide one to one education for her daughter during the entire school day," and because the student "requires one to one teaching across all domains to master any skill" (id. at p. 2). She further alleged that the BIP contained in the March 5, 2008 IEP was insufficient to modify the student's severe behavior and that the annual goals contained in the

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[7] The hearing record contains an IEP prepared by RFTS staff and agreed to by the parent on September 24, 2008 (Parent Ex. N). The hearing record demonstrates that during the 2008-09 school year at RFTS, the student received speech-language therapy five times per week for 60 minutes per session in a 1:1 setting (Dist. Ex. 4 at p. 1), ABA instruction for 20 hours per week in a 1:1 setting (Tr. pp. 351-52; Dist. Ex. 5 at pp. 1-3, 5; see Dist. Ex. 7 at p. 1), and OT five times per week for 45 minutes per session in a 1:1 setting (Dist. Ex. 6 at p. 1).

[8] According to the hearing record, at RFTS, the student "makes her wants and needs known through the aid of an augmentative and alternative communication system … called a DynaVox V," described as a "high technology form of augmentative equipment in order to make her needs and wants known to the classroom, as well as occasional gestures" (Tr. p. 292). The student's speech-language pathologist at RFTS elaborated that "the DynaVox V is considered a higher tech system within the field of augmentative communication" (id.).

[9] The term "free appropriate public education" means special education and related services that—

(A) have been provided at public expense, under public supervision and direction, and without charge;

(B) meet the standards of the State educational agency;

(C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and

(D) are provided in conformity with the individualized education program required under section 1414(d) of this title.(20 U.S.C. § 1401[9]; see also 34 C.F.R. § 300.17).

IEP were inappropriate, were not related to the student's present functioning, and were not targeted to modify her behavior (id.). The parent again informed the district that she re-enrolled the student in RFTS for the 2008-09 school year and requested the following relief: (1) reimbursement for the student's 2008-09 tuition at RFTS, or, in the alternative, funding directly to RFTS for the 2008-09 school year; (2)an agreement by the district to provide the student with the related services enumerated on her last agreed upon IEP;[10] and (3) an agreement by the district to provide the student with bus transportation to and from RFTS for the 2008-09 school year (id.).

On December 18, 2008, the district conducted a classroom observation of the student at RFTS (Dist. Ex. 9). The observer reported that the student "pokes her eyes, bangs her head and throws herself backwards onto the floor. She is self-injurious and aggressive to others. She jumps, gallops and flaps" (id.). The student required considerable prompting, redirection, and repetition of instructions (id.). She was instructed several times to use her "communication device," which she ultimately used to inform the teacher that she desired to eat cereal (id.). However, the observer noted that the program director at RFTS advised that the student "has been in the program since 2005" and "has made a lot of progress particularly with her behavior" (id.).

Also on December 18, 2008, the CSE reconvened to revise the March 5, 2008 IEP (Dist. Ex. 8). In attendance were the district special education teacher who also acted as the district representative, the school psychologist, the school social worker, and an additional parent member (id. at p. 2). A "therapist"/regular education teacher, the director of programs at RFTS, the student's speech-language pathologist at RFTS, the parent, and her advocate participated telephonically (id.). The December 18, 2008 CSE continued the student's classification as a student with autism and recommended a 6:1+1 special class in a "specialized school (District 75),"[11] with an effective date of January 13, 2009, related services consisting of OT twice per week for 30 minutes per session in a 1:1 setting, PT twice per week for 30 minutes per session in a 1:1 setting, and speech-language therapy three times per week for 45 minutes per session in a 1:1 setting, and the use of assistive technology in the form of the DynaVox V device (id. at pp. 1-2, 5, 14-16). The December 18, 2008 IEP included a BIP, which noted the student's "self-stimulating behaviors: flicking, tapping, vocalizations," as well as "self-injurious behaviors: eye poking, head hitting" and attention difficulties and aggression toward others, and recommended "positive reinforcement of appropriate behaviors, token economy, repetition and modeling" to address these behaviors (id. at p. 17). The IEP reflected that the student was to receive the recommended programs and services on a 12-month basis (id. at p. 1).

On January 30, 2009, RFTS generated an OT progress report relative to the student (Parent Ex. O). Although acknowledging continuous progress in all target areas, the evaluators commented that the student displayed "significant difficulty in sensory processing self-regulation, which inhibit[ed] interaction with other[s], learning in a classroom environment and attend[ing] to various functional activities" (id. at p. 6). The evaluators opined that the student required therapeutic intervention to address her deficits in gross, fine, and visual motor skills and to increase her independence in self-care skills (id.). The evaluators "strongly recommended" continued OT

[10] The only district IEPs contained in the hearing record are those dated March 5, 2008 (Dist. Ex. 2) and December 18, 2008 (Dist. Ex. 8). There is no evidence in the hearing record that the parent agreed to the terms of the March 5, 2008 IEP.

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

five times per week for 45 minutes per session "to enhance necessary skill development to reach important age appropriate milestones" (id.)

