



The University of the State of New York

The State Education Department

State Review Officer

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No. 10-063

Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:

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

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

DECISION

Petitioner (the district) appeals from the decision of an impartial hearing officer which found that it failed to offer an appropriate educational program to respondents' (the parents') son and ordered it to reimburse the parents for their son's tuition costs at the McCarton School (McCarton) for the 2008-09 school year. The appeal must be sustained.

At the time that the impartial hearing convened in September 2008, the student was attending a center-based program at McCarton and receiving home-based applied behavioral analysis (ABA) therapy (Tr. pp. 591, 711-14, 734; Parent Exs. V; EE). McCarton has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7). The student's eligibility for special education and related services as a student with autism is not in dispute in this appeal (see 34 C.F.R. § 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

With regard to the student's educational history, the student participated in an early intervention program while residing in New Jersey, and was thereafter referred to the Child Study Team (CST) due to his developmental delays (Parent Ex. C at p. 6). On April 11, 2005, the CST convened for the student's initial review and to develop an individualized education program (IEP) for the 2005-06 school year (id. at p. 2). The April 2005 CST determined that the student was eligible for special education services as a preschool student with a disability and developed the student's IEP for the 2005-06 school year (id.). The April 2005 CST recommended that the student

be placed in a preschool "inclusion" class and did not recommend extended school year services (id. at pp. 2, 12). The April 2005 IEP stated that the student had been receiving private ABA therapy, speech-language therapy, and occupational therapy (OT) since October 2004 (id. at p. 6). At the time of the IEP meeting, the student was receiving ABA therapy for 20 hours per week to address communication and pre-readiness skills (id.).

The April 2005 IEP reflected that the student had previously received a diagnosis of autism (Parent Ex. C at p. 6). The April 2005 CST noted that although the student had limited interactions with peers, he made progress in the area of social skills (id.). According to the April 2005 IEP, the student would benefit from interacting with nondisabled peers within the regular education preschool program that included incidental learning, peer modeling, and peer interaction, and noted that the student was "able to participate with non-disabled peers in all non-academic and extracurricular activities" (id. at p. 11).

The student's father reported that the student attended the recommended preschool program in New Jersey with the assistance of a special education itinerant teacher (SEIT) for approximately two to three months (Dist. Ex. 7 at p. 2). However, due to the student's tantrum behaviors and difficulty with the classroom routine, the family sought home-based services consisting of 30 hours of ABA therapy, speech-language therapy, and OT (id.).

In January 2006, the student was evaluated by the McCarton Center to assess his then-current educational and therapeutic needs (Dist. Ex. 8). The evaluator noted that at the time of the evaluation the student's district provided him with speech-language therapy three times per week for 45 minutes and OT two times per week for 45 minutes (id. at p. 1). The evaluator also noted that the student's ABA therapy hours had decreased from 31 hours to 13 hours per week due to scheduling difficulties with one of his two ABA therapists (id.). The evaluator opined that the decrease in ABA therapy hours resulted in attention difficulties and regression in the student's behavior, including an increase in sensory seeking behavior (id.).

The evaluator administered a battery of standardized tests to the student including the Beery-Buktenica Test of Visual Motor Integration Fifth Edition (VMI); the Childhood Autism Rating Scale (CARS); the Expressive One-Word Picture Vocabulary Test (EOWPVT); the Receptive One-Word Picture Vocabulary Test (ROWPVT); the Stanford-Binet Intelligence Test, Fifth Edition (SB-V); and the Vineland Adaptive Behavior Scales, Second Edition (VABS-II) (Dist. Ex. 8). The student's assessment results indicated that his verbal and nonverbal reasoning skills fell within the low to very low range (id. at p. 4). The student exhibited average abilities in the area of quantitative reasoning and the student's adaptive behavior skills fell in the low range (id. at pp. 4, 6-7). According to the CARS results, the student's behavior met the criteria for a mild to moderate autism spectrum disorder (id. at p. 7).

Based on her observation, the evaluator reported that the student "required a significant amount of support to remain focused on materials and goal related tasks" (Dist. Ex. 8 at p. 3). With regard to the student's play skills, the student was able to engage with the evaluator for structured play for a "short time" (id.). The evaluator reported that the student's "ability to communicate was limited by his language delays" (id.).

With regard to services, the evaluator from McCarton recommended that the student attend a 12-month program as well as receive 30 hours weekly of ABA therapy and three hours weekly of parent training to address the student's generalization of skills to the home and community settings (Dist. Ex. 8 at p. 8). The evaluator advised that the student should receive speech-language therapy and OT (id.). It was recommended that the student's therapists, teacher, and parents engage in monthly interdisciplinary meetings to review the student's progress and modify his program (id.). According to the evaluator, the student should attend a center-based program that primarily utilized an ABA therapy (1:1 discrete trial training) instructional methodology (id.). The evaluator noted that if such an ABA program was not available, the student should continue to receive a home program which consisted of 30 hours of ABA per week (id.).

The student began attending McCarton in September 2006 (Tr. pp. 657-58; Parent Ex. C at p. 1). On July 1, 2007, the student's family relocated to the district from New Jersey (Tr. pp. 777-78). The parents received an enrollment contract from McCarton dated July 9, 2007, which confirmed the student's enrollment in McCarton for the 2007-08 school year (Parent Ex. U).

