The University of the State of New York

The State Education Department
State Review Officer
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No. 10-004

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

Appearances:
Skyer, Castro, Cutler and Gersten, attorneys for petitioners, Sonia Mendez-Castro, Esq., of counsel

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

DECISION

Petitioners (the parents) appeal from a decision of an impartial hearing officer which determined that the educational program and services respondent's (the district's) Committee on Special Education (CSE) had recommended for the their son for the 2009-10 school year was appropriate. The appeal must be sustained in part.

At the time of the impartial hearing, the student was receiving 26 hours per week of special education itinerant teacher (SEIT) services, which included two hours per week of parent training, as well as occupational therapy (OT), physical therapy (PT), and speech-language services (Tr. pp. 355-56). The student's SEIT services were provided at his home as well as at a general education preschool program, which the student was attending for three hours per day, three days per week (Tr. pp. 226, 254, 332, 337, 339, 355-56, 359, 387, 401). The student was also receiving private PROMPT services (Tr. pp. 355-56).[1] The student's eligibility for special education programs and services as a student with autism is not in dispute in this proceeding (see 34 C.F.R. § 300.8[c][1][i]; 8 NYCRR 200.1[zz][1]).

The hearing record reflects that due to developmental concerns, the student received PT and OT through Early Intervention (EI) beginning when he was ten months old (Tr. pp. 350, 352). At age 28-months, the student was evaluated by a medical developmental specialist and diagnosed

[1] "PROMPT" is an acronym for "Prompts for Restructuring Oral-Motor Phenomic Targets" (Dist. Ex. 5 at p. 9).

with "PDD/NOS"[2] (Tr. pp. 350-51). The student continued to receive EI services until he was three years old, at which time he became eligible for services through the district's Committee on Preschool Special Education (CPSE) (id.). The student received PT, OT, speech-language therapy,[3] and SEIT services[4] through the CPSE (Tr. pp. 352-53).

On June 6 and July 16, 2007, when the student was three years old, a private center conducted a comprehensive evaluation to determine the student's then current developmental status and to use the evaluative information to define his educational and therapeutic needs (Dist. Ex. 4 at p. 1). The evaluation report indicated that medically, the student had a history of reflux, frequent ear infections for which he had equalizing tubes surgically placed in his ears, and a possible milk allergy for which he ate a dairy free diet (id.). Administration of the Bayley Scales of Infant and Toddler Development, Third Edition (Bayley – III) yielded a cognitive score of 85 (low average range), a language score of 59 (very low range), and a motor score of 79 (low range) (id. at p. 4). The evaluation report noted that the student was resistant to performing some tasks on demand (id.). As a result, some of the student's cognitive and motor skills were observed on an incidental basis or not at all (id.). In light of the student's "language delays and behavioral challenges (self-directed style, short attention span, and inconsistent imitation)" the evaluation report advised that the student's "test performance must be regarded cautiously as an estimate of his skills" (id. at p. 7).

The evaluation report also included behavior rating scale results from the Childhood Autism Rating Scale (CARS) (Dist. Ex. 4 at p. 7).[5] The student's ratings on the CARS were based on observations during the evaluation and parent report (id.). The CARS ratings yielded an overall score of 34, indicating that the sum total of the student's behaviors met the criteria for the autistic range (id.). The evaluation report indicated that the student was noted to have low reciprocal social interaction, variable attention span, limited eye contact, and delays in play, language, and communication skills (id.). The evaluation report described the student as a "variably related and self-directed boy, who is intent on doing what he wants to do" (id.). The report also noted that the student's ability to attend, concentrate and comply with external demands was low (id.). The report indicated that at the time of the evaluation, it was difficult for the student to inhibit his desires when necessary, follow examiner-directed activities, imitate on request, and accept limits (id.). The evaluation report also indicated that by clinical observation and results of the CARS, the

[2] The hearing record indicates that "PDD-NOS" stands for Pervasive Developmental Disorder – Not Otherwise Specified (see Dist. Ex. 4 at p. 7).

[3] According to the student's mother, the student received speech-language therapy because although he previously "had some language," the student "lost his speech," did not demonstrate eye contact, and did not relate to his family or express himself (Tr. pp. 353-54, 379).

[4] The hearing record reflects that the student had "great difficulty" with cognitive functioning (Tr. pp. 354-55). According to the hearing record, the referenced SEIT service was necessary to continuously teach the student and to reinforce what he learned (Tr. p. 355).

[5] The comprehensive evaluation report indicated that the CARS provides information on 15 behavior scales suggestive of Autism Spectrum Disorder (Dist. Ex. 4 at p. 7). Each behavior is given a rating based on specific criteria (1= within normal limits, 2= mildly abnormal, 3= moderately abnormal, and 4= severely abnormal) (id.). The overall score may range from a low of 15 to a high of 60 (id.). Scores of 30 and above are characterized in the autistic range (id.).

student demonstrated several behaviors consistent with a PDD - NOS (id.). The evaluation also indicated a diagnosis of verbal dyspraxia (id. at p. 8).

The evaluation's recommendations included: (1) a continuous 12-month program, spread out over a full seven-day period and during school holidays, and school vacations in the summer months; (2) 35 hours of SEIT based on applied behavior analysis (ABA) methodology (this included 20 hours of ABA therapy at home and 15 hours of SEIT in a mainstream nursery school); (3) that the ABA therapy at home consist of 1:1 discrete trial intervention supervised by a BCBA[6] therapist; and that the ABA supervisor spend at least two hours per week working directly with the student; (4) that the goals of the ABA program be interfaced with what the student was learning in nursery school; (5) that the ABA therapist should facilitate social interaction between the student and other children in school; (6) that in addition to the student's ABA hours, weekly teaching clinics be scheduled for the ABA supervisor and ABA therapist to review the student's program and update it; (7) that the parents have an additional three hours per week with the ABA therapist or supervisor in order to learn techniques necessary to generalize what the student was learning in the 1:1 ABA sessions; (8) individual speech-language therapy five times per week for 60 minutes, including PROMPT therapy and focused on all aspects of expressive, receptive, and pragmatic skills; (9) individual OT therapy two times per week for 60 minutes emphasizing fine motor and graphomotor skills; (10) individual PT therapy two times per week for 60 minutes for gross motor skills, balance, and coordination; and (11) monthly, two hour interdisciplinary meetings among the student's therapists, teachers, and parents to review the student's progress and modify his program (Dist. Ex. 4 at pp. 7-8).

In September 2007, the student began to attend a general education preschool with the support of a SEIT for 15 hours per week (Tr. pp. 353, 378; Dist. Exs. 5 at p. 3; 8 at p. 1). The hearing record reflects that the student had "great difficulty" in this school setting (Dist. Ex. 5 at p. 3; see also Tr. p. 378). The parents withdrew the student from the school in February 2008 and pursuant to the parents' request, the CPSE increased the student's SEIT individual services at home (Tr. pp. 378, 379; Dist. Ex. 5 at p. 3).

When the student was almost four years old, a neurodevelopmental evaluation was conducted in order to assess the student's then current developmental status and treatment needs (Dist. Ex. 5 at pp. 1, 7). The May 12, 2008 neurodevelopmental evaluation report noted that the parents sought the evaluation due to the student's significant speech and expressive language delays (id. at p. 1). Administration of Module 1 of the Autism Diagnostic Observation Schedule (ADOS) yielded results above the cut-off for an autism diagnosis (id. at p. 7). Assessment results indicated that the student displayed deficits in communication and social interaction, as well as stereotyped/repetitive behaviors consistent with a diagnosis of autism (id.). The evaluation report noted that the student specifically demonstrated great difficulties attending to and understanding spoken language and in expressing himself verbally and nonverbally (e.g. pointing) (id.). The student demonstrated marked deficits in social interaction, although he was more affectionate with familiar people (id.). The report further indicated that the student displayed little interest in peers, but tended to be more interactive with his siblings and parents (id.). Stereotypic behaviors such as perseverative behaviors, non-purposeful vocal self-stimulatory behaviors, and sensory seeking behaviors were especially predominant when the student was not engaged in structured activities (id.). The evaluation report noted that although the student had a desire to communicate, he

[6] The hearing record reflects that "BCBA" refers to "Board Certified Behavior Analysis" certification, which is the highest level of certification for ABA practitioners (Tr. p. 184).

appeared content to engage in repetitive activities (id.). The report described the student's play skills as "immature and limited" (id.). The student responded best to a highly structured environment with positive reinforcement (id. at pp. 7-8). The neurodevelopmental evaluation report indicated that the student showed evidence of a severe childhood apraxia of speech (CAS), a disorder described as notable for difficulty in motor planning the movements of the articulators for oral movements, as well as for sounds and syllables (id. at p. 8). Additional formal testing revealed that the student demonstrated significant difficulty with volitional motor control of his oral musculature for functional speech, indicating a neurological motor speech impairment (id.).