An impartial hearing convened on March 20, 2009 and concluded on May 15, 2009, after four days of testimony. In a decision dated June 3, 2009, the impartial hearing officer determined that with respect to the issues of tuition reimbursement and direct funding of the student's tuition at RFTS for the 2008-09 school year, the parent lacked requisite standing to seek such relief, and he dismissed both claims without reaching the merits (IHO Decision at pp. 7-9). Regarding tuition reimbursement, the impartial hearing officer posited that the hearing record did not demonstrate that the parent had either paid anything to RFTS for her daughter's education for the 2008-09 school year, or that the parent was in any way obligated to do so (id. at p. 7). Therefore, he dismissed the parent's tuition reimbursement claim (id.).[12]

With respect to the parent's request for an award of direct retrospective funding to the private school, the impartial hearing officer reasoned, under equitable principles, that the facts of this case did not warrant such an award (IHO Decision at pp. 7-8). Furthermore, the impartial hearing officer determined that the parent "had incurred no financial risk or obligation in connection with her placement of the [s]tudent at [RFTS]" and it was "clearly evident" that RFTS had chosen to provide an educational placement to the student in the hopes that the district would fund the placement (id. at p. 8). He reasoned, therefore, that it was RFTS, not the parent that "is the real party in interest in this proceeding and the only party to benefit from a decision favorable to the parent" (id.). However, the impartial hearing officer noted that under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482), the right to seek legal recourse is limited to the disabled student and their parents, and "[a]ny award of retrospective tuition to [RFTS] would impermissibly extend the benefits of such legislation to parties unintended" (id. at pp. 8-9). Accordingly, he dismissed the parent's claim for direct funding to RFTS (id. at pp. 7-9).

The impartial hearing officer next addressed the issues of related services and transportation. He denied both of the parent's requests, because the parent's testimony confirmed that the "[s]tudent received some [r]elated [s]ervices after school, paid for by the [district], and received others as part of her program at [RFTS], which will not be duplicated," and because the hearing record did not address the issue of transportation (IHO Decision at p. 9).

The parent appeals, and requests as relief reversal of the impartial hearing officer's June 3, 2009 decision, and either a remand of the case for consideration of the claims adduced in the due process complaint notice on the merits, or a review of the merits of the parent's claims by a State Review Officer and an order directing the district to retrospectively pay the costs of the student's tuition for the 2008-09 school year directly to RFTS.[13] In support of her petition, the parent alleges, among other things, that the impartial hearing officer's dismissal of the due process complaint notice without reaching the merits of her direct funding claim for the 2008-09 school year was erroneous because: (1) the impartial hearing officer ignored that a parent has legal

[12] In responding, in part, to the parent's argument, the impartial hearing officer noted, "[t]he Connors decision has been seized upon and applied inappropriately on numerous occasions, despite the fact that it was a decision rendered by a court of original jurisdiction, has never been reviewed by a higher court and is quoted only for its dicta comment. I will give it no more consideration than that to which it is entitled" (IHO Decision at p. 8).

[13] Although represented by a non-attorney advocate at the impartial hearing, the parent is represented by an attorney on appeal.

standing to pursue a claim for direct funding independent of the parent's financial stake in obtaining payment by the district; and (2) the impartial hearing officer mistakenly asserted that the parent was not legally obligated by the enrollment contract to pay tuition at RFTS for the student's 2008-09 school year, and the contract's failure to specify particular date(s) upon which payment was due neither invalidated the contract nor extinguished her obligation.

Next, the parent alleges that the district deprived the student of a FAPE during the 2008-09 school year because the March 5, 2008 IEP was not reasonably calculated to confer an educational benefits upon the student, in that: (1) the March 5, 2008 CSE lacked sufficient evaluative information upon which to develop an adequate IEP because the CSE failed to conduct a speech-language evaluation of the student prior to the CSE meeting; it failed to include the student's speech-language therapist from RFTS at the CSE meeting; it failed to properly assess the student's communication needs; it failed to conduct an assistive technology evaluation prior to the CSE meeting; it failed to identify and address the student's emotional and behavioral needs, in that it failed to conduct a formal classroom observation of the student prior to the CSE meeting; it failed to perform a functional behavioral assessment (FBA); it did not develop the student's BIP until after the CSE meeting; and it developed the student's annual goals before and after the CSE meeting, but not during the CSE meeting; (2) the 6:1+1 special class recommended by the district in its May 21, 2008 FNR was inappropriate because it failed to suitably group the student for instructional purposes with students of similar needs and abilities; and (3) the hearing record established that the student was unable to function independently, required much more individual attention than the recommended 6:1+1 class could provide, and that the student learned best in a 1:1 ABA setting, an option which the district did not offer.

The parent further maintains that RFTS is an appropriate placement for the student, because: (1) it is a special school for students with autism in which each student is taught on a 1:1 basis for the entire school day, with either an ABA-trained teacher, speech-language pathologist, or occupational therapist; (2) the student is suitably grouped with four other students, all of whom are within two years of the student's age, all with autism, and with five teachers in the class; (3) the student's progress made during the 2008-09 school year was corroborated by witnesses produced during the impartial hearing; and (4) RFTS provides the student with a 1:1 teacher or therapist at all times during the day and staff who are appropriately trained.

Lastly, the parent argues that the equities favor her in this case, contending that she cooperated fully with the CSE, visited the proposed placement, and provided timely notice to the district of her rejection of the placement and her intentions to enroll the student at RFTS and to seek tuition payment directly to RFTS.

The district answers, countering that the impartial hearing officer correctly held that the parent is not entitled to direct funding relief because she has not incurred any out-of-pocket expenses in connection with the student's placement at RFTS. Second, the district alleges that the parent is not entitled to direct funding because equitable considerations do not favor her, in that the parent failed to provide the district with requisite notice of her intention to enroll the student at RFTS at public expense.

The parent did not appeal the impartial hearing officer's determinations and dismissals with respect to her claims for related services and transportation expenses for the student's 2008-09 school year at RFTS (IHO Decision at p. 9). Therefore, those aspects of the decision are final and binding on the parties (34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[j][5]; see Application of the Bd.

of Educ., Appeal No. 09-057; Application of a Student with a Disability, Appeal No. 09-013; Application of a Student with a Disability, Appeal No. 08-073; Application of a Student with a Disability, Appeal No. 08-046; Application of the Dep't of Educ., Appeal No. 08-025; Application of a Student with a Disability, Appeal No. 08-013; Application of a Child with a Disability, Appeal No. 07-050; Application of a Child with a Disability, Appeal No. 07-026; Application of a Child Suspected of Having a Disability, Appeal No. 06-092; Application of a Child with a Disability, Appeal No. 06-085; Application of a Child with a Disability, Appeal No. 04-024; Application of a Child with a Disability, Appeal No. 03-108; Application of a Child with a Disability, Appeal No. 02-100).