In a January 3, 2008 speech-language progress report from McCarton, the student's speech-language pathologist reported that he received speech-language therapy five times per week individually for 60 minutes to address play skills, speech motor planning skills, and "oral-sensory-motor" skills, as well as receptive, expressive and pragmatic language (Dist. Ex.11 at pp. 1-3). The speech-language pathologist reported that the student continued "to exhibit frequent self-stimulating behaviors and behavioral issues (e.g., frequent vocal protests, impulsive movements such as darting away, falling to the floor, grabbing, touching and smelling objects, spitting), which impede[d] his speech and language progress" (id. at p. 1). She reported that the student made "steady progress in all areas of speech and language" and continued to recommend therapy five times per week individually for 60-minute sessions to address his speech-language deficits (id. at p. 3).

In a McCarton educational progress report dated January 7, 2008, the student's teacher noted that at the time of the evaluation the student attended an ABA classroom which had a 1:1 student-to-teacher ratio and five children (Dist. Ex. 10). The student received related services of speech-language therapy and OT, as well as 30 hours of center-based ABA and eight hours of home-based ABA instruction (Dist. 10 at p. 1). The teacher reported that although the student's overall functioning had improved, he continued to display delays in cognition, play skills, social skills, living skills, gross and fine motor skills, adaptive behavior, and communication (id. at p. 1). The student also displayed difficulties with attention, eye contact, and behavior such as self-stimulatory behaviors, non-contextual perseverative vocalizations, eye gazing; and low frustration tolerance as indicated by screaming, dropping to the floor and throwing materials (id.). The teacher stated that the student's behavior negatively affected all areas of development and required "constant, individualized adult intervention in order to follow directions and attend to tasks, play appropriately, and learn new skills" (id.). According to the teacher, the student "require[d] a structured one to one situation to learn, with continuous interaction, positive reinforcement, redirection, and adult prompting to remain focused and stay on task" (id. at p. 2). The teacher concluded that the student "continue[d] to exhibit [a] positive response to the highly structured, visual, and individualized behavioral teaching methods" (id. at p. 7). The teacher recommended that the use of a "highly structured treatment using 1:1 model . . . to increase [his] abilities . . . is necessary to help him develop attending and behavioral controls" (id.).

In a McCarton OT progress report dated January 18, 2008, the occupational therapist indicated that the student received OT five times per week individually for 45 minutes in a sensory gym to address self regulation needs, motor planning skills, fine motor skills, perceptual skills, self-care skills, frustration tolerance, and coping skills (Dist. Ex. 9 at pp. 1-6). The student's sensory processing and attention skills were addressed through a sensory diet and daily individual OT sessions including deep pressure massage, walking on a treadmill, and vestibular input on a variety of swings (id. at pp. 1-2). The occupational therapist reported that the student made steady progress in the areas of sensory regulation, gross and fine motor, and living skills but continued to need support in these areas (id. at p. 6). Recommendations included continuation of OT five times per week individually for 45 minutes (id.).

In an undated letter, the student's father requested that the Committee on Special Education (CSE) meet to determine his son's eligibility for special education services (Tr. pp. 778-79; Parent Ex. C at p. 1). The student's father provided consent to release the student's prior assessments to the district and indicated that he would provide consent for additional evaluations if necessary (Parent Ex. C at p. 1). The student's father indicated that the student was "making good and meaningful progress in his McCarton program" but that he would like to consider other educational programs (id.). The student's father enclosed the student's most recent IEP from the school the student attended in New Jersey (id.).

By letter dated February 20, 2008, the district advised the parents of the date that the initial special education evaluation would be conducted for the student (Parent Ex. G). The district requested consent for the evaluation and provided the parents with a parent's guide for special education (id. at pp. 1-2). In a letter to the district dated March 13, 2008, the student's father consented to an initial evaluation for special education services for the student (Dist. Ex. 4).

On March 13, 2008, a district social worker completed a social history with the parents as part of the initial evaluation of the student (Dist. Ex. 7). The student's father reported that the student had made progress in the areas of attention, behavior, and social skills (id. at p. 2). The social history reflected that the student had difficulty with communication and needed much redirection (id.).

On March 20, 2008, a district psychologist conducted a psychoeducational assessment of the student as part of the initial evaluation (Dist. Ex. 3). Administration of the Kaufman Survey of Early Academic and Language Skills (K-SEALS) yielded results in the "[l]ower-[e]xtreme" to the "upper limits of the [l]ow [a]verage range regarding the student's academic skills (id. at p. 2). The student demonstrated a two-year delay in the areas of expressive and receptive language (id. at p. 3). The student's vocabulary skills were in the lower-extreme range and his knowledge of number letters and words was in the low average range (id. at pp. 2-3). The district psychologist noted that the student's "fluctuations in attention and focus, eye-contact, difficulties with verbal expression and the presentation of behaviors that are typical characteristics of [his disability that] render this partial evaluation a minimal estimate of his true academic functioning" (id. at p. 2).

On April 7, 2008, the district social worker who had completed the social history with the parents conducted a classroom observation of the student at McCarton (Dist. Ex. 5). The observation report reflected that the student engaged with the speech-language therapist while three other students worked individually with ABA therapists (id. at p.1). The student engaged in

activities that involved speaking in full sentences and sequencing skills and he earned tokens and chose rewards following each activity (id.). During the activities, the student had difficulty maintaining his attention and needed to be redirected several times (id.). Although the student exhibited some perseverative behaviors, he was able to be redirected most of the time (id. at p. 2). According to the observation report, the student presented with a "fair amount of eye contact," responded to questions, and engaged in spontaneous speech (id.).