The neurodevelopmental evaluation report indicated that the student had global developmental delays including language, motor, cognitive, and play skills, as well as a severe receptive and expressive language impairment (Dist. Ex. 5 at p. 8). The evaluation report indicated that the student showed evidence of a global dyspraxia, otherwise known as a developmental coordination disorder, which underlies his difficulty and delays in planning gross and fine motor movements (id.). Sensory integration dysfunction was evident as the student displayed auditory, vestibular, oral, and proprioceptive sensory-seeking and avoidant behaviors (id.). Recommendations included: (1) continuing the student's home program of therapeutic interventions "as a school environment would likely be over-stimulating for [the student] and may not be able to meet all of [the student's] needs;" (2) mainstreaming extra curricular activities for peer exposure with supervision of his behavioral therapists; (3) continuing CPSE and private speech-language therapy at home; (4) using an alternate communication system such as sign language or the Picture Exchange Communication System (PECS) to provide the student with a concrete means of expressing himself or learning to speak; (5) exposing the student to one language consistently at home in order "to hasten the development of verbal communication skills;"[7] (6) continuing OT and PT; (7) providing the student with ABA for 25 hours per week in both a home and community setting; (8) conducting a developmental optometric evaluation of the student; (9) providing the student with vitamin E supplementation; and (10) conducting a reevaluation in six months time (id. at pp. 8-10).

The hearing record reflects that in spring 2008, because of a concern with the student's progress, the parents obtained the assistance of a district approved private agency to supervise the student's existing SEIT services and to provide parent training (Tr. pp. 198-200). In September 2008, the private agency became the student's SEIT provider and continued in that capacity through the time of the impartial hearing (Tr. p. 200; see Dist. Ex. 8).

The student's speech-language pathologist prepared a progress report dated January 18, 2009, when the student was four years eight months old (Dist. Ex. 6 at p. 1). The speech-language progress report indicated that at the time of the progress report, although the student received three individual speech-language therapy sessions per week and two small group (2:1)[8] sessions per week, the student was unable to attend to administration of standardized language testing (id. at p. 1). Because of this, the speech-language pathologist determined age level equivalents for the student through clinical observation and referencing items on the Preschool Language Scale - Fourth Edition (PLS-4) and the Westby Symbolic Play Scale (id.). The progress report noted that

[7] The hearing record reflects that the student's household is multi-lingual (Dist. Ex. 5 at p. 3; Parent Ex. D at p. 1).

[8] The hearing record reflects that the group (2:1) speech-language therapy sessions included the student's sibling as the second person (Tr. p. 332).

the student's receptive language abilities "scatter[ed]" from a 36 to 42 month developmental level, expressive language abilities "scatter[ed]" from a 30 to 40 month developmental level, and play skills "scatter[ed]" between 19 to 22 months and 24 months (id.). The speech-language progress report indicated that the student presented with "severe delays in the development of receptive, expressive and pragmatic language, and in development of phonemic repertoire and sound sequencing skills, and oral-motor deficits" (id. at p. 2). The progress report described the student as having made progress in the development of receptive and expressive single word vocabulary, the generation of two to four word phrases, and an increased demonstration of language functions, and response to directions and questions (id.). The progress report indicated that the student continued to have significant delays in reciprocity of eye gaze, developing dialogues, attention to task, and development of age-appropriate cognitive-linguistic concepts and morpho-syntactic rules and forms (id.). The progress report recommended: (1) that the student continue to receive speech-language intervention at the same frequency and duration as then given "as [the student's] skills do not appear to develop without direct teaching;" (2) that additional SEIT hours should be considered; and (3) that the student receive 12-month services due to his need for "continual repetition and practice to develop, maintain and generalize skills learned" (id.).

The student's occupational therapist prepared an OT progress report dated January 21, 2009 (Dist. Ex. 7). The progress report indicated that the student continued to make "great gains," but had not yet achieved all of his goals (id. at pp. 1-2). The progress report noted that decreased strength, frustration tolerance, and decreased attention continued to play a role in the student's inability to master tasks (id. at p. 2). The OT progress report stated that the student's "sensory seeking behaviors and inability to self-regulate directly impact[ed]" the student's "ability to participate in therapy sessions and in daily activities at home and during his therapies" (id.). The progress report indicated that the student demonstrated positive results when provided with "enough sensory input prior to fine motor tasks," and recommended that the student continue receiving OT services four times per week for 60-minutes per session (id.).

An undated progress report prepared by the student's physical therapist indicated that the student was ambulatory and functioned at the 18 month old level with scattered skills (id. at p. 1).[9] The progress report noted that the student was "easily distracted and often requires redirection to complete activities in the gym" (id.). It also noted that the student exhibited sensory processing delays and responded well to sensory activities that enhanced his ability to take in sensory information from his body and the environment to function effectively and efficiently (id.). The progress report described the student as communicating through vocalic sounds and words on command (id.). It also described him as presenting with decreased muscle strength in all extremities, decreased core muscle strength, poor balance and coordination, and poor motor planning,[10] which often predisposed the student to clumsiness and decreased safety when negotiating the gym environment (id.). The progress report advised that the student would benefit from continued PT services two times per week for 60-minutes per session to address gross motor delays (id.).

[9] While the progress report itself is undated, the report indicated that the student was four years eight months old at the time it was written (Dist. Ex. 10 at p. 1). Based on the student's date of birth (see Parent Ex. D at p. 1), the progress report was written in January 2009 (Tr. p. 24).

[10] The PT progress report also indicated that the student had good motor planning abilities and often required verbal, tactile, and kinesthetic cues to complete gross motor activities due to environmental distractions (Dist. Ex. 10 at p. 1).

The supervisor of the student's home based SEIT program, who at the time of the impartial hearing was also providing the student with at least 5 hours per week of SEIT services, prepared an annual review report dated January 22, 2009 (Dist. Ex. 8; see Tr. pp. 202, 254). The annual review report described the student's program as it related to the areas of language, play, social/emotional functioning, motor skills, self-help skills, cognitive skills, and behavior (Dist. Ex. 8 at pp. 1-4). With respect to the student's behavior, the report indicated that the student presented with "maladaptive behaviors that occur in an excess frequency and can interfere with the acquisition of skills," including vocal protest, visual self-stimulatory behavior, and vocal self-stimulatory behavior (id. at p. 4). The report indicated that the behaviors had been reduced by the implementation of "individualized" behavior intervention plans, "but continue to be observed throughout session and across environments" (id.). According to the report, at the time of the annual review, the student's protest behavior (characterized as vocal outburst or crying as escape and/or attention) had been reduced to once per hour; his visual self-stimulatory behavior (characterized as looking at objects, lights, or reflections, and not attending to tasks) had decreased to an average of twice per hour; and his vocal self-stimulatory behavior (characterized as noise or sounds that are not communicative) was continuing to occur "at a high frequency but varie[d] per day and activity" (id.). The report indicated that "[p]roactive measures" had been taken to reduce all behaviors, including "visual schedule," "token board," "reinforcement assessments," "sensory activities," and "visual and auditory activities to redirect [self stimulatory behavior]" (id.).

The annual review report further indicated that while the student had made significant progress in his intensive 1:1 educational program using the techniques and principles of ABA, he continued to present with significant delays that "will impede his ability to learn independently in an academic setting" (Dist. Ex. 8 at p. 5). The report indicated that the student continued to display delays in language, social pragmatics, and play skills (id.). The report stated that with intensive intervention provided over the past year, the student had made many gains in receptive language, expressive language, his ability to vocalize, and in his overall ability to communicate his needs, wants, and desires, across environments (id.). The report also noted that the student had made gains in the ability to engage in pretend play activities and socialize with his siblings (id.). The report indicated that the student also demonstrated improvement in caring for his toileting needs, dressing himself, and eating independently (id.). It also indicated that the student demonstrated improvement in his cognitive skills by being able to match identical and similar stimuli and by sorting objects by category (id.). The report also noted that "[a]s gains in all domains had been made [the student] continues to present as a student with global delays that impact his ability to learn in the classroom setting" (id.). The report recommended that the student continue to receive 35 hours per week of intensive ABA instruction implemented across home and social settings; these hours should include "the direct therapy provided in the home or school and bi-monthly clinic/team meeting, supervision time, or parent training" (id.). The report also recommended that the student receive services on a 12-month basis to include holidays, breaks, and vacations to minimize the opportunity for regression of previously learned skills (id.).

The district's CPSE convened on January 23, 2009 (Parent Ex. C at p. 1). According to the resultant preschool individualized education program (IEP), the CPSE determined the student eligible for special education services as a preschool student with a disability and recommended a 12-month special class (id.). The IEP stated that the student presented with a history of developmental delays across all domains and that he had been receiving a significant amount of SEIT services in school and at home (id. at p. 20). The information contained in the IEP with respect to the student's present levels of academic performance and learning characteristics, social and emotional performance, and health and physical development included information from the

January 2009 speech-language therapy, OT, and PT progress reports, and the SEIT's annual review report, the June/July 2007 comprehensive evaluation report, and the May 2008 neurodevelopmental evaluation report (see Parent Ex. C at pp. 3-6; see also Dist. Exs. 4 at pp. 1-10; 5 at pp. 1-10; 6 at pp. 1-2; 7 at pp. 1-2; 8 at pp. 1-5; 10 at pp. 1-2). The IEP included annual goals and short-term objectives (Parent Ex. C at pp. 7-19). The January 2009 CPSE also recommended individual OT and speech-language therapy, each for three times per week for 30 minutes in a separate location, and individual PT two times per week for 30 minutes in a separate location (id. at p. 21). The January 2009 preschool IEP provided that the projected initiation date for the recommended program was January 26, 2009 and that the projected IEP review date was June 1, 2009 (id. at p. 2).