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). While school districts are required to comply with all IDEA procedures, not all procedural errors render an IEP legally inadequate under the IDEA (A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if a procedural violation is alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an impartial hearing officer's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 130 [2d Cir. 1998]; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see 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 least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see 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]; see 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).

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 (Forest Grove Sch. Dist. v. T.A., 129 S. Ct. 2484, 2485 [2009]; 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).

Turning first to the dismissal of the parent's tuition reimbursement claim, it is well settled that parents who choose to unilaterally place their child at a private school without consent or referral by the school district do so at their own financial risk (Carter, 510 U.S. at 15; Burlington, 471 U.S. at 373-74; see Forest Grove, 129 S. Ct. at 2496). The United States Supreme Court in Burlington held that retroactive reimbursement of private educational expenses is appropriate as an available remedy under the IDEA (Burlington, 471 U.S. at pp. 370-71; see Carter, 510 U.S. at 14-15; see also Gagliardo, 489 F.3d at 111 [2d Cir. 2007] [explaining that parents who believe that

their child has been denied a FAPE may, at their own financial risk, enroll the child in a private school and seek retroactive reimbursement for the cost of the private school]; Diaz-Fonseca v. Commonwealth of Puerto Rico, 451 F.3d 13, 32, 40 [1st Cir. 2006] [concluding that reimbursement under the IDEA allows parents to recover only actual, not anticipated, expenses for private school tuition and related expenses]; Cerra, 427 F.3d at 192 [noting the availability of "retroactive tuition reimbursement" under the IDEA]; Muller v. Comm. on Special Educ. of East Islip, 145 F.3d 95, 106 [2d Cir. 1998] [holding that compensation for "out of pocket expenses" was appropriate]; Streck v. Bd. of Educ., 2009 WL 2163090, at * 2 [N.D.N.Y. July 17, 2009]; see generally Emery v. Roanoke City Sch. Bd., 432 F.3d 294, 299 [4th Cir. 2005]). While the IDEA provides that a court shall grant such relief that is determined to be appropriate (20 U.S.C. § 1415[i][2][C][iii]; Forest Grove, 129 S. Ct. at 2488), the IDEA does not expressly provide for payment of tuition costs in the circumstance herein. The IDEA does provide that "a court or a hearing officer may require the [school district] to reimburse the parents for the cost of [private school] enrollment if the court or hearing officer finds that the [school district] had not made a [FAPE] available to the child in a timely manner prior to that enrollment" (emphasis added) (20 U.S.C. § 1412[a][10][C][ii]; see 34 C.F.R. § 300.148[c]; see also Application of the Dep't of Educ., Appeal No. 09-001; Application of the Dep't of Educ., Appeal No. 07-032; Application of a Student with a Disability, Appeal No. 08-050; Application of the Bd. of Educ., Appeal No. 04-037).[14]

The hearing record reflects that for the 2008-09 school year, the student's parents entered into an enrollment contract with RFTS applicable to the 2008-09 school year, in which the parents agreed to "assume, jointly and severally, complete financial responsibility for the enrollment of the [student] in [RFTS] for the year 2008-09 and agree to pay when due the Annual Tuition and Fees, as detailed below" (Parent Ex. E at p. 1). The enrollment contract further provides that "[t]he undersigned each understands that payment of Annual Tuition and Fees is a condition of enrollment, and that the School may revoke this Enrollment Contract and suspend or terminate the [student's] enrollment for non-payment or untimely payment," and "[t]he undersigned each understands and agrees that the School, at its sole discretion, shall be entitled to recover from us jointly and several[ly] the reasonable fees and expenses of the School's counsel incurred in connection with the enforcement of the terms and conditions of this Contract" (id. at pp. 2-3).

However, those portions of the enrollment contract calling for a deposit and outlining a payment schedule were left blank (Parent Ex. E at p. 1). Additionally, an affidavit provided by the co-director of RFTS dated November 12, 2008 and introduced into evidence at the impartial hearing by the parent, states that "[n]o tuition has been received for [the student] in accordance with an agreement that [the student's parents] would contact an advocate or attorney and seek funding under Connor's provisions" (Parent Ex. D). During the impartial hearing, the parent testified that she does not pay tuition at RFTS, because "We can't provide, we don't have that money to pay the school" (Tr. p. 314). She added that RFTS did not confer any scholarship or

[14] I do note; however, that the United States Court of Appeals for the Second Circuit has determined that under the pendency doctrine, school districts may be required to directly fund pendency placements (see Bd. of Educ. v. Schutz, 290 F.3d 476, 482-84 [2d Cir. 2002]; Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ., 297 F.3d 195, 200-01 [2d Cir. 2002]), and that courts have awarded "prospective payment" to afford access to compensatory education (see, e.g., Streck v. Bd. of Educ., 2008 WL 2229141[2d Cir. May 30, 2008]; Draper v. Atlanta Indep. Sch. System, 518 F.3d 1275, 1286 (11th Cir. 2008). Moreover, a public agency may, under certain circumstances, place a student in an approved private school, however if it does so, the placement must be a public expense and meet state standards (20 U.S.C. §1412[a][10][B]).

other form of financial aid upon the student for the 2008-09 school year (Tr. pp. 315-16), and acknowledged the existence of an agreement with RFTS under which she would seek recovery of the student's tuition for the 2008-09 school year from the district (Tr. pp. 318-19). There is no evidence in the hearing record indicating that the parents have made any payments to RFTS, that RFTS has ever sought payment of the student's tuition for the 2008-09 school year from the parents, or that it has any intention of doing so (see S.W. v. New York City Dep't of Educ., 2009 WL 857549, at *8-*9 [S.D.N.Y. March 30, 2009]). Because the hearing record demonstrates that the parent has not paid any tuition or incurred out-of-pocket expenses, under the circumstances of the instant appeal, I concur with the impartial hearing officer's conclusion that the parent does not have standing to seek tuition reimbursement or retrospective relief on behalf of the private placement.[15]