On May 15, 2008, the CSE convened for the student's initial review and to develop the student's IEP for the 2008-09 school year (Parent Ex. B). Attendees at the May 15, 2008 CSE meeting included a special education teacher/related service provider, who also acted as a district representative, a district school psychologist, a district school social worker, an additional parent member, and staff from the McCarton School who participated by telephone, including the director of education, speech-language therapist and ABA therapist (id. at p. 2).

The May 2008 CSE determined that the student was eligible for special education and related services as a student with autism and developed the student's IEP for the 2008-09 school year (Parent Ex. B at p. 1). The student's present levels of academic performance in the resultant IEP indicated that according to previous testing completed in January 2006, the student demonstrated significant delays in nonverbal and verbal reasoning skills but showed average ability in quantitative reasoning skills (id. at p. 3). The May 2008 IEP indicated that the student's academic skills in the areas of vocabulary, letter/word skills, number skills, expressive skills, and receptive skills all fell at the pre-kindergarten level (id.). Additionally, the student's number, letter, and word skills all fell at the kindergarten level (id.). The May 2008 IEP indicated that his academic management needs included opportunities for repetition/practice, visual/verbal prompts, breaking down instructional tasks into smaller parts, preferential seating, verbal encouragement, immediate positive reinforcement, and a behavior modification system (id. at p. 4).

With regard to the present levels of social/emotional performance, the May 2008 IEP reflected the student had received a diagnosis of a pervasive developmental disorder (PDD) (Parent Ex. B at p. 5). The May 2008 IEP noted that the student displayed difficulties with attention and social/emotional functioning (id. at p. 5). The May 2008 IEP reflected that the student required highly intensive supervision with one-to-one support (id.). The May 2008 IEP indicated that his social/emotional management needs included constant adult supervision, immediate reinforcement, a behavior modification system, and assistance with pragmatic language skills (id.).

The May 2008 IEP contained 21 annual goals and 62 corresponding short-term objectives related to the student's needs in the areas of self-regulation, motor skills, self-care, frustration tolerance, expressive and receptive language, following directions, articulation skills, sensory-motor skills, play skills, math, reading, eye contact, attention, and social/emotional functioning (Parent Ex. B at pp. 7-11). Testing accommodations were not recommended for the student (id. at p. 16). The May 2008 CSE recommended that the student be placed in a 6:1+1 special class in a specialized school on a 12-month basis and receive related services including speech-language therapy and OT five times per week individually for 30 minutes (id. at p. 1, 16).

A behavior intervention plan attached to the May 2008 IEP indicated that the student had behaviors that interfered with learning, which included repetitive non-contextual sounds, words or phrases; use of an inappropriate pitch, tone and volume; and dropping to the floor (Parent Ex. B at

p. 17). The behavior intervention plan identified strategies and supports to address the student's interfering behaviors including correction of the behavior, differential reinforcement of alternative behaviors, differential reinforcement of incompatible behaviors, positive behavioral support, variation of task difficulty, fast paced item presentation, a visual schedule, movement breaks, a sensory diet, "planned ignoring" and a token economy (id.).

The district sent the parents a final notice of recommendation (FNR) dated June 17, 2008, stating that the student was recommended to attend a 6:1+1 special class in a specialized school with related services of speech-language therapy and OT (Dist. Ex. 2). The FNR stated that a notice of parental rights and the student's IEP were attached (id.). In the FNR, the district also informed the parents of the specific school and class that the student would attend for the 2008-09 school year (id.).

In a letter to the district dated June 24, 2008, the student's father requested an opportunity for the parents to visit the school site identified by the district (Parent Ex. GG). However, in a letter dated June 27, 2008, the student's parent advised the district that he was unable to visit the proposed school site due to the "short time frame" between the FNR and the commencement of the 2008-09 school year (Parent Ex. D). The student's father informed the district that the parents rejected the district's proposed placement and intended to seek reimbursement for private services at McCarton and related services for the 2008-09 school year (id.).

In a due process complaint notice dated June 30, 2008, the parents requested an impartial hearing to adjudicate, among other things, their claims for declaratory relief and reimbursement for the private educational services obtained by the parents for the 2007-08 and 2008-09 school years (Parent Ex. A at p. 1). With regard to the 2008-09 school year, the parents alleged the district failed to offer the student a Free Appropriate Public Education (FAPE) because a specific placement was not developed with their participation during the May 2008 CSE meeting and that the student's placement was developed by another individual that did not attend the May 2008 CSE meeting (id. at p. 2). The parents also asserted that the district failed to provide for parent training and counseling related to the student's autism (id.). The parents contended that the district failed to include a regular education teacher at the May 2008 CSE meeting (id.). According to the parents, the student presented with a variety of interfering behaviors and the district failed to conduct an appropriate functional behavioral assessment (FBA) or develop an appropriate behavior intervention plan for the student (id.). Although the parents asserted that the student required "additional support" to meaningfully participate in his activities, the May 2008 IEP lacked testing accommodations with regard to state and local assessments (id.). Additionally, the parents asserted that "many goals" in the student's May 2008 IEP were ambiguous, lacked methods of measurement, or were not objectively measurable (id. at pp. 2-3).