The hearing record reflects that the district issued a "notice of eligibility for partial services" dated January 23, 2009 (Parent Ex. B; see Tr. pp. 287-88). Among other things, the notice of eligibility for partial services advised the parents that at that time, the district was "unable to identify a preschool where [the student] can receive all of the special education services" listed on his IEP, but that it was able to offer the student "partial services" (Parent Ex. B). The notice advised the parents that the district could provide the student with 26 hours of SEIT services, including two hours of indirect services with the parents and at home and related services provided by approved providers (id.). The related services included individual speech-language therapy three times per week for 45 minutes, speech-language therapy twice per week for 45 minutes in a group of two, individual OT four times per week for 60 minutes, and individual PT twice per week for 60 minutes (id.). The notice of eligibility for partial services also advised the parents that the district would continue its efforts to identify a preschool where the student would be able to receive the special education services recommended on the IEP and that the parents would be invited to an IEP meeting when an appropriate preschool setting had been identified (id.).

The district's CSE convened on March 13, 2009 for a CSE "turning 5" review and to develop the student's IEP as a school age student for the 2009-10 school year (Tr. pp. 20, 42; Parent Ex. D at pp. 1-2).[11] The March 2009 CSE members included a school psychologist, who was also the district representative; a district special education teacher; a district regular education teacher; the supervisor of the student's SEIT services, who also provided the student with at least five hours of SEIT instruction; the parents; and an additional parent member (Tr. pp. 22, 42, 202, 241, 254, 361-62; Parent Ex. D at pp. 1-2). The March 2009 CSE determined that the student was eligible for special education as a school age student with autism and recommended a 6:1+1 special class in a specialized school with related services, as he was in need of intensive academic, behavioral, and social/emotional support throughout the day, something which could not be provided in a general education program (Parent Ex. D at pp. 1, 15).[12] The student was also found eligible for

[11] The hearing record contains duplicative exhibits. In particular, both the district and the parents submitted copies of the March 2009 IEP (Dist. Ex. 2; Parent Ex. D), the May 26, 2009 final notice of recommendation (FNR) (Dist. Ex. 9; Parent Ex. E), and the due process complaint notice (Dist. Ex. 1; Parent Ex. A). For purposes of this decision, reference is made to the parents' exhibits only. I remind the impartial hearing officer that it is her responsibility to exclude evidence that she determines to be irrelevant, immaterial, unreliable, or unduly repetitious (see 8 NYCRR 200.5[j][3][xii][c]).

[12] The March 2009 IEP reflects that other programs/services were considered for the student, but that a special class in a community school (12:1+1) with related services was considered but rejected because such placement did not provide the necessary level of academic, social/emotional and behavioral support that the student required to achieve his potential (Parent Ex. D at p. 16). A residential school was also considered but was rejected because it was too restrictive (id.).

extended school year (ESY) services (id. at p. 1). Similar in content to the January 2009 IEP developed by the CPSE, the IEP developed by the March 2009 CSE included the student's academic performance and learning characteristics, identified his behavioral, language, social/emotional and physical developmental needs consistent with the aforementioned evaluation reports and progress reports written by his related service providers, and contained annual goals and short-term objectives (id.; compare Parent Ex. C at pp. 7-19, with Parent Ex. D at pp. 6-14). Related service recommendations were for individual OT three times per week for 30 minutes in a separate location, individual PT two times per week for 30 minutes in a separate location, individual speech-language therapy two times per week for 30 minutes in a separate location, and speech-language therapy in a small group (2:1) two times per week for 30 minutes in a separate location (Parent Ex. D at p. 17).

By Final Notice of Recommendation (FNR) dated May 26, 2009 issued to the parents, the district summarized the CSE's recommendations in the March 2009 IEP and indicated the specific specialized school location for the student for the 2009-10 school year (Parent Ex. E).

On June 12, 2009, the parents, along with the student's SEIT supervisor/instructor, visited the recommended school, observed a special education class, and met with the school's assistant principal (Tr. pp. 248, 381-84; Parent Ex. A at p. 5). Staff of the recommended school advised the parents and the SEIT supervisor/instructor that the student was being assigned to a new class and that at the time of the visit, the school had not yet received information about who would be in the class (Tr. pp. 248, 381).

The parents, through their attorney, filed a due process complaint notice dated July 13, 2009 (Parent Ex. A). The parents requested that the student's pendency placement be continued pursuant to the district's January 2009 notice of eligibility for partial services (id. at p. 2; see Parent Ex. B). The parents contended that the district failed to offer the student a FAPE for the 2009-10 school year and alleged that the March 2009 CSE's recommendation for a special class in a special school was "both procedurally and substantively flawed" and that "[a]s a result, the parents seek the continuation of [the student's] current placement" as it was recommended on the January 2009 CPSE IEP and thereafter modified by the district's January 2009 notice of eligibility for partial services (Parent Ex. A at pp. 1, 3).

The parents asserted that procedurally, the March 2009 CSE "did not rely on necessary evaluations to properly gauge [the student's] current skill levels" and in particular, that the March 2009 IEP "failed to indicate any information" regarding the student's instructional levels in reading, writing, and math (Parent Ex. A at pp. 3-4). The parents also alleged that the March 2009 IEP did not include any academic management needs, failed to indicate an appropriate method of measurement for assessing the student's progress toward his goals, and failed to address the student's social/emotional needs because it "failed to indicate the extent to which [the student's] behavior interfered with the instructional process," and that the March 2009 IEP did not include "information about present levels of behavioral support" (id. at p. 4). Additionally, the parents alleged that the March 2009 CSE "arbitrarily reduced all mandates for related services without any basis for the change" and without conducting any formal evaluations (id.). The parents further asserted that the specific class recommended for the student on the FNR was "wholly inappropriate" to meet his needs, alleging that "the proposed placement [did] not offer [the student] a suitable and functional peer group for instructional and social/emotional purposes" in accordance with State regulations, and asserting that contrary to State regulations, the students in the recommended class "would vary significantly in terms of their age range" (id. at p. 5). Finally, the

parents contended that "no one from the [district] had formally evaluated [the student]" (id. at p. 6).[13] The parents set forth that for these reasons, they "reject[ed]" the recommended program at the recommended school (id.). With respect to remedies, the parents sought funding from the district for the program recommended by the CPSE (id. at p. 6).

Subsequent to the parents' July 13, 2009 due process complaint notice, the CSE reconvened on July 27, 2009 and developed another IEP, which is not contained in the hearing record (Tr. pp. 4, 6-8).[14]

The impartial hearing began on August 24, 2009, and concluded on December 4, 2009, after eight days of proceedings. During the August 24, 2009 proceeding, the parents sought an interim order of pendency (Tr. p. 5). In particular, the parents requested that the impartial hearing officer issue an order directing the district to fund the "last agreed to program," as set forth in the district's notice of eligibility for partial services (id.). In response to the parents' request, the district advised the impartial hearing officer that it was in agreement with the parents' request for pendency pursuant to the notice of eligibility for partial services (Tr. p. 6). The parents restated their request for pendency during the September 22, 2009 proceedings (Tr. pp. 176-77). An interim order on pendency was not issued by the impartial hearing officer; however, as discussed below, she addressed the student's pendency placement in her final decision.

The impartial hearing officer rendered a decision dated December 10, 2009 (IHO Decision at p. 17). With respect to pendency, the impartial hearing officer concluded that "the services now being provided by the parents are far too restrictive and deprive the student of an appropriate school-based special education setting, which is available to the student at…the [district's] recommended school" (id. at p. 16). Therefore, she determined that the student's pendency placement was the public school recommended by the district in its May 26, 2009 FNR (id.). Turning to the merits of the case, the impartial hearing officer found that the March 2009 CSE was "duly constituted," that the parents had "some familiarity" with the IEP process, and that the parents "actively participated" in the CSE meeting (id. at p. 13). The impartial hearing officer also found that the district "was not required to observe the student at home and that the evaluations and reports [the CSE] reviewed provided adequate information about the student's educational needs and current functioning" (id.). The impartial hearing officer further found that a behavioral intervention plan (BIP) "was not required in this instance," that the student's behavior did not warrant a functional behavioral assessment (FBA) or a BIP, and that there were "sufficient safeguards in place to assure that a BIP would be developed by the school-based support team" if the student later demonstrated behavior necessitating such a plan (id. at pp. 13-14). The impartial hearing officer also found that "all of the evaluations were adequately reviewed and carefully considered," by the CSE, that the district "considered the private evaluations and other information

[13] The parents' due process complaint notice also stated that the parents reserved the right to raise other procedural or substantive issues that might come to their attention "during the pendency of the litigation of this matter" (Parent Ex. A at p. 6).