With respect to the dismissal of the parent's claim for direct funding to RFTS for the 2008-09 school year, the evidence contained in the hearing record supports the impartial hearing officer's conclusion that it was RFTS, not the parent, who incurred the financial burden associated with the student's education for the 2008-09 school year (see S.W., 2009 WL 857549, at *7-*9 [parent had no financial standing to sue for direct retrospective payment to private placement where terms of enrollment contract absolved her of responsibility for paying tuition]). However, RFTS is not a party in this case and is, therefore, not entitled to relief under the IDEA. While the parent here has standing to bring a complaint asserting that a FAPE has been denied,[16] the parent cannot assert a claim for the particular relief she has requested on behalf of a private entity that lacks standing under the IDEA to maintain a claim against a school district in its own right (see Emery, 432 F.3d at 299; Piedmont Behavioral Health Center LLC v. Stewart, 413 F. Supp. 2d 746, 755-56 [S.D. W.Va. 2006]; see also Malone v. Nielson, 474 F.3d 934, 937 [7th Cir. 2007]).

The parent maintains that she is entitled to direct funding under Connors v. Mills, 34 F. Supp. 2d 795, 805-06 (N.D.N.Y. 1998). However, in Connors, the Court dismissed the parents' claim for tuition and in dicta,[17] discussed the concept of "prospective" tuition payment after the Court made a finding that the school district conceded that it could not provide an appropriate education for the student and that the private placement could (34 F. Supp. 2d at 806). In the case at bar, the district has conceded neither that it failed to offer the student a FAPE for the 2008-09

[15] I note that even if the parent had standing to seek tuition reimbursement, her advocate apparently utilized a standard form to provide notice to districts of parental unilateral placement (Parent Ex. M). The form used in this matter stated "the student's parent could not observe the recommended placement because the school was not in session, and/or the Committee did not offer their child a placement; and/or the Committee failed to conduct a timely annual review and draft an IEP, and/or visited the program and did not find it appropriate" (id.; see 20 U.S.C. § 1412[a][10][C][iii][I][aa]). The notice requirement of 20 U.S.C. § 1412 "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). The notice in this matter provided the district notice of the unilateral placement intended at public expense, but it did not give adequate notice of the parents' procedural or substantive concerns with the proposed IEP. Whether under 20 U.S.C. § 1412 notice requirements, or general equity principles regarding notice (see Frank G. 459 F. 3d. 356, 376), the notice did not adequately inform the district of the parent's concerns (see Application of a Student with a Disability, Appeal No. 08-088).

[16] S.W., 2009 WL 857549, at *9-*10.

[17] S.W., 2009 WL 857549, at *10.

school year, nor that the parent's unilateral placement at RFTS was appropriate for the student.[18] Furthermore, I find that the other cases cited by the parent are distinguishable from this case and fail to support her claim for relief. Based upon the foregoing, I concur with the impartial hearing officer's determination that the parent was not entitled to direct funding of tuition at RFTS for the 2008-09 school year (20 U.S.C. § 1412[a][10][C][ii]; 34 C.F.R. § 300.403[c]; see generally Burlington, 471 U.S. 359; Carter, 510 U.S. 7; A.A. v. Bd. of Educ., 196 F. Supp. 2d 259 [E.D.N.Y. 2002]; Application of the Dep't of Educ., Appeal No. 09-001; Application of a Student with a Disability, Appeal No. 08-050; Application of the Dep't. of Educ., Appeal No. 07-032; Application of the Bd. of Educ., Appeal No. 04-037).

Although I agree with the impartial hearing officer's decision that the parent lacked standing to request tuition for the student's attendance at RFTS during the 2008-09 school year, I will consider the parent's allegation that the district did not offer the student a FAPE during the 2008-09 school year. As an initial matter, I note that the parent alleges several deficiencies in connection with the March 5, 2008 CSE's development of an IEP for the student's 2008-09 school year that were neither specifically raised in her November 26, 2008 due process complaint notice, nor during the impartial hearing, including: (1) the CSE's alleged lack of sufficient evaluative information upon which to develop an appropriate IEP; (2) its alleged failure to conduct a speech-language evaluation of the student prior to the CSE meeting; (3) its alleged failure to include the student's speech-language therapist from RFTS as a participant in the CSE meeting; (4) its alleged failure to properly assess the student's communication needs; (5) its alleged failure to conduct an assistive technology evaluation prior to the CSE meeting;[19] (6) its alleged failure to identify and address the student's emotional and behavioral needs through its alleged failure to conduct a classroom observation of the student prior to the CSE meeting;[20] (7) its alleged failure to conduct an FBA; and (8) its alleged failure to develop the student's BIP until after the CSE meeting. Consequently, I find that these claims and allegations regarding the development of the March 5, 2008 IEP are not properly before me, as they were not identified in the parent's due process complaint notice, are raised for the first time on appeal, and are thus beyond the scope of review (see A.B. v. San Francisco Unified Sch. Dist., 2008 WL 4773417, at *9 [N.D. Cal. Oct. 30, 2008]; Saki v. Hawaii, 2008 WL 1912442, at *6-*7 [D. Hawaii April 30, 2008]; Application of a Student with a Disability, Appeal Nos. 09-008 & 09-010; Application of the Dep't of Educ., Appeal No. 08-122; Application of a Student Suspected of Having a Disability, Appeal No. 08-100; Application of the Bd. of Educ., Appeal No. 08-029; Application of a Student with a Disability, Appeal No. 08-008; Application of a Child with a Disability, Appeal No. 07-122; Application of a Child with a Disability, Appeal No. 07-051; Application of a Child with a Disability, Appeal No. 07-008; Application of a Child with a Disability, Appeal No. 06-046; Application of a Child with a Disability, Appeal No. 06-039; Application of a Child with a Disability, Appeal No. 05-080;

[18] The impartial hearing officer's decision stated that "In [Connors], the Court therein noted, albeit in dicta, the possibility of finding equitable justification for ordering *prospective* payment of tuition by the District to a parent's unilaterally-selected facility when, *except for such intervention*, a disabled student could not gain entry into such unilaterally-selected placement" (IHO Decision at p. 8) (emphasis in original). As the impartial hearing officer inferred,, retrospective tuition is sought in this case, not prospective funding (id.).