The student attended McCarton for the 2008-09 school year and the parents obtained 10 hours per week of private home-based ABA therapy for the student (Parent Exs. V; W; Tr. p. 734). McCarton developed an individual education plan for the student for the 2008-09 school year, which contained goals and objectives for the student in the areas of receptive language, expressive language, community skills, pre-academic skills, academic skills, social/leisure skills, daily living skills, behavior skills, and attention skills (Parent Ex. S at pp. 1-15).

An impartial hearing convened on September 26, 2008 and concluded on November 24, 2009 after seven days of testimony (Tr. pp. 1-845). In a decision dated June 14, 2010, the impartial hearing officer ruled that the parents did not properly notify the district that they were expecting an educational placement offer from the district or that they were seeking reimbursement for privately obtained services for the 2007-08 school year (IHO Decision at pp 16).¹ Therefore, the impartial hearing officer denied the parents claim for reimbursement for the 2007-08 school year.

With regard to the 2008-09 school year, the impartial hearing officer determined that district failed to provide the student with a FAPE for several reasons (IHO Decision at pp. 14-16). The impartial hearing officer found that the site identified in the June 17, 2008 FNR was not available in July 2008, the district failed to respond to phone calls and letters from the parents, and there was no evidence that the district redirected the parent to a different school site at which the student could attend (id. at p. 14). According to the impartial hearing officer, the parents' witnesses testified that there was no consideration of any placement other than a 6:1+1 special class and that the severity of the student's behaviors required the use of individual instruction (id. at pp. 14-15). The impartial hearing officer also determined that no FBA was conducted for the student, the student's behavior intervention plan was vague based on "standards in the field," and that deferring to the district staff that would work with the student for several weeks undermined the purpose of the FBA that formed the basis of a behavior intervention plan (id. at p. 15). The impartial hearing officer discussed the parent counseling and training offered through the parent coordinator in the district's proposed program and noted that the district's special education teacher did not provide parent counseling and training (id. at p. 15). The impartial hearing officer concluded that the "expectation that a school would include [parent counseling and training] in its program" did not meet the requirements in State regulations (id. at p. 15). For the forgoing reasons, the impartial hearing officer found that the district failed to offer the student a FAPE for the 2008-09 school year (id. at p. 16). The impartial hearing officer did not address the parents' allegations regarding the lack of a regular education teacher at the May 2008 CSE, the lack of testing accommodations for the student, the adequacy of the student's goals and objectives, or the failure to identify a specific school site on the May 2008 IEP (see id. at pp. 13-19).

With regard to the private educational services obtained by the parents, the impartial hearing officer determined that the parents established that McCarton was an appropriate placement for the student due to his significant progress in internalizing his impeding behaviors and improving his attentional skills (IHO Decision at p. 17). The impartial hearing officer also noted that the student received OT and speech-language therapy that targeted his needs as well as improvements in language, fine motor skills, and behaviors that were observed by the parents (id.

¹ I note that the hearing record does not contain documentation regarding the delay in conducting the impartial hearing or rendering a decision that complied with State regulations (see 8 NYCRR 200.5[j][5][i]-[iv]). For example, the hearing record does not contain any written decisions regarding the parties' extension requests (see 8 NYCRR 200.5[j][5][iv]). Additionally, on the first day of the impartial hearing, the impartial hearing officer planned multiple extensions at once to achieve a 68-day adjournment (later extended again to a total of 119 days), which was well in excess of the 30-day maximum set forth in State regulations (Tr. pp. 143-44, 149; see 8 NYCRR 200.5[j][5][i]). Furthermore, although the impartial hearing concluded in November 2009, the impartial hearing officer did not render a decision for over six months thereafter in June 2010, which was nearly two years after the parents filed their due process complaint notice (Tr. pp. 769; Parent Ex. A at p. 1; IHO Decision at p. 19). I remind the impartial hearing officer to comply with State regulations with regard to granting extensions and rendering a timely, final decision (8 NYCRR 200.5[j][3][xiii], [5]).

at p. 18). The impartial hearing officer concluded that the private home-based ABA therapy obtained by the parents was appropriate for the student, noting his increased ability to stay on task, newly observed enjoyment and pleasure, reduced anxiety which allowed the student to engage in play, and behavioral progress (id. at p. 18).²

The impartial hearing officer determined that the parents cooperated with the district and that there was no basis for ruling against them with regard to equitable considerations (IHO Decision at p. 18). For relief, the impartial hearing officer ordered the district to reimburse the parents for the student's tuition at McCarton for the 2008-09 school year as well as the costs of three private home-based ABA therapy providers (id. at p. 19).

The district appeals, contending that the impartial hearing officer erred in determining that the district failed to offer the student a FAPE and directing the district to reimburse the parents for the costs of the student's private educational services. Specifically the district argues that the impartial hearing officer erred in addressing the availability of the school site identified in the June 17, 2008 FNR because it was beyond the scope of issues identified in the parents' due process complaint notice. The district also challenges the impartial hearing officer's decision to address the appropriateness of the 6:1+1 special class placement recommended for the student. With regard to the student's behavioral needs, the district asserts that the lack of an FBA in developing the student's behavior intervention plan did not deny the student a FAPE because the May 2008 CSE developed the behavior intervention plan based upon reports describing the student's behavior. Additionally, the district asserts that if the student enrolled in the district, there would be further opportunity to observe the student in his class, conduct an FBA if necessary, and modify the student's behavior intervention plan if necessary. The district alleges that the lack of parent counseling and training on the student's IEP was not a deprivation of a FAPE and that the parents would have received extensive parent counseling and training from the parent coordinator in the recommended program.