[14] At the first day of the impartial hearing proceedings, August 24, 2009, the parents requested an opportunity to amend the due process complaint notice to take into account the July 27, 2009 IEP (Tr. p. 4). The district representative advised the impartial hearing officer and the parents that the recommendations of the July 27, 2009 IEP were "the same" as the recommendations the parents were contesting from the March 2009 IEP (Tr. pp. 4, 8). In light of the absence in the hearing record of any subsequently issued IEP, the district's unchallenged representation that the recommendations of any subsequent IEP were the same as the recommendations of the March 2009 IEP, and in the absence from the hearing record of an amended due process complaint notice and/or any references to such a document, the IEP at issue in this matter is the March 2009 IEP.

presented by the parents" at the CSE meeting, that "the evidence in the hearing record support[ed] a finding that the program offered by the district was appropriate for the student," and that "no additional evaluations were required" (id. at pp. 14-15). The impartial hearing officer determined that the March 2009 CSE's recommendation was reasonably calculated to confer educational benefits on the student in the least restrictive environment (LRE) and therefore, offered the student a free appropriate public education (FAPE) (id. at pp. 15-16). Based on her findings, the impartial hearing officer denied the relief requested by the parents (id. at p. 17).

The parents appeal, contending that the impartial hearing officer rendered a biased decision without a full record of the underlying proceedings, and that the impartial hearing officer wrote her decision before she had the transcripts of the student's mother's testimony. The parents also allege that, contrary to the impartial hearing officer's findings, the district failed to offer the student a FAPE during the 2009-10 school year because: (1) no one from the March 2009 CSE or the district observed the student prior to the March 2009 CSE meeting; (2) the March 2009 CSE failed to conduct an FBA and subsequently implement a BIP despite evidence that the student required such intervention; and (3) the March 2009 CSE's decision to reduce the student's related services and to discontinue his SEIT services was "arbitrarily predetermined to conform with the [district's] 'Autism program'." The parents further allege that the district's March 2009 IEP was not reasonably calculated to enable the student to receive educational benefits because: (1) its recommendations were "based on the opinions of outside professionals who were consulted in secret, and who had never met" the student; (2) the March 2009 CSE never observed the student and "chose to credit the opinions of alleged professionals who were strangers to [the student] over the opinions" of the parents and instructors; (3) the annual goals developed by the March 2009 CSE were chosen by the school psychologist "who had never met, evaluated, or observed [the student]" and not by the student's "own educators;" (4) the annual goals "were not based on current and appropriate assessments;" (5) the recommended 6:1+1 class for the 2009-10 school year "did not exist;" (6) the recommended 6:1+1 class was not appropriate for the student; (7) the recommended level of SEIT and related services was not appropriate for the student; (8) the recommended class "could not provide [the student] with the level of supervision he requires to keep him safe;" (9) the student would not have been suitably grouped in the recommended class in that the students in the class did not have similar language or social skills; and (10) "a 1:1 instructional setting" was the LRE for the student.[15]

The parents also assert that the continuation of the student's preschool program was appropriate, was provided in the student's LRE, and was calculated to ensure educational benefits. The parents argue that the student requires a program that provides ABA, that he made progress in the preschool ABA program, and that as testified to at the impartial hearing, "ABA is the only scientifically proven method of teaching children with autism" (Pet. ¶ 82). The parents further allege that their claim for reimbursement is supported by equitable considerations and that the impartial hearing officer erred in not addressing this issue. Lastly, the parents allege that the

[15] The parents do not appeal the impartial hearing officer's conclusion that the March 2009 CSE was "duly constituted" (IHO Decision at p. 13). Further, with the exception of assertions that no one from the March 2009 CSE or district observed the student prior to the March 2009 CSE meeting, that the March 2009 CSE failed to conduct an FBA and subsequently implement a BIP, and that the March 2009 IEP's annual goals were not based on current and appropriate assessments; the parents do not appeal the impartial hearing officer's findings that the evaluations and reports that the March 2009 CSE reviewed provided adequate information about the student's educational needs and current functioning and that therefore, no additional evaluations were required (id. at pp. 14-15). Therefore, these findings are final and binding upon the parties (see 34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[j][5][v]).

impartial hearing officer erred in her determination that the student's pendency placement was at the district's recommended school. The parents request that a State Review Officer set aside the impartial hearing officer's decision and grant their request for reimbursement for the continuation of the student's home-based services for the 2009-10 school year.

The district answered the parents' petition. The district states that it does not contest the parents' assertion that the impartial hearing officer's finding regarding the student's pendency placement was incorrect. The district further states that by stipulation dated October 29, 2009, the parties have agreed that the student's pendency placement consisted of 26 hours per week of SEIT services (including two hours of parent training), individual speech-language therapy three times per week for 45-minutes per session, speech-language therapy in a group of two twice per week for 45-minutes per session, and individual PT twice per week for 60-minutes per session (Answer ¶¶ 42, 43).[16] Regarding the balance of the parents' claims, the district requests that the petition be "denied in all respects because [the parents] have failed to prove that the unilateral placement is appropriate." Specifically, the district asserts that there is insufficient evidence in the hearing record to prove that the home-based services were necessary or appropriate for the student to receive educational benefits. The district further alleges that the parents offered no testimonial evidence regarding the OT and PT services that they seek. It further asserts that there is no documentary evidence supporting testimony that the student was making progress in his speech-language and SEIT services and that the home-based program is not the student's LRE. Furthermore, it contends that the student is no longer eligible for SEIT services because he is a school age student. Lastly, the district contends that the impartial hearing officer was not biased. While it admits that the impartial hearing officer did not have the transcript of the student's mother's testimony available to her prior to issuing the decision, it contends that she did "hear and observe" the testimony only six days prior to rendering her decision and there is "no reason to think that she disregarded this testimony in rendering her decision." It further alleges that the parents do not point to any evidence in the hearing record indicating that the impartial hearing officer was biased and it notes that a State Review Officer has the entire record upon which to render a decision.

I will now turn to the merits of the parent's appeal. I will first consider the parents' allegations that the impartial hearing officer rendered "a biased decision without a full record of the underlying proceedings, as evidenced by the egregious legal and factual mistakes contained in her erroneous pendency ruling" (Pet. ¶ 107). As discussed below, the hearing record does not support the parents' contention.

An impartial hearing officer must be fair and impartial and must avoid even the appearance of impropriety or prejudice (see Application of the Bd. of Educ., Appeal No. 09-057; Application of a Student with a Disability, Appeal No. 09-052; Application of a Student with a Disability, Appeal No. 08-090; Application of a Child with a Disability, Appeal No. 06-039; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 04-010; Application of a Child Suspected of Having a Disability, Appeal No. 03-071), and must render a decision based on the hearing record (see Application of a Student with a Disability, Appeal No. 09-058; Application of a Student with a Disability, Appeal No. 08-036; Application of a Child with a Disability, Appeal No. 06-065; Application of a Child with a Disability, Appeal No. 06-039; Application of a Child with a Disability, Appeal No. 00-063; Application of a Child

[16] I note that this is the same program of services offered to the student by the district's notice of eligibility for partial services except that it does not include any OT services (Parent Ex. B).

Suspected of Having a Disability, Appeal No. 00-036; Application of a Child with a Disability, Appeal No. 98-55). Further, an impartial hearing officer, like a judge, must be patient, dignified and courteous in dealings with litigants and others with whom the impartial hearing officer interacts in an official capacity and must perform all duties without bias or prejudice against or in favor of any person, and shall not, by words or conduct, manifest bias or prejudice, according each party the right to be heard (Application of a Child with a Disability, Appeal No. 07-090; Application of a Child with a Disability, Appeal No. 07-075; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child Suspected of Having a Disability, Appeal No. 01-021).

After reviewing the entire hearing record, I find that the evidence does not support the parents' contention that the impartial hearing officer was not impartial or acted in a manner that did not conform to federal and State regulations. Although the parents in this case disagree with the conclusions of the impartial hearing officer, their disagreement does not provide a basis for finding that the impartial hearing officer acted with bias (Application of a Student with a Disability, Appeal No. 09-058; Application of a Student with a Disability, Appeal No. 08-158; Application of a Child with a Disability, Appeal No. 07-078; Application of a Child with a Disability, Appeal No. 06-102; Application of a Child with a Disability, Appeal No. 06-013; Application of a Child Suspected of Having a Disability, Appeal No. 04-059; Application of a Child with a Disability, Appeal No. 96-3; Application of a Child with a Disability, Appeal No. 95-75). Further, the fact that a hearing officer rules against a party on a disputed issue is not evidence of bias, nor is bias shown when a hearing officer makes an honest error of law (Application of a Child with a Disability, Appeal No. 00-074). Moreover, although the parents assert that the impartial hearing officer erred in her pendency determination, an honest error of law on the part of the impartial hearing officer is not itself proof of bias (Application of a Child with a Disability, Appeal No. 00-074). Upon my review, I find no evidence in the hearing record to indicate that the impartial hearing officer acted with bias.