[19] The hearing record evidences that the district conducted an assistive technology evaluation on November 19, 2008, one week prior to the filing of the parent's due process complaint notice and one month prior to the December 18, 2008 CSE meeting (Dist. Ex. 7).

[20] The hearing record evidences that the district conducted a classroom observation of the student on December 18, 2008; the same day as the December 18, 2008 CSE meeting (Dist. Ex. 9).

Application of a Child with a Disability, Appeal No. 04-043; Application of a Child with a Disability, Appeal No. 04-019; Application of the Bd. of Educ., Appeal No. 02-024).

The hearing record evidences that in assessing the student's present performance levels of performance, the March 5, 2008 CSE considered the February 3, 2008 psychoeducational evaluation conducted by the district, and goals submitted to the CSE from the student's speech-language and OT providers at RFTS (Tr. pp. 29, 60; see Dist. Exs. 1; 2 at pp. 4, 7-14).[21] A review of the resultant IEP illustrates that the CSE incorporated the information provided in the psychoeducational evaluation, as both pieces of documentary evidence consistently reflected that the student was nonverbal and that her present levels of performance and learning characteristics were characterized by extreme deficits specific to receptive and expressive language, social/emotional skills, academics, cognitive skills, attention and need for constant supervision, and dependence on others for all daily living skills, including toileting (Tr. pp. 32-35; Dist. Exs. 1 at pp. 1-4; 2 at pp. 1, 3-6).

In consideration of the student's present levels of performance and learning characteristics, the March 5, 2008 CSE acknowledged the student's need for "a small segregated class" that would address her array of deficits as noted above, her behaviors associated with autism, including her need for "intense supervision," adapted physical education, and related services of OT, PT, and speech-language therapy (Tr. p. 34; Dist. Ex. 2 at pp. 4-6). The district's social worker testified that the CSE attempted on previous occasions to secure a copy of a BIP developed by RFTS personnel addressing the student's social and behavioral needs, but when such efforts were unsuccessful, "we wrote one to the best of our ability after the meeting had taken place based on discussions at the meeting" (Tr. pp. 35-37; see Dist. Ex. 2 at p. 18).

The annual goals and short-term objectives[22] contained in the March 5, 2008 IEP addressed the student's needs regarding toileting; participation in adapted physical education commensurate with her age and physical abilities; self-help skills specific to eating, grooming, and dressing; improving of gross and fine motor skills; increasing receptive and expressive language skills;[23] and increasing her ability to use sensory information to understand and effectively interact with people and objects in school and home environments (Dist. Ex. 2 at pp. 7-14). The district's social worker advised that some of the goals were submitted by RFTS and others were drafted by CSE participants after the CSE identified areas of need to be addressed in the recommended program (Tr. pp. 56-58, 61).

[21] The hearing record indicates that the CSE requested progress reports from RFTS related to speech-language therapy and OT, and received goals in response to that request (Tr. p. 61).

[22] The March 5, 2008 IEP indicated that the student would participate in "Alternate Assessment" because her delays were too severe to permit her participation in formalized testing (Tr. p. 47; Dist. Ex. 2 at p. 17). I note that the March 5, 2008 IEP included many of short-term objectives associated with a variety of annual goals (Dist. Ex. 2 at pp. 7-14). The inclusion of short-term objectives in an IEP for a student recommended for alternate assessment is consistent with 8 NYCRR 200.4(d)(2)(iv).

[23] The March 5, 2008 IEP indicated that the student's severe receptive and expressive language delays were characterized by limited receptive and expressive vocabulary, inability to follow simple commands, decreased utterance length, and difficulties responding to her name (Dist. Ex. 2 at p. 3). One of the receptive language short-term objectives recommended that the student "will identify items on her speech output device (MiniMo)" (id. at p. 11).

The BIP contained in the March 5, 2008 IEP, which the district concedes was developed after the CSE meeting based upon the CSE's discussion of the student's behaviors that interfered with the instructional process, noted the student's tendency to be "extraordinarily active," as well as her attention and redirection needs (Tr. pp. 35-36; Dist. Ex. 2 at p. 18). The BIP also addressed the student's tendencies to tantrum, put pressure on her eyes, and demonstrate self-injurious behaviors that interfered with learning, through utilization of a token system designed to enable the student to have "quiet hands" and to reduce her tantrums (Dist. Ex. 2 at p. 18). Consistent with testimony offered by the district's social worker, the BIP recommended that teachers and other support staff use the token system consistently across all areas to help the student generalize the desired behavioral changes (Tr. pp. 36-37; Dist. Ex. 2 at p. 18).

The district's social worker testified that the parent, her advocate, a special education teacher, and the RFTS director participated telephonically in the March 5, 2008 CSE meeting (Tr. pp. 48-49; see Dist. Ex. 2 at p. 2). The social worker testified that she did not recall the parent or her advocate expressing any objections to the recommended special education program, which consisted of a 6:1+1 special class in a specialized school with related services consisting of OT, PT,[24] and speech-language therapy (Tr. p. 49; see Dist. Ex. 2 at p. 15). The social worker added that she agreed with the CSE's recommendations because, in her opinion, the student required the support of a 6:1+1 classroom, and she believed that the student would progress in such a setting (Tr. pp. 49-50). She testified that she also agreed with the recommendation for a 12-month program because she believed the student would experience substantial regression over the summer (id.).