The district asserts that the impartial hearing officer erred in finding that the student's placement at McCarton was appropriate because the program was overly restrictive and did not provide adequate mainstreaming opportunities. According to the district, the impartial hearing officer also erred in finding that the student's home-based ABA therapy was appropriate because the district was not required to generalize the student's skills to his home environment as long as the student was making some progress in school. The district also contends that the hearing record does not contain objective evidence that the student made progress as a result of the home-based program.

With regard to equitable considerations, the district argues that the impartial hearing officer should not have ordered the district to reimburse the parents for the student's private educational services because the parents failed to timely provide notice of their intent to unilaterally place the student in a private program and seek reimbursement from the district. The district also alleges that the parents failed to explain why they believed the district's recommended program was inappropriate for the student. According to the district, the impartial hearing officer should not have granted the parents reimbursement for the student's private educational services because the

² The impartial hearing officer noted that there were certain private speech-language services identified in the hearing record for which there was insufficient evidence to support reimbursement (IHO Decision at p. 18).

evidence shows that the parents never intended to remove the student from McCarton and place him in a public school placement for the 2008-09 school year.

In their answer, the parents deny the allegations of error in the district's petition for review. The parents deny that the impartial hearing officer improperly addressed issues that were beyond the scope of issues identified in the due process complaint notice, such as the unavailability of the school site in July 2008 and the student's behavioral difficulties. The parents also deny the district's claim that it was not required to conduct an FBA and they assert that the behavior intervention plan was inappropriately vague. According to the parents, the district cannot argue in good faith that parent counseling and training would be available to the parents because the site identified by the district was not available in July 2008. Furthermore, the parents assert that the district violated State regulations by failing to include parent counseling and training on the May 2008 IEP. The parents deny the district's allegations that the impartial hearing officer erroneously found McCarton and the home-based services were appropriate for the student. The parents assert that equitable considerations favor the parents because the district failed to respond to the parents, reconvene and make new recommendations, or offer new FNRs identifying sites where the student could attend. The parents assert that the district improperly alleges that their notice of unilateral placement was untimely because the district did not identify a "placement that was operational and functioning at the start of the 2008-09 school year." The parents also assert that they are not required to place the student in a public school prior to challenging the district's recommended placement and seeking tuition reimbursement from the district.

Two purposes of the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally 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 least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]). Also, a FAPE must be available to an eligible student "who needs special education and related services, even though the [student] has not failed or been retained in a course or grade, and is advancing from grade to grade" (34 C.F.R. § 300.101[c][1]; 8 NYCRR 200.4[c][5]).

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). Additionally, federal regulations do not require the CSE to include information under one component of a student's IEP that is already contained in another component of the IEP (34 C.F.R. § 300.320[d][2]). 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 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 (see Application of the Bd. of Educ., Appeal No. 08-016).

At the outset, a procedural matter must be addressed. I note that the parents did not cross-appeal from any aspect of the impartial hearing officer's decision including her decision not to address several issues presented in the parents' due process complaint notice (see 8 NYCRR 279.4[b]). An impartial hearing officer's decision is final and binding upon the parties unless appealed to a State Review Officer (34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[j][5][v]). Accordingly, those aspects of the impartial hearing officer's decision that were not decided in favor of the parents, including the lack of a regular education teacher at the May 2008 CSE, the lack of testing accommodations for the student,³ the adequacy of the student's goals and objectives, the failure to identify a specific school site on the May 2008 IEP, and their reimbursement claim related to the 2007-08 school year, have become final and binding upon the parties and, therefore, I decline to consider them.

Next, the district contends that the impartial hearing officer should not have addressed the availability of the school site identified in the June 17, 2008 FNR or the adequacy of placement recommended for the student in light of his interfering behaviors. Pursuant to the 2004 amendments to the IDEA, the party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process request unless the original request is amended prior to the impartial hearing or the other party otherwise agrees (20 U.S.C. § 1415[c][2][E], [f][3][B]; 34 C.F.R. §§ 300.508[d][3], 300.511[d]; 8 NYCRR 200.5[i][7][i], [j][1][ii]; see Application of the Bd. of Educ., Appeal No. 09-054; Application of the Dep't of Educ., Appeal No. 08-131; Application of the Bd. of Educ., Appeal No. 07-081; Application of the Bd. of Educ., Appeal No. 07-043; Application of a Child with a Handicapping Condition, Appeal No. 91-40). It is also essential that the impartial hearing officer disclose his or her intention to reach an issue which the parties have not raised as a matter of basic fairness and due process of law (Application of the Bd. of Educ., Appeal No. 10-013; Application of the Bd. of Educ., Appeal No. 07-081; Application of the Bd. of Educ., Appeal No. 07-043; see Lago Vista Indep. Sch. Dist. v. S.F., 50 IDELR 104 [WD Tex. Oct. 24, 2007]; see also John M. v. Bd. of Educ., 502 F.3d 708, 713 [7th Cir. 2007]). In this case, the parents did not challenge the unavailability of the school

³ With regard to testing accommodations, the school psychologist testified during the impartial hearing that the student would be in kindergarten and that he would not have state and local assessments (Tr. p. 102).

site identified in the June 17, 2008 FNR in their due process complaint notice (see Parent Ex. A). Additionally, there is no indication in the hearing record that the parents sought to amend their due process complaint notice. Furthermore the district repeatedly objected to raising issues outside the due process complaint notice and asked the impartial hearing officer to identify and limit the issues raised in the impartial hearing to those addressed in the parents' due process complaint notice (Tr. pp. 24-26, 31-33, 122, 164-67, 214, 346-47, 718-19).⁴ Consequently, the impartial hearing officer should not have expanded the issues in the impartial hearing and addressed the availability of the school site identified in the June 17, 2008 FNR.⁵ However, with respect to the district's remaining assertion as to the scope of the impartial hearing, I find that the parents raised the student's interfering behaviors in their challenge to the student's recommended IEP in their due process complaint notice and, therefore, I find that it was appropriate for the impartial hearing officer address the adequacy of the supports recommended for the student in the May 2008 IEP (Parent Exs. A at p. 2; B).