With respect to the parents' assertion that the impartial hearing officer erred in determining the student's pendency, I note that in its answer, the district does not contest the parents' assertion that the impartial hearing officer's pendency determination was incorrect. As indicated above, the district has advised on appeal that the parties have agreed to change the student's pendency placement by stipulation dated October 29, 2009 and that it continues to provide pendency services to the student pursuant to the parties' stipulation (Answer ¶ 42). This is not disputed by the parents. Parties are not prohibited from agreeing to changes in a student's pendency placement (20 U.S.C. § 1415[j]; 34 C.F.R. § 300.518[a]; 8 NYCRR 200.5[m]). I therefore find that the student's pendency placement is the related and SEIT services set forth in the parties' October 29, 2009 stipulation and it is not necessary for me to review the impartial hearing officer's finding with respect to pendency. However, I will annul that portion of the impartial hearing officer's decision that determined pendency and issue an order setting forth pendency services consistent with the parties' October 2009 stipulation.

The parents also contend that the impartial hearing officer's decision should be reversed because the impartial hearing officer rendered her decision prior to the receipt of the transcript of the student's mother's testimony at the impartial hearing.

State regulations require an impartial hearing officer to render a decision that is based solely upon the hearing record (8 NYCRR 200.5[j][5][v]; see Application of a Student with a Disability, Appeal No. 09-058; Application of a Child with a Disability, Appeal No. 00-063; Application of a Child Suspected of Having a Disability, Appeal No. 00-036; Application of a Child with a Disability, Appeal No. 98-55). Although impartial hearing officers often review

impartial hearing transcripts prior to issuing their decisions, there is no statutory requirement for them to do so (Application of a Student with a Disability, Appeal No. 09-084). The student's mother testified on the eighth and final day of the impartial hearing (see Tr. pp. 349-98). The hearing record shows that overall, the impartial hearing officer was engaged in the impartial hearing process, asked questions of witnesses (see Tr. pp. 5-6, 7, 8, 13-14, 24, 25, 27-28, 29, 30, 39, 40, 41, 55, 61, 62, 72, 76, 78, 80, 82, 99, 100, 103, 122, 127, 134, 149, 155, 157, 161-62, 165-66, 171, 172, 173-74, 176, 177, 178, 243, 250, 253, 280, 281, 282, 288, 329, 336, 338, 339, 340, 348-49), and ruled in favor of the parents on numerous occasions in the course of considering the parties' objections (see Tr. pp. 29, 30, 39, 62, 99, 122, 155, 336). I note that the impartial hearing decision was rendered only six days after the close of the impartial hearing and the student's mother's testimony (see Tr. p. 346; IHO Decision at p. 17), and that the parents do not contend that the impartial hearing officer failed to address any arguments raised by the parents during the impartial hearing. Therefore, under the circumstances of this case, I do not find that the decision of the impartial hearing officer should be reversed on this basis. I further note that on appeal I have reviewed the entire hearing record in this case, including the transcript of the student's mother's testimony, in making my decision.

I will now turn to the remainder of the parents' appeal. Two purposes of the 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 Forest Grove v. T.A., 129 S. Ct. 2484, 2491 [2009]; 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 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).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "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 has 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 now consider the parents' contention that no one from the March 2009 CSE or the district conducted an observation of the student in contravention of State regulations, resulting in a denial of a FAPE.[17] The impartial hearing officer concluded that the district was not required to observe the student at his home prior to the March 2009 CSE's recommendation.

State regulations at 8 NYCRR 200.4(b)(iv) provide that an initial evaluation must include "an observation of the student in the student's learning environment (including the regular classroom setting) or, in the case of a student of less than school age or out of school, an environment appropriate for a student of that age, to document the student's academic performance and behavior in the areas of difficulty." Further, a CSE is not required to use its own evaluations in the preparation of an IEP and in the recommendation of an appropriate program for a student. For such purposes, a CSE may rely upon a private evaluation in lieu of conducting its own evaluation (Application of a Child with a Disability, Appeal No. 02-098; Application of a Child with a Disability, Appeal No. 01-040; Application of a Child with a Disability, Appeal No. 96-87); Application of a Child Suspected of Having a Handicapping Condition, Appeal No. 92-12; see also Application of a Child Suspected of Having a Disability, Appeal No. 98-80).

With respect to the parents' allegation that no one from the March 2009 CSE conducted an observation of the student, I first note that State regulations do not require that the observation be conducted by a member of the CSE (see 8 NYCRR 200.4[b][iv]). The student's SEIT supervisor/instructor participated in the March 2009 CSE and prepared an annual review report in January 2009 for the district relating to the student (Tr. pp. 202, 241, 254; see Dist. Ex. 8; Parent Ex. D at p. 2). The annual review report, among other things, reflected the student's SEIT supervisor/instructor's observations of the student in his learning environment and documented his academic performance and behavior in the areas of difficulty. Under the circumstances, I find that the manner in which the observation was conducted did not result in a denial of a FAPE to the student.

With respect to the parents' assertion that no one from the district has ever observed the student to determine his needs arising from his diagnosis of autism, I note that the hearing record includes a private neurodevelopmental and psychological evaluation of the student conducted in June and July 2007 and a second private comprehensive evaluation of the student conducted in May 2008, both of which included observations of the student and addressed the student's needs (see Dist. Exs. 4; 5). I note further that the hearing record includes January 2009 speech-language therapy, OT, and PT progress reports from the student's current related services providers relating to their instruction of the student and the student's current needs and which were a part of the student's initial evaluation (see Dist. Exs. 6; 7; 10). There is no indication in the hearing record that the parents requested the district to conduct a district observation of the student that the district declined to conduct. Nor do the parents allege any deficiency in the quality or extent of the evaluations in the hearing record. Based on my review of the hearing record, I find that the

[17] As part of their argument that no one had observed the student prior to the March 2009 CSE meeting, the parents contend that the district's written policies require that they should have received a "Notice of No Testing" and that no such notice was ever sent. This argument is made for the first time on appeal and is therefore outside the scope of my review (see 20 U.S.C. § 1415[c][2][E][i][II], [f][3][B]; 34 C.F.R. §§ 300.507[d][3][i], [ii], 300.511[d]; 8 NYCRR 200.5[i][7][b], [j][1][ii]). I will therefore not consider it. I also note that the hearing record does not include any documentation verifying the parents' contention with respect to the asserted district policy.

impartial hearing officer's decision should not be reversed on the basis of the parents' contention that no one from the district had observed the student.

Next, the parents contend that the March 2009 CSE should have conducted an FBA and implement a BIP to address the student's behaviors. In the case of a student whose behavior impedes his or her learning or that of others, the CSE shall consider positive behavioral interventions and supports, and other strategies, to address that behavior (20 U.S.C. § 1414[d][3][B][i]; 34 C.F.R. § 300.324[a][2][i]; see 8 NYCRR 200.4[d][3][i]; see also A.C., 553 F.3d at 172; J.A. v. East Ramapo Cent. Sch. Dist., 603 F. Supp. 2d 684, 689 [S.D.N.Y. 2009]; M.M. v. Dep't of Educ., 583 F. Supp. 2d 498, 510 [S.D.N.Y. 2008]; Tarlowe, 2008 WL 2736027, at *8; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 149-50 [S.D.N.Y. 2006]; Application of a Student with a Disability, Appeal No. 09-101; Application of a Student with a Disability, Appeal No. 09-038; Application of a Student with a Disability, Appeal No. 08-028; Application of the Dep't of Educ., Appeal No. 07-120).[18] In addition to this, State regulations relating to an initial evaluation and a reevaluation, require that the CSE include an FBA for a student whose behavior impedes his or her learning or that of others, as necessary to ascertain the physical, mental, behavioral and emotional factors which contribute to the suspected disabilities (8 NYCRR 200.4[b][1][v]).[19] Additionally, under State regulations when considering more restrictive programs or placements as a result of the student's behavior, as CSE "shall consider the development of a behavioral intervention plan" (8 NYCRR 200.22[b]).[20]

In her decision, the impartial hearing officer concurred with the district that the student's behavior did not warrant an FBA or a BIP and that there were sufficient safeguards in place to assure that a BIP would be developed by the district's school-based support team if the student later demonstrated behaviors that interfered with his learning necessitating a BIP (IHO Decision at p. 14). Testimony by the school psychologist who attended the March 2009 CSE meeting and the assistant principal of the proposed school was consistent with the impartial hearing officer's findings. The school psychologist indicated that the special education teacher and the paraprofessional in any classroom such as the one proposed for the student would be trained to deal with students' behaviors such as biting (Tr. pp. 84-85). The assistant principal indicated that the proposed school had a school-based support team as well as a school psychologist (Tr. p. 168). The assistant principal testified that although the March 2009 IEP did not include a BIP, once the student entered the 6:1+1 program, his teacher might feel the need to assess him again to determine if any inappropriate social behaviors were chronic and severe enough to warrant a BIP, or if such behaviors were isolated incidents (Tr. pp. 170-71). Based on the foregoing, the impartial hearing

[18] In developing an IEP and considering "special factors," when a student's behavior impedes learning, federal regulations (34 C.F.R. § 300.324[a][2][i]) and State regulations (8 NYCRR 200.4[d][3]) require consideration of strategies to address that behavior as part of the development of the IEP. Federal regulations (34 C.F.R. §§ 300.530[d][1][ii], 300.530[f][1][i]) and State regulations (8 NYCRR 201.3) also address preparation of, or review of, an FBA and BIP in disciplinary situations. In addition, State regulations (8 NYCRR 200.4[d][3][i], 200.22[a], [b]), but not federal regulations, require consideration of an FBA and BIP in certain non-disciplinary situations.