The district conducted an assistive technology evaluation on November 19, 2008, that was requested by the student's speech-language pathologist supervisor at RFTS (Tr. pp. 86, 108, 288; Dist. Ex. 7 at p. 1). The hearing record reveals that the purpose of the evaluation was to determine if the student required an "upgrade" in her augmentative communication device in order to meet her current IEP goals, and if so, to determine what type of device would best meet her educational and community needs (Dist. Ex. 7 at p. 1). The evaluators observed that at the time of the evaluation, the student was non-verbal and communicated through gestures, pointing, and use of her "Mini-Mo," in one to two word utterances (id. at pp. 2-3). The evaluators characterized the student as cooperative during the evaluation, and discerned that she understood to use her Mini-Mo to request a desired food choice or toy, and was able to independently set up her device to navigate to the appropriate page set (id. at p. 2). When presented with a dynamic display VOCA with a 20 location page set, the student formulated simple sentences using the device with minimal prompts, successfully used the "clear" button, and pressed the message window to speak the sentence, with the aid of an initial demonstration and minimal prompting (id. at p. 3). In addition, the student was able to navigate throughout a 20-button location page set, as well as formulate numerous syntactically correct sentences (id.). She demonstrated good attention skills in a structured setting, and independently used the device in a systematic manner to request desired food (id.). The student "demonstrated retention of sequences necessary to communicate a sentence string on a dynamic display device with minimal prompts, as well as good understanding of cause-effect and the use of a VOCA to communicate with others in a clear manner" (id.). Based on the evaluation findings, it was recommended that the student required the use of a new dynamic

[24] The hearing record reflects that although the student's preschool IEP recommended PT, she did not receive this service at RFTS because there was no full-time physical therapist on site at the school (Tr. pp. 40, 42). The March 5, 2008 CSE was unable to get direct input from a physical therapist, but recommended PT twice per week for 30 minutes per session on the student's IEP because it felt she would benefit from the related service (Tr. pp. 40-41).

display VOCA, and the evaluators developed one long-term goal and several short-term objectives for the student's use of a VOCA in order to participate in teacher directed activities, and appended a draft purchase order for a DynaVox V device to the conclusion of the evaluation report (id. at pp. 3, 6).

As described above, on December 18, 2008, the CSE reconvened to review the November 19, 2008 assistive technology evaluation and to integrate assistive technology goals and short-term objectives and the student's use of the augmentative communication device into the student's IEP (Tr. p. 106; Dist. Ex. 8 at p. 1). The district's school psychologist testified that the December 18, 2008 CSE considered reports from the student's teachers and speech-language and OT service providers at RFTS, a classroom observation conducted by the district earlier that day, the March 5, 2008 IEP, an evaluation report from a private psychologist,[25] and the November 19, 2008 assistive technology evaluation report (Tr. pp. 81-83, 85; Dist. Exs. 2; 4; 5; 6; 7; 9). The school psychologist testified that the December 18, 2008 CSE also spoke with one of the student's teachers and the director of programming from RFTS (Tr. p. 81). The hearing record confirms that the December 18, 2008 CSE modified the March 5, 2008 IEP in that the latter identified the student's need for assistive technology, addressed this need through utilization of the DynaVox V VOCA device with a dynamic display, and developed annual goals and short-term objectives[26] relative to the implementation of the DynaVox V device[27] (Tr. p. 107; compare Dist. Ex. 2 at pp. 1-2, 4-6, 15, 17- 18, with Dist. Ex. 8 at pp. 1-5, 7, 12, 14, 16-17). The district's school psychologist, who attended the December 18, 2008 CSE meeting, testified that the parent participated telephonically during the entire meeting, but denied recalling the parent or any other CSE meeting participants raising any objections to the recommended program (Tr. pp. 101-02).

The special education teacher of the recommended 6:1+1 special class testified that she was a certified special education teacher, holding degrees in regular and special education, with several years experience in working with students with autism in a variety of settings (Tr. pp. 147-49). She added that she was certified in the Treatment and Education of students with Autism and Communicative Handicaps (TEACCH), a methodology for students with autism that structures and schedules the classroom environment, and enables students to independently transition from one place to another in the classroom (Tr. pp. 150, 214).

[25] The hearing record contains no information regarding the examination of the student by a private psychologist.

[26] The district speech-language therapist, who attended the December 18, 2008 CSE meeting and who provided speech-language therapy to students in the recommended classroom, confirmed that on the first day of school in September 2008, her schedule would have accommodated the student's speech-language therapy recommendations, and stated that she would have been able to work with the student on the speech-language goals enumerated in the December 18, 2008 IEP (Tr. pp. 132-33; see Dist. Ex. 8 at pp. 6-7, 11-12).

[27] The district speech-language therapist also clarified that she received training previously for an earlier version of the DynaVox device, and advised that had the student attended the recommended placement, she would have received additional training to become familiar with the DynaVox V device recommended for the student (Tr. p. 134). She added that after receiving such training, she would bear the responsibility to train the teacher and the paraprofessionals in the student's classroom in the use of the student's augmentative communication device (Tr. p. 135). Additionally, she commented that she regularly communicated with her students' parents and the 6:1+1 special class teacher (Tr. pp. 138-39).