Turning next to the parents' contentions that the May 2008 CSE failed to develop an FBA or an appropriate behavior intervention plan, in the case of a student whose behavior impedes his or her learning or that of others, the CSE shall consider, when appropriate, strategies, including positive behavioral interventions, and supports 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. 08-028; Application of the Dep't of Educ., Appeal No. 07-120). In addition to the federal requirement, State regulations require that an evaluation 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 that contribute to the suspected disabilities (8 NYCRR 200.4[b][1][v]; see Connor v. New York City Dep't. of Educ., 2009 WL 3335760, at *4 [S.D.N.Y. 2009]). 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]).

Here, the student was attending school in a different environment at the time of the May 2008 CSE meeting and has not attended the district's recommended placement. The school psychologist testified that the behavior intervention plan developed for the student by the CSE was based upon McCarton evaluative reports and progress reports in addition to a classroom observation conducted by the district's social worker, as well as information gathered at the May 2008 CSE meeting (Tr. pp. 81-82, 125; Parent Exs. B at p. 17; 8-11). The school psychologist

⁴ I remind the impartial hearing officer that State regulations set forth provisions for conducting a prehearing conference to simplify or clarify the issues that will be addressed in an impartial hearing (8 NYCRR 200.5[j][3][xi][a]).

⁵ Although it is unnecessary to address this issue for purposes of this decision, I note that the hearing record shows that the student's father stated that the parents did not have time to visit the identified school site before rejecting the district's recommended IEP (Parent. Exs. D; GG). The hearing record does not support a conclusion that changing the school site from the one identified in the June 17, 2008 FNR to an alternate site four blocks away had any effect upon the student whatsoever since the parents had already decided to place the student at McCarton (Tr. p. 310; Parent Ex. D).

explained that the behavior intervention plan noted the student's behaviors that interfered with learning included repetitive non-contextual sounds, words, or phrases; use of an inappropriate pitch, tone and volume; and dropping to the floor (Tr. p. 83; Parent Exs. B at p. 17). As indicated on the behavior intervention plan, the strategies used to address these behaviors included correction of the behavior, differential reinforcement, positive behavioral support, variation of task difficulty, fast paced item presentation, a visual schedule, movement breaks, a sensory diet, "planned ignoring" and a token economy (Tr. pp. 83-88; Parent Ex. B at p. 17). The school psychologist testified that if an FBA is conducted, it is standard to have knowledge of the function of the behavior prior to the completion of an FBA, and she acknowledged that in this instance the student's behavior intervention plan was vague (Tr. p. 126, 130). However, the school psychologist clarified that once the student was in his placement an FBA would have been completed and his behavior intervention plan would have been made more specific (Tr. p. 129).

Furthermore, the special education teacher of the district's 6:1+1 class testified that had the student attended her class she would have completed an FBA and behavior intervention plan (Tr. p. 434).⁶ The special education teacher testified that she had experience in developing behavior intervention plans and explained the process of conducting an FBA and creating a behavior intervention plan, which included completing an observation of the student (Tr. 432-33). According to the special education teacher, FBAs are completed when a student is in the presence of the evaluator for a significant amount of time (Tr. p. 433). The special education teacher testified she takes data and identifies the antecedents and the consequences of the student's interfering behaviors (Tr. p. 433). Moreover, the special education teacher stated that data would be taken for several weeks as part of an FBA prior to the completion of a behavior intervention plan (Tr. p. 434). Based on the foregoing, I find that the hearing record does not support the impartial hearing officer's conclusion that the student was denied a FAPE due to the lack of an FBA where under these circumstances, the district developed a behavior intervention plan that addressed the student's interfering behaviors (see A.H. v. Department of Educ., 2010 WL 3242234, at *4 [2d Cir. Aug. 16, 2010]; M.N. v. New York City Dept. of Educ., 2010 WL 1244555, at *6 [S.D.N.Y. Mar. 25, 2010]; A.G. v. Frieden, 2009 WL 806832, at *9 [S.D.N.Y. Mar. 26, 2009]).