[19] In New York, an FBA is defined as "the process of determining why a student engages in behaviors that impede learning and how the student's behavior relates to the environment" (8 NYCRR 200.1[r]).

[20] In New York, a BIP is defined as "a plan that is based on the results of a functional behavioral assessment and, at a minimum, includes a description of the problem behavior, global and specific hypotheses as to why the problem behavior occurs and intervention strategies that include positive behavioral supports and services to address the behavior" (8 NYCRR 200.1[mmm]; see 8 NYCRR 201.2[a]).

officer properly found that the March 2009 CSE was not required to conduct an FBA or develop a BIP prior to the development of the March 2009 IEP.

The parents additionally contend that the March 2009 CSE's decision to reduce the student's related services and to discontinue his SEIT services was arbitrarily predetermined to conform to the district's autism program. The issue of predetermination was not raised in the parents' due process complaint notice (see Parent Ex. A), or was it the subject of an amended due process complaint notice. However, both parties elicited testimony relative to this issue at the impartial hearing and the parents raised it in their closing argument. The district did not object to the issue being raised at the impartial hearing and has not claimed in its answer that it is not a proper subject for appeal. The impartial hearing officer did not address this issue. For these reasons and notwithstanding that the impartial hearing officer did not address this issue, I will consider it.

Both parents attended the March 2009 CSE meeting and the student's SEIT supervisor, who also provided the student with at least five hours of SEIT instruction per week was also a participant at that meeting (Tr. pp. 202, 241, 254, 361; Parent Ex. D at p. 2). Although the parents assert that reports were not reviewed with them, that they were not asked particular questions, and that the March 2009 CSE did not address particular issues (Tr. pp. 365, 367, 368, 371), the hearing record also indicates that the parents had an opportunity to meaningfully participate in the March 2009 CSE meeting (see, e.g., Tr. pp. 31, 32, 45, 46, 91-92). Further, the hearing record shows that the parents as well as the student's SEIT supervisor/instructor participated in the meeting and expressed their opinions during the March 2009 CSE's deliberations when they wished to do so (see Tr. pp. 31, 32, 46, 68-69, 241-42, 377-78). I note also that the requirement for meaningful parent participation in a CSE meeting does not mean that the CSE is required to always agree with the opinions expressed by parents at such meetings (Application of a Student with a Disability, Appeal No. 09-137; Application of a Student with a Disability, Appeal No. 08-035; Application of a Child with a Disability, Appeal No. 07-117; see Sch. for Language and Communication Development v. New York State Dep't of Educ., 2006 WL 2792754, at *7 [E.D.N.Y. Sept. 26, 2006] ["Meaningful participation does not require deferral to parent choice"]). I note further that a number of the annual goals and short-term objectives in the March 2009 IEP resulted from suggestions provided to the CSE by the private agency providing the student with SEIT services as well as from at least one of the student's related services providers (Tr. pp. 63, 78-79, 243-45). Additionally, the school psychologist indicated that as part of the district's turning-five evaluation, the school psychologist spoke with the student's mother several times by telephone, received the parent survey portion of the evaluation at the March 2009 CSE meeting, and completed the necessary exit information that was a part of the student's transition process from the CPSE to the CSE (Tr. pp. 21, 72-3; Dist. Ex. 3 at pp. 1-6). Further, upon its receipt of the parents' July 13, 2009 due process complaint notice, the district scheduled an additional CSE meeting to discuss the student's program for the 2009-10 school year (Tr. pp. 4, 7). Based on the above, the hearing record reflects that the CSE's recommended program for the student was not predetermined and thus did not significantly impede the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student (T.P. and S.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]; Nack v. Orange City Sch. Dist., 454 F.3d 604, 610-11 [6th Cir. 2006]; R.R., 2009 WL 1360980, at *8-*9; A.G. v. Frieden, 2009 WL 806832, at *7 [S.D.N.Y. Mar. 26, 2009]; E.G, 606 F. Supp. 2d at 388; P.K. v. Bedford Central Sch. Dist. 569 F. Supp. 2d 371, 382-83 [S.D.N.Y. 2008]; Danielle G. v. New York City Dep't of Educ., 2008 WL 3286579, at *6-*7 [E.D.N.Y. Aug. 7, 2008]; M.M. v. New York City Dep't of Educ., 583 F. Supp. 2d 498, 507 [S.D.N.Y. 2008]; W.S., 454 F. Supp. 2d at 147-48; 20 U.S.C. § 1415[f][3][E][ii][II]; 34 C.F.R. § 300.513[a][2][ii]; 8 NYCRR 200.5[j][4][ii]; see Application of a Student with a

Disability, Appeal No. 09-038; Application of a Student with a Disability, Appeal No. 08-035 [finding that the hearing record supported a conclusion that a predetermination of program services rose to the level of a denial of a FAPE.

The parents further allege that the program and placement recommended by the March 2009 CSE was not reasonably calculated to enable the student to receive educational benefits. Among other things, the parents contend on appeal that the recommendations were not individualized, but were based on the opinions of outside professionals who were consulted "in secret," and who had never met the student; that the March 2009 CSE chose to credit the opinions of alleged professionals who were strangers to the student over the opinions of the parents and the student's related services providers; and that the annual goals developed by the March 2009 CSE were chosen by the school psychologist, "who had never met, evaluated, or observed [the student]" and not by the student's "own educators." The impartial hearing officer concluded that the evaluations were adequately reviewed and carefully considered and that the March 2009 CSE also considered the other information presented by the parents at the March 2009 CSE meeting (IHO Decision at p. 14). The impartial hearing officer did not address the adequacy of the annual goals in the March 2009 IEP. None of these issues were raised in the parents' due process complaint notice (see Parent Ex. A), or does the hearing record show that these issues were properly raised in an amended due process complaint notice. Further, while there was some testimony at the impartial hearing relative to them, the hearing record does not show that the district agreed to expand the scope of the impartial hearing to include these issues.

A party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 C.F.R. §§ 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]) or the original due process complaint is amended prior to the impartial hearing per permission given by the impartial hearing officer at least five days prior to the impartial hearing (20 U.S.C. §1415[c][2][E][i][II]; 34 C.F.R. § 300.508[d][3][ii]; 8 NYCRR 200.5[i][7][b]; see Snyder v. Montgomery County. Pub. Sch., 2009 WL 3246579, at *7 [D. Md. Sept. 29, 2009]; 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 No. 09-140; Application of a Student with a Disability, Appeal No. 09-112; Application of a Student with a Disability, Appeal No. 09-095; Application of a Student with a Disability, Appeal No. 09-082; Application of a Student with a Disability, Appeal No. 09-079; 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; 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).. Therefore, and for the reasons set out above, I find that these contentions by the parents are outside the scope of my review and I therefore will not consider them.[21, 22]

The parents also assert that the March 2009 IEP's annual goals were not based on current and appropriate assessments. This contention was asserted at the impartial hearing without the district's objection. The annual goals and short-term objectives included in the March 2009 IEP are consistent with the evaluative data in the initial evaluation with respect to the student and are aligned with the student's identified areas of need (see Dist. Exs. 5; 6; 7; 8; 10; Parent Ex. D at pp. 6-14;). I also note that the school psychologist testified that the student's recommended goals were appropriate for the student, that they were "very much linked" to the evaluations and were consistent with the related service progress reports, and that they were interconnected to each other (Tr. pp. 40, 95, 98). For example, specific to the student's fine motor goal and objectives pertaining to "functional hand control and strength for a greater success with fine motor tasks and greater proficiency with classroom utensil use," testimony by the assistant principal indicated that such a goal and its related objectives would be implemented in the classroom by the teacher and by the therapist (Tr. pp. 171-75; Parent Ex. D at p. 12). The assistant principal also noted that during art, students work with clay, putty, and finger paint, and perform tasks involving cutting, pasting, and gluing as pre-writing exercises to help prepare then for the fine motor task of writing (Tr. p. 175). Further, the March 2009 IEP includes sufficient information detailing the student's academic performance and learning characteristics, and appropriately identifies the student's behavioral, language, social/emotional and physical developmental needs. Additionally, the present levels of performance and information relative to the student's needs are consistent with the evaluative information that was a part of the student's initial evaluation, and a great deal of that information was prepared by individuals who at the time of the March 2009 CSE meeting were providing the student with SEIT and related services (see Parent Ex. D at pp. 3-5; see also Dist. Exs. 6; 7; 8; 10). I also note that the district representative/ school psychologist at the March 2009 CSE meeting testified that the information with respect to the student's present levels and needs was initially prepared by the student's SEIT (Tr. pp. 48-49).

The parents further assert that the impartial hearing officer's decision should be reversed because the "class recommended for [the student] did not exist for the 2009-10 school year" and because the district's recommended 6:1+1 class as well as the recommended level of SEIT and related services were not appropriate for the student. The impartial hearing officer concluded that the evidence in the hearing record supported a finding that the program offered by the district was appropriate for him and that the March 2009 CSE recommendation was reasonably calculated to confer educational benefits on the student in the LRE (IHO Decision at pp. 14, 16). Upon my independent review of the hearing record and for the reasons set forth below, I find that the hearing record supports the impartial hearing officer's conclusions.