The district's special education teacher also described the profile of the recommended 6:1+1 special class, advising that at the time of the impartial hearing, the class roster included four other students, all classified as students with autism (Tr. pp. 151, 165-66). She estimated that the students' functional levels for reading ranged from pre-kindergarten to grade two, and for math, from grades one through three (Tr. p. 167). Regarding language needs, one student in the class was verbal, one utilized "PECS,"[28] and the other two were building their verbal skills through the use of pictures and low level assistive technology switches and devices that were located around the room (Tr. pp. 168, 195). The classroom of the recommended placement contained workstations used by students to work on tasks for the maintenance of mastered skills, with or without the help of a paraprofessional as necessary (Tr. pp. 168-69). The classroom also contained one table at which the teacher worked individually with students, another table for activities such as arts and crafts and structured games, a large carpet upon which students sat and worked on "pairing and manding,"[29] story time, or games, four computers for student use, and the teacher's desk with its own computer (Tr. p. 169). Two speech-language teachers "engineer[ed] the environment" with devices on the door to label items; for example, if a student wanted to hear music, they touched a device that audibly communicated "I want to listen to music" (Tr. p. 170).

According to the district's special education teacher, the recommended class followed a particular model for the 2008-09 school year (Tr. p. 152). She explained that a district ABA consultant visited her classroom one day per week, observed her during activities such as group morning meeting, and provided "pointers" on incorporating more language into the morning meeting and suggested using increased visuals (Tr. p. 156). During individual sessions, the special education teacher stated that the ABA consultant might "model how to do something" with a student; "[o]therwise, she talks me through it" (Tr. p. 161). If the special education teacher and the ABA consultant observed certain classroom behavior during the consultant's visit, the pair developed BIPs as necessary in response thereto (id.). Additionally, the special education teacher advised that once per month, an ABA trainer from a private clinic visited the classroom to ensure that the district ABA consultant was training the special education teacher and classroom staff correctly, to fine-tune anything already worked on, and to answer questions raised by district staff (Tr. p. 165).

In September 2008, the district's special education teacher conducted the Assessment of Basic Language Learning Skills (ABLLS) with each student, regardless of students' verbal ability (Tr. pp. 156-57). The purpose of conducting the ABLLS was to assess skills in a variety of categories including receptive and expressive language, group instruction, math, reading, group routines, grooming, and daily living skills (Tr. p. 158). Based on the results of the ABLLS, the special education teacher created a program binder for each student that contained a list of goals specific to that student, in addition to the goals and objectives included in the student's IEP (id.). On a "typical day," when the district ABA consultant was in the classroom, these goals would be

[28] Although not defined in the hearing record, this acronym presumably refers to "Picture Exchange Communication System."

[29] The hearing record defines "pairing and manding" as a technique in which students were presented with items they enjoyed, and then were required to specifically request those items in order to obtain them (Tr. pp. 163-64).

addressed by the teacher with each student on a 1:1 basis for 45 minutes (Tr. pp. 155-57, 161).[30] The special education teacher explained that during these 1:1 sessions, she focused on addressing the behavioral needs of each student and on building language, as well as anything on each student's IEP that was included in the student's program binder (Tr. pp. 161-62). She further testified that she collected and graphed data for each targeted goal for each student and wrote programs for targeted goals based on the hierarchy of skills included in the ABLLS (Tr. pp. 159-61, 196-97, 201-02). The hearing record demonstrates that when the district's special education teacher was working individually with one student, the other students in the class were working with the two paraprofessionals[31] in the class who had been trained by the district ABA consultant in pairing and manding (Tr. pp. 163-64). She further asserted that the ABLLS "encompassed [the student's] IEP," and that the ABLLS provided her with a guideline for what she would sequentially address within each category of skills (Tr. pp. 211-12).

The district's special education teacher also described that during adapted physical education, the physical education provider came into the classroom to work with the class on structured activities (Tr. pp. 162, 188). The special education teacher further testified that her students utilized technology by participating in activities using a "Smart Board" (Tr. pp. 163, 169).[32] She added that her students required prompting, guidance, and modeling when playing with each other, and that one of the students on the class roster had no prior experience playing with other children (Tr. p. 203).

In regard to the student's social/emotional needs, after reviewing the student's December 18, 2008 IEP, the district's special education teacher affirmed that her classroom could, as mandated by the IEP, address the student's needs, including providing the student with positive reinforcement, repetition and rephrasing, addressing her self-stimulating behaviors, including both vocalizing and sometimes self-injurious behaviors, and addressing toilet training needs and other self-help skills (Tr. pp. 171, 173-75, 178). She also noted that during lunch, the class worked on manners, using utensils, and cleaning up after themselves (Tr. pp. 178, 203-04).

With respect to academics, the district's special education teacher maintained that she attempted whenever possible to do all academic work in a 1:1 setting, leaving the group settings to structured games and centers for socialization (Tr. p. 179). The students in her class worked on functional math skills such as using a calculator, time and money, addition, subtraction, and calendar work (id.). She further confirmed that she would be able to address the student's math skills, which were assessed at the beginning readiness level as indicated in the December 18, 2008 IEP, and identified the math readiness skill upon which the student was working as "the foundation

[30] The district's special education teacher testified that she worked with each student on a 1:1 basis for a minimum of 30 minutes daily (Tr. p. 193). When working individually with a student, the other students were working out of the classroom with a therapist, using the computer, completing work stations, or engaging in a group activity with a paraprofessional (Tr. pp. 193-94).

[31] The hearing record establishes that the class included a classroom paraprofessional and a crisis management paraprofessional assigned to a particular student in the class (Tr. p. 172). However, district's special education teacher explained that the particular student's behaviors had significantly decreased since the start of the school year, as had his dependence on the crisis management paraprofessional, thereby freeing up the paraprofessional to run more groups and enabling the special education teacher to utilize her for other things (Tr. p. 210).