Turning next to the district's contention that the impartial hearing officer erred in determining that the parent counseling and training services offered by the district were inadequate, State regulations require that an IEP indicate the extent to which parent training will be provided to parents, when appropriate (8 NYCRR 200.4[d][2][v][b][5]). State regulations

⁶ The impartial hearing officer noted that the portion of the special education teacher's testimony heard on January 23, 2009 was not included in her decision because the witness had contact with the district's attorney during the preceding four-month adjournment of the impartial hearing (IHO Decision at p. 4 n1). However, I note that the impartial hearing officer also stated in the hearing record that she did not doubt the witness's testimony and found that it was helpful in rendering a determination in the case (Tr. p. 238). Furthermore, the parents were allowed an opportunity to make a motion to strike the witness's testimony (id.), but the hearing record does not contain any indication that the parents availed themselves of that opportunity, that the impartial hearing officer considered such a motion, or that the district was provided an opportunity to respond. Consequently, I find that, under the circumstances of this case, it is appropriate to consider the testimony offered by the special education teacher on January 23, 2009 since the impartial hearing officer did not doubt its reliability. However, I agree with the impartial hearing officer that it was not proper for the district's attorney and the witness to engage in a conversation about her prior testimony during the adjournment in contravention of the impartial hearing officer's directive, however brief or general the conversation (see Tr. pp. 141-42, 237).

further provide for the provision of parent counseling and training for the purpose of enabling parents of students with autism to perform appropriate follow-up intervention activities at home (8 NYCRR 200.13[d]). Parent counseling and training is defined as: "assisting parents in understanding the special needs of their child; providing parents with information about child development; and helping parents to acquire the necessary skills that will allow them to support the implementation of their child's individualized education program" (8 NYCRR 200.1[kk]).

In this case, the school psychologist testified that the May 2008 CSE did not separately identify parent counseling and training on the student's IEP because parent counseling and training was integrated into the proposed program (Tr. p. 97). The parent coordinator testified that her responsibilities included acting as a liaison between the parents and the school, coordinating services with outside agencies for the students' families, conducting a series of workshops, and parent advisement regarding the students' educational programs (Tr. pp. 251-52). The parent coordinator explained that she conducted a series of workshops specifically regarding autism spectrum disorder (Tr. p. 254-55). She noted that she offered approximately nine workshops per year for parents during the 12-month school year (Tr. p. 255). In the workshops she provided instruction to parents regarding the creation of visual schedules, use of behavioral intervention strategies, development of play skills, sensory regulation techniques, access to respite and Medicaid services, and use of social stories to create social opportunities in the home setting (Tr. p. 256).

According to the parent coordinator, when parents requested information on a particular subject she provided the information or arranged for another agency to provide that information (Tr. pp. 256-58). The parent coordinator testified that she also arranged for parents to receive crisis management services from an outside agency to address severe behavior and assisted a family with obtaining support from outside agencies to address a student's self-care goals (Tr. pp. 258-60). The parent coordinator stated that the district offered instruction for parents in ABA and TEACCH (Tr. p. 262). The parent coordinator described how parents become informed of the parent counseling and training services that she offered through a bimonthly newsletter and telephone communication (Tr. p. 268). The parent coordinator also testified that she consulted with teachers and related services providers to assist with providing support to families (Tr. p. 272).

In light of the forgoing evidence, I find that the hearing record supports the conclusion that the recommended placement would have afforded the parents sufficient parent training and counseling in accordance with State regulation (see M.N., 2010 WL 1244555, at *8). Moreover, I note that, although parent counseling and training was not specifically set forth in the May 2008 IEP, in light of the evidence presented herein regarding the available services for parent counseling and training at the proposed placement, the district's failure to include these services on the IEP did not procedurally or substantively, result in the denial of a FAPE to the student (see T.Y. v. New York City Dep't of Educ., 2008 U.S. Dist. LEXIS 89827, 51 IDELR 78 [E.D.N.Y. July 2, 2008] aff'd, 584 F.3d 412 [2d Cir. 2009]; Application of the New York City Dep't of Educ., Appeal No. 08-140; Application of a Child with a Disability, Appeal No. 07-030).

With regard to the parties' dispute over the adequacy of the support recommended in the 6:1+1 special class placement proposed in the May 2008 IEP, the impartial hearing officer concluded the student required individual instruction due to the severity of the student's behaviors

(IHO Decision at pp. 14-15). However, as further described below, I find that the special education services recommended in the May 2008 IEP were appropriate for the student.

To develop the student's May 2008 IEP, the CSE considered the January 2006 McCarton developmental and psychological evaluation as well as the March 2008 district psychoeducational evaluation (Parent Ex. B; Dist. Exs. 3; 8). According to the May 2008 IEP, the student's present levels of academic achievement reflected that previous testing indicated the student demonstrated significant delays in nonverbal and verbal cognitive skills (Parent Ex. B at p. 3). The IEP also reflected that the previous academic testing indicated the student exhibited average performance regarding knowledge of numbers, letters, and words but demonstrated delays in expressive and receptive language skills (*id.*). Consistent with the student's academic abilities, the IEP provided that the student would have opportunities for repetition/practice, visual/verbal prompts, breaking down of instructional tasks into smaller parts, preferential seating, verbal encouragement, immediate positive reinforcement and a behavior modification system (*id.* at p. 4). With regard to social/emotional development, the IEP indicated that during testing the student "was easily frustrated, and had difficulty handling his emotions" (*id.*). The May 2008 IEP reflected that the student's behavior required highly intensive support including one-to-one support (*id.* at p. 5). Consistent with the student's social/emotional needs, the May 2008 IEP provided that the student have constant adult supervision, immediate reinforcement, a behavior modification system, and assistance with pragmatic language skills (*id.*).