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[21] I also note that with respect to the parents' claim that the annual goals were selected by the school psychologist who did not know the student and not by the student's "own educators," the hearing record reflects that at least some of the annual goals and short-term objectives were suggested by the student's SEIT and at least one of his related services providers (Tr. pp. 63, 78-79, 243-45).

[22] With respect to the parents' claim that the March 2009 IEP's recommendations were based on the opinions of outside professionals who were consulted "in secret" and who had not met the student, the hearing record reflects that the March 2009 CSE approved the student's program and services, that the parents had an opportunity to meaningfully participate in the March 2009 CSE meeting, and that the parents expressed opinions at that meeting when they wished to do so (Tr. pp. 31-33, 37, 45, 46, 91-92, 31, 32, 46, 68-69, 241-42, 377-78).

With respect to the 6:1+1 class recommended by the March 2009 CSE, the hearing record reflects that the recommended school is housed in a building that in addition to the proposed special school, contains two other general education schools (Tr. pp. 112, 115). At the time of the impartial hearing, the school had three 6:1+1 classes, each comprised of six students eligible for special education services as students with autism, one teacher, and one paraprofessional (Tr. pp. 111, 113). Although the assistant principal's testimony indicated that the 6:1+1 class proposed for the student had no enrollment at the time of the impartial hearing, the assistant principal testified that the class was being newly formulated and the special school was in the process of receiving student referrals; the teacher likely assigned to the new class had 26 years of service and was nationally board certified in early childhood education (Tr. pp. 114, 130-32).

With respect to the programming, the assistant principal indicated that although ABA would not be used all day in the recommended classroom, the teacher of the 6:1+1 class was ABA trained, would use ABA in the classroom, and would collect and maintain data in a folio (Tr. pp. 136-37). The paraprofessional in the classroom was also ABA trained (Tr. pp. 135, 137). The assistant principal testified that the teacher would also instruct the student in how to utilize TEACCH,[23] which the hearing record reflects is "a process of instructing children on how to move and to transition from one activity to the other, and what to expect" (Tr. pp. 137-38). The assistant principal also explained how the use of TEACCH would foster the student's use of language by using pictures/words as prompts to encourage the internalization of language (Tr. pp. 138-39).

The assistant principal testified that a 6:1+1 class may contain additional paraprofessionals, depending on the needs of the children in the class and in accordance with their IEPs (Tr. p. 113). Further, the assistant principal indicated that the teachers in the 6:1+1 class are trained in the TEACCH methodology; that the classroom contains workstations; that students are taught how to utilize their schedules to proceed to their workstations to complete their work; that the teachers utilize ABA and "ABC" charts; and that telephone contact and a shared communication book between the teacher and the parent facilitate teacher and parent communication (Tr. pp. 117-18). School staff is also trained in PECS and/or communication devices are used in the classroom in conjunction with the speech-language teacher, depending on the communication needs of the student (Tr. pp. 118, 141-42). With respect to the student's daily schedule, the assistant principal testified that in the morning, the class would have an "instructional breakfast" where students would make choices using their specific mode of communication (Tr. pp. 118-19). After breakfast, the students would transition to the classroom, begin unpacking, and have a group morning meeting time (Tr. p. 126). After the group morning meeting time, the students would go to their workstations to work on their individual goals with teacher and paraprofessional assistance (Tr. pp. 126-27). The hearing record indicates that staff have a "responsibility chart" that includes, among other things, a listing of the students, scheduling information, each students' specific goals, and the teacher's goals for the students (Tr. p. 126).

The assistant principal testified that the proposed school's related service providers review their students' IEPs and provide related services based on the student's IEP mandates (Tr. p. 119). OT, PT and speech-language related service providers collaborate with classroom teachers so that there is a "seamless alignment of goals" (Tr. pp. 119-20). Related service providers "sign in" when they enter a classroom as a form of accountability to ensure that students receive their IEP-mandated instruction (Tr. p. 120). Related service providers also collaborate with the classroom

[23] TEACCH stands for "Treatment and Education of Autistic and related Communication-handicapped Children."

teachers to modify lessons as well as to "push into" classrooms to assist within the natural environment, when appropriate (id.).

The assistant principal further testified that she maintains "open communication" with parents through telephone contact, use of communication notebooks, and by parent visits to the school (Tr. p. 121). A parent coordinator provides parents of students with information and workshops (Tr. p. 122). The parent coordinator also provides activities on weekends for parents and their children who choose to participate in such activities (id.). In addition, the school's guidance counselors, the family worker, and the parent coordinator provide outreach (id.).

Further, the school provided assistance to students who received home instruction in transitioning to the special school and this assistance was flexible and depended on the needs of the parents (Tr. p. 124). The assistant principal testified that most times, particularly with younger children, parents tended to come into school and assist with the transition of their child (Tr. pp. 125-26). She also testified that it was important to work with parents in order to deal with a transitioning student's "separation and anxiety" (Tr. p. 126).

The assistant principal indicated that the 6:1+1 program would be appropriate for the student and that she believed that he would make meaningful educational gains (Tr. pp. 122-23). She indicated that the "very experienced" teachers in the class had had success with helping children make gains in improving academics and social skills and that gains in both were part of the school's curriculum (Tr. p. 123). Regarding the implementation of the student's classroom goals, the assistant principal indicated that teachers would review his IEP (id.). The teachers would also do their own assessment[24] so as to target a student's strengths and weaknesses and to "know how to better move forward with academic instruction" (id.). The assistant principal explained that academic instruction is based on State regulations and that all special education teachers differentiate instruction for their students (id.). The assistant principal also testified that progress is measured three times per year and that each time the school issues a report card, students' IEPs are reviewed and "the measures and progress" are indicated on the IEP and attached to the report card (Tr. p. 124). Parent-teacher conferences also occur three times per year (id.). Additionally, the students' goals are reviewed for appropriateness, improvement, adjustment, or continuance during the annual review period (id.).

With respect to the parents' contention that the student required 1:1 SEIT services and additional related services than what the March 2009 CSE recommended, for the reasons explained below, I disagree. The school psychologist who attended the March 2009 CSE meeting testified that the amount of related services recommended by the March 2009 CSE would be adequate for the student's needs (Tr. p. 38). She also testified that the March 2009 CSE's related services recommendations reflected review by related services providers in her school who had familiarity with the reports of the student (Tr. pp. 35-36, 57-58, 60-61, 62, 66, 88). Further, the school psychologist testified that a 6:1+1 special class is a "very intensive" setting (Tr. p. 37). The school psychologist testified that pull-out sessions for OT, PT and speech-language were reduced for the student because the proposed 6:1+1 program included language enrichment as a major part of the program and all services would be adapted to students' needs (Tr. pp. 38-39, 61, 65-66, 93). She testified that the 6:1+1 program included adapted physical education, and that the gym teacher and the physical therapist could work in consultation to assist the student with his PT needs (Tr. p. 38).

[24] The assistant principal indicated that the school used the "Brigance," but had switched to using the "ABLLS" (Tr. p. 123).

In regard to OT, she testified that the student's fine motor needs would also be addressed in gym as well as in the classroom setting where fine motor activities and "OT stimulation" would occur (Tr. pp. 38-39, 65). The district representative/school psychologist also testified that the intensive 6:1+1 educational setting addresses OT needs, that the recommended number of OT sessions was the "correct" number, and that "pull[ing]" the student from class resulted in missed educational time (Tr. pp. 65-66). The district representative/school psychologist further noted that given the 6:1+1 setting, the student would be able to participate in all school activities because all activities including gym, recess and lunch would be adapted to his needs and would offer him opportunities for socialization (Tr. pp. 38-39). Furthermore, the district representative/school psychologist testified that the 6:1+1 class provided comprehensive service to a student in that all of the related service providers are in the setting and work closely with the classroom teacher (Tr. p. 93). She testified that the related service providers can be in the classroom and out of the classroom; that the classroom would be "very language enriched;" that there would be "a lot of focus on OT issues, on activities of daily living (ADL), PT issues, all of those things are addressed all day long in the classroom;" and that these issues would also be addressed when the related service providers come into the classroom or pulled the students out (id.). Further, the assistant principal indicated that the proposed school has a sensory teacher with a classroom who provides students an opportunity to work with textures and participate in memory games and exercises as well as in fine and gross motor activities (Tr. pp. 164-65).[25]

I further note that the hearing record reflects that the 1:1 SEIT and home-based services that were being provided to the student by the district at the time of the impartial hearing, and which the parent asserted were appropriate for the student and should therefore continue, had been approved only in light of the CPSE's inability during the prior school year to locate an appropriate preschool where the student could receive the special education services identified as appropriate