[32] The hearing record defines a "Smart Board" as an interactive computer touch screen that students used to play games or to participate in activities (Tr. p. 163).

of the ABLLS in the math section" (Tr. p. 179; see Dist. Ex. 8 at p. 6). The special education teacher also assured that the ABLLS would also assess the student's reading readiness skills as reflected in the December 18, 2008 IEP (in which the student would be expected to recognize and name the letters of the alphabet), and from there, she would move onto the next skill (Tr. p. 180, see Dist. Ex. 8 at p. 6). She also indicated that she attempted to include either 30 minutes of science or social studies into the classroom schedule each school day (Tr. pp. 200-01).

With regard to addressing the student's language needs, in combination with the student's mandated speech-language therapy sessions, the district's special education teacher testified that in the classroom she would address following directions with the student and that the student would receive language-based instruction for approximately 3 to 3½ hours per day (Tr. pp. 178, 180-81, 200). She also opined that the ABLLS and classroom work center activities, OT, and PT services offered in the recommended placement would address the student's gross and fine motor needs, goals, and short-term objectives as delineated in the December 18, 2008 IEP (Tr. pp. 181-82, 213).[33]

The hearing record establishes that the district's special education teacher had experience in dealing with self-injurious, head banging behavior, as well as an array of other skill-based behaviors addressed through 1:1 teaching that were similar and appropriate to the student's level of functioning (Tr. pp. 205, 207). If the student required 1:1 attention during the entire school day, she confirmed that she would make sure that either she or a paraprofessional worked with the student at all times, having done so previously for another student during the first two months of the school year, until that student became more independent (Tr. p. 209). The special education teacher represented that she would be able to provide the student with needed individual attention in the classroom, regardless of whether or not it was called for on the student's IEP, because it was her job to arrange the classroom schedule (Tr. pp. 209-10). She further asserted that she had completed extensive training with the consultant from the private clinic in teaching verbal and nonverbal children with autism and in decreasing their (inappropriate) behaviors and raising their independence (Tr. p. 211).

At the time of the impartial hearing, the proposed class had already been on four or five field trips since September 2008 (Tr. p. 182). The special education teacher explained that she enjoyed taking her class on a field trip at least once per week not only for recreation, but also for the opportunity it afforded her to bring visuals and assistive technology along, thereby enabling her students to label things in their environment and discuss their activities or the sights they see on the trip (Tr. pp. 182-83). Additionally, she testified that students in the 6:1+1 special class had the opportunity to be around typically developing peers or non-handicapped students during a daily period when "eighth grade helpers" visited their classroom to play with the students and engaged in activities designated by the special education teacher as part of the "Big Buddy Program" (Tr. p. 183). If her students behaved appropriately, they were permitted to attend assembly on Fridays and to eat lunch with the general education students (id.). The special education teacher testified that at the time of the impartial hearing, two of her students were attending a physical education class and a music class with general education students (Tr. pp. 183-84).

The district's special education teacher further testified that the district provided training to parents of students with autism (Tr. p. 185), and noted that she differentiated her instructions to

[33] The district's special education teacher advised that she would collaborate with the student's therapists in completing the ABLLS specific to the student's gross motor and fine motor needs (Tr. pp. 213-14).

her students because they are "diverse learners" (Tr. pp. 212-13). She opined that based upon her review of the student's March 5, 2008 and December 18, 2008 IEPs, she would be able to provide the student with the requisite support in her classroom so that the student could achieve meaningful educational benefit (id.).

The evidence contained in the hearing record shows that the special education program recommended by the district for the student's 2008-09 school year appropriately addressed her unique special education needs. The evidence establishes that the March 5, 2008 IEP was appropriate for the student because her "cognitive, academic, and social delays prevented her from participation in the general education environment" and that the district's 6:1+1 special class, with programmatic supports, would enable the student to receive educational benefits (see Dist. Ex. 2 at p. 17). Furthermore, the hearing record reflects that the district was responsive to the request for an assistive technology evaluation made by the student's speech-language pathologist supervisor from RFTS and that it conducted an assistive technology evaluation and subsequently scheduled a CSE review on December 18, 2008, at which the results of the assistive technology evaluation were discussed, leading to the CSE's revision of the March 5, 2008 IEP through the inclusion of additional recommendations, goals and short-term objectives relating to the VOCA device.

Consequently, based upon a careful review of the evidence contained in the hearing record, I conclude that the district's recommended special education program and related services in the March 5, 2008 and December 18, 2008 IEPs, at the time they were formulated, were reasonably calculated to enable the student to receive educational benefits in the LRE (Viola v. Arlington Cent. Sch. Dist., 414 F. Supp. 2d 366, 382 [S.D.N.Y.] citing to J.R. v. Bd. of Educ. of the City of Rye Sch. Dist., 345 F. Supp. 2d 386 at 395 n.13 [S.D.N.Y. 2004]; see Cerra, 427 F.3d at 195; see also Mrs. B., 103 F3d. at 1120; Application of a Student with a Disability, Appeal No. 09-034; Application of a Student with a Disability, Appeal No. 08-045; Application of a Student with a Disability, Appeal No. 08-029; Application of a Child with a Disability, Appeal No. 07-030; Application of a Child with a Disability, Appeal No. 06-112; Application of a Child with a Disability, Appeal No. 06-071; Application of the Bd. of Educ., Appeal No. 06-010; Application of a Child with a Disability, Appeal No. 05-021).

Having determined that the district offered the student a FAPE in the LRE for the 2008-09 school year, I need not reach the issue of whether RFTS was appropriate for the 2008-09 school year, and the necessary inquiry is at an end (M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134; Application of a Student with a Disability, Appeal No. 09-034; Application of a Student with a Disability, Appeal No. 08-157; Application of the Dep't of Educ., Appeal No. 08-045; Application of a Child with a Disability, Appeal No. 07-030; Application of a Child with a Disability, Appeal No. 05-038; Application of a Child with a Disability, Appeal No. 03-058).

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

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
September 14, 2009

PAUL F. KELLY
STATE REVIEW OFFICER