The hearing record shows that, consistent with the description of the student's present levels of performance, the annual goals and short-term objectives in the May 2008 IEP addressed sensory processing skills, motor skills, self-care skills, communication, listening skills, following directions, understanding sequential and linguistic concepts, articulation, play skills, pre-academic skills in math and reading, social/emotional functioning, behavior, and attention (Parent Ex. B at pp. 7-11). The school psychologist explained that the student's annual goals and short-term objectives were based on McCarton progress reports and provided several examples in her testimony demonstrating that the annual goals and short-term objectives were measurable and objective (Tr. pp. 97-100).

To address the student's special education needs and implement the annual goals and short-term objectives described above, the CSE recommended placing the student in a 6:1+1 special class in a specialized school with related services of both speech-language therapy and OT five times per week for 30 minutes on an individual basis (Parent Ex. B at pp. 1, 16). The school psychologist stated that the student required a high rate of speech-language therapy and OT based on the evidence from the evaluative reports (Tr. pp. 95-96). Additionally, the school psychologist stated that the proposed placement would allow the student's related services to be integrated into the student's classroom experience (*id.*). The school psychologist testified that the student presented with mild to moderate characteristics of autism and that "a nonpublic school really wasn't indicated based on the evidence" (Tr. p. 96).

The special education teacher testified that the proposed 6:1+1 special class, based upon her review of the student's IEP, would have been an appropriate placement because he had a similar "function level" compared to her other students (Tr. p. 416). She stated that many of the student's goals, such as maintaining eye contact, sitting at a desk independently, sorting objects and categories, and identifying numbers were also goals for the other students in the proposed 6:1+1

special class and would have been addressed daily (Tr. pp. 417-18, 421-22, 426). The special education teacher testified that with regard to social/emotional functioning, the student would have been on the "lower to mid end based on his IEP" and that the proposed class contained students who were on both the "higher end" and the "lower end" socially (Tr. p. 417). The special education teacher described how students benefit from interacting with each other and also provided examples as to how she would have addressed the student's needs in the areas of academics and social/emotional functioning (Tr. pp. 418, 421-26). To assist students with deficits in maintaining attention, she implemented strategies such as a timer system, a visual schedule, positive reinforcement, and a token economy system (Tr. pp. 422-23, 464). To address the needs of students with behavior difficulties, the special education teacher also implemented peer modeling, behavioral charts, sticker charts, and the provision of breaks (Tr. p. 430). The special education teacher further testified that the proposed classroom implemented ABA and TEACCH principles and that data, based upon testing, was recorded on a daily basis to monitor students' progress toward annual goals (Tr. pp. 415, 419-20). The special education teacher stated that an assessment of the student would have been completed upon his entering her classroom to concentrate instruction on "the most functional" goals (Tr. p. 420).

According to the special education teacher, she also provided students with one-to-one instruction as needed (Tr. p. 454). The special education teacher testified that during group circle time, 1:1 assistance would be provided to a student as needed and that the paraprofessional engaged students who were in need of 1:1 assistance (Tr. p. 428). The special education teacher further testified that if a student came into her classroom and she believed that student needed a 1:1 paraprofessional, then she would contact the assistant principal to make arrangements to provide this service, which would take "a couple of days" (Tr. pp. 456-457). Noting that the student had an annual goal regarding verbal expression of feelings, the special education teacher testified that she also provided daily opportunities for the students to discuss their feelings (Tr. p. 425). The special education teacher stated that she had experience in addressing behaviors such as the behavior outlined in the student's behavior intervention plan (Tr. p. 432). She testified that all of the students in her 6:1+1 special class had a "behavior chart," and that as students with autism they needed that reinforcement (Tr. pp. 432, 452-453). According to the special education teacher, the proposed 6:1+1 special class in a special school would have been an appropriate placement for the student (Tr. pp. 416, 435).

Also before the May 2008 CSE was the student's January 2008 educational progress report in which the student's teacher from McCarton reported that the student continued "to respond well to a structured, nurturing, predictable learning environment with frequent repetition, utilizing a skill based behavior modification program" (Dist. Ex. 10 at p. 2). The McCarton teacher concluded that the student continued "to exhibit positive response to the highly structured, visual, and individualized behavioral teaching methods" (*id.* at p. 7).

I also note that the evidence shows that in the developmental and education evaluation report that was before the May 2008 CSE, the McCarton evaluator stated that the student "made his needs and wants known in a basic way, with phrases and short sentences, facial expressions and gestures" (Dist. Ex. 8 at p. 3). The McCarton evaluator concluded that the student "responded well to a high degree of structure, clear limits and behavioral reinforcement" (*id.* at p. 7). Additionally, the student's occupational therapist at McCarton indicated in the student's January 2008 progress report that the student's frustration tolerance fluctuated depending on environmental

factors and the type of demand placed upon him (Dist. Ex. 9 at p. 5). Although the student "most often seem[ed] completely over stimulated, expressed in the form of yelling, falling to the ground, and laughing uncontrollably," the occupational therapist noted that "as a token system [was] implemented, [the student] improved in both his ability to engage in therapist's chosen activities and in transitioning between activities without overreaction" (id.).

As detailed above, the evidence demonstrates that the May 2008 CSE developed the student's 2008-09 IEP based upon the student's progress reports, McCarton developmental and psychological evaluation and a district psychoeducational evaluation (see Parent Ex. B). Moreover, the recommended 6:1+1 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 special education teacher's testimony and description of the 6:1+1 proposed classroom is consistent with the student's needs (Tr. pp. 415-30, 454, 473-476). In addition, the evidence above demonstrates that the May 2008 CSE properly concluded that the student's sensory regulation, behavioral