[25] The parents assert on appeal that the student lacked all awareness of potential danger and that he would commonly flee a room with an unlocked door, and "given the distracting behaviors" of the students in the 6:1+1 class, the recommended class "could not provide [the student] with the level of supervision he requires to keep him safe." This issue was not raised in the parents' due process complaint notice (see Parent Ex. A), nor does the hearing record show that it was properly raised in an amended due process complaint notice. Further, while there was some testimony at the impartial hearing relative to this issue, the parents did not include this issue in their closing statement and the hearing record does not show that the district agreed to expand the scope of the impartial hearing to include this issue. Consistent with this, the impartial hearing officer did not address this issue. For these reasons, and taking into account the earlier referenced law and regulations delineating which issues may be considered at an impartial hearing (see 20 U.S.C. § 1415[c][2][E][i][II], [f][3][B]; 34 C.F.R. §§ 300.507[d][3][i], [ii], 300.511[d]; 8 NYCRR 200.5[i][7][b], [j][1][ii]), I find that the parents' contention that the recommended class could not provide the student with the level of supervision he requires to keep him safe is not properly raised for review and the argument is dismissed as outside the scope of review. However, even if this contention had been properly preserved for review, I would find that it was not persuasive. In particular, the school psychologist who was also the district's representative at the March 2009 CSE testified that the student would receive the attention he required for his behavioral needs (Tr. p. 33). She also testified that additional paraprofessionals would be in the class as required by the IEPs of the students in the class (Tr. p. 113). I note that there was no testimony from either the student's SEIT or his speech-language therapist that the recommended 6:1+1 would not provide an adequate level of supervision to ensure the student's safety. I note further that the assistant principal described the school building as "very collaborative," with "uniformity" in arrival and dismissal procedures (Tr. pp. 116-17); that special education classes and related services delivery locations are located exclusively on the fifth floor of the school building; that the assistant principal testified that when students arrive in the morning, all staff are present and assigned to receive students off buses and escort them into the building, whereupon students immediately go to their class grouping (Tr. p. 129); that two "safety agents" are assigned to the building, one being responsible for monitoring the four-door entrance into the building and the other circulating between the other five doors through the cafeteria (Tr. pp. 128-30); and that supervision is provided by teachers and parents during lunchtime (Tr. p. 121).

for his needs in his January 2009 preschool IEP (see Dist. Ex. B). Further, I note that the district's January 2009 CPSE had initially recommended that the student's preschool placement be a full-day special class and that in conjunction with that placement, had recommend a less intensive program of related services for the student (see Parent Ex. C at pp. 1, 21). With respect to this, but for the CPSE's inability to locate an appropriate special class placement for the student during the prior school year, the January 2009 preschool IEP had included a lesser amount of related services (id. at p. 21). I also note that at least one of the parents attended the January 2009 CPSE meeting and that the hearing record does not reflect any objection by the parents to the related services recommendations in the January 2009 preschool IEP.

The parents also assert that the student would not have been suitably grouped in the recommended class in that the students in the class did not have similar language or social skills. The impartial hearing officer did not address this issue. State regulations require that in special classes, students must be suitably grouped for instructional purposes with other students having similar individual needs (8 NYCRR 200.1[ww][3][i], 200.6[a][3], [h][3]; see Application of the Dep't of Educ. Appeal No. 08-095; Application of the Dep't of Educ., Appeal No. 08-018; Application of a Child with a Disability, Appeal No. 07-068; Application of a Child with a Disability, Appeal No. 05-102).[26] State regulations further provide that determinations regarding the size and composition of a special class shall be based on the similarity of the individual needs of the students according to: levels of academic or educational achievement and learning characteristics; levels of social development; levels of physical development; and the management needs of the students in the classroom (8 NYCRR 200.6[h][2]; see also 8 NYCRR 200.1[ww][3][i][a] – [d]). The social and physical levels of development of the individual students shall be considered to ensure beneficial growth to each student, although neither should be a sole basis for determining placement (8 NYCRR 200.6[a][3][ii], [iii]). Further, the management needs of students may vary and the modifications, adaptations and other resources are to be provided to students so that they do not detract from the opportunities of the other students in the class (8 NYCRR 200.6[a][3][iv]). The similarity of abilities and needs may be demonstrated through the use of a proposed class profile or by the testimony of a witness who is familiar with the children in the proposed class (Application of the Dep't of Educ., Appeal No. 08-095; Application of the Dep't of Educ., Appeal No. 08-018; Application of a Child with a Disability, Appeal No. 07-068). State regulations also require that a "district operating a special class wherein the range of achievement levels in reading and mathematics exceeds three years shall, . . . , provide the [CSE] and the parents and teacher of students in such class a description of the range of achievement in reading and mathematics, . . . , in the class, by November 1st of each year" (8 NYCRR 200.6[g][7]). However, the regulations do not preclude a grouping of students in a classroom when the range of achievement levels in reading and math would exceed three years (see Application of the Dep't of Educ., Appeal No. 08-018; Application of the Bd. Of Educ., Appeal No. 06-010; Application of a Child with a Disability, Appeal No. 01-073).

The assistant principal testified that the students in the class recommended for the student were eligible for special education services as students with autism (Tr. pp. 140-41). She also testified that the school expected the class to be composed of all students in the "turning 5 group" and should be "basically, the same level" (Tr. p. 140). When asked if the goals on the student's March 2009 IEP were similar to goals that might be worked on by other students in the proposed class, the assistant principal testified that some would be similar but that all of them would not be the same because the IEPs are individualized (Tr. pp. 154-55). Moreover, the recommended 6:1+1

[26] See Walczak, 142 F.3d at 133 (approving IEP that placed student in a classroom with students of different intellectual, social, and behavioral needs, where sufficient similarities existed).

class, by regulatory definition (see 8 NYCRR 200.6[h][4][ii][a]), would be one comprised of not more than six students whose management needs are determined to be highly intensive and requiring a high degree of individualized attention and intervention. The student in the case herein has management needs that are highly intensive and require a high degree of individualized attention and intervention. The assistant principal's testimony and description of the 6:1+1 proposed classroom is consistent with the student's needs (see generally Tr. pp. 111-143).

The parents also contend that a 1:1 instructional setting was the LRE for the student. The impartial hearing officer determined that in light of the student's progress while receiving CPSE services from the district during the 2008-09 school year, the program recommended by the March 2009 CSE would have provided the student with appropriate educational benefits in the LRE (IHO Decision at p. 16). The district representative/school psychologist testified that based on the reports as well as discussion with district OT, PT and speech-language professionals, the March 2009 CSE concluded that the student, who would be of school age at the time the March 2009 IEP would be implemented, would benefit from a small setting with a full-time special education teacher, receipt of all of his related services in a coordinated manner, and from the opportunity to interact with other children, particularly with respect to the latter because socialization was a deficit area for the student (Tr. pp. 32, 57). The district representative/school psychologist testified that the March 2009 CSE believed that there was no reason why the student could not participate in a school program with other children his age, that the student would "benefit greatly" from attending a school program with other children, and that it would not be in the student's best interest to be at home for another year (Tr. p. 68). The district representative/school psychologist also testified that in the school program, which included a classroom paraprofessional, the student would be able to receive the attention that he needed in "all aspects, language, educationally and behaviorally," and that the program would provide him with the benefit of peer interaction (Tr. pp. 33-34).

A home-based program is one of the most restrictive environments (see 8 NYCRR 200.6[d][a]-[j]; see also Application of a Child with a Disability, Appeal No. 04-071; Application of a Child with a Disability, Appeal No. 96-07). The hearing record reflects that, upon its review, the March 2009 CSE concluded that the student would benefit from the opportunity of the peer interaction that he would receive as a result of the recommended school based program and that such a program was appropriate for him (Tr. pp. 32-33, 35-36, 53-54, 57, 68, 84). Consistent with this, the hearing record does not show that the student requires a 1:1 educational program as a necessary component of a FAPE for this student (see Application of a Child with a Disability, Appeal No. 07-096; Application of a Child with a Disability, Appeal No. 06-131). I have considered the testimony by the student's CPSE speech-language related service provider that the student received small group speech-language therapy with his sibling because he was "not ready to be seen with another special education child in a group setting as mandated on the IEP" (Tr. pp. 331-32). However, I note that the March 2009 CSE concluded that it was appropriate to initiate speech-language services that would include a two person group and that there is no evidence to suggest, given the student's ability to engage in positive interaction with his sibling in a structured two person setting, that such would not be an appropriate effort to make.

In conclusion, I find that the impartial hearing officer's determination that the district offered the student a FAPE in the LRE for the 2009-10 school year is supported by the hearing record. Having determined that the district offered the student a FAPE in the LRE, I need not reach the issue of whether the program proposed by the parents was appropriate 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 Disability, Appeal No. 08-158; Application of a Child with a Disability, Appeal No. 05-038).[27]

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

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the portion of the impartial hearing officer's decision with respect to pendency is annulled and pendency services for the student shall reflect the parties' October 2009 stipulation on pendency.

Dated: **Albany, New York**
March 22, 2010

PAUL F. KELLY
STATE REVIEW OFFICER

[27] With respect to an assertion by the parents that they should be reimbursed for monies expended on behalf of the student representing payment for the student's SEIT and related services, I note that as indicated above, the hearing record does not show that the parents have expended any monies on these services, however, the district should reimburse the parent for any expenditures that may have been appropriately made by the parents to maintain pendency that the district should have been paying all along (see New York City Dep't. of Educ. v. S.S., 2010 WL 983719, at * 8 (S.D.N.Y. March 17, 2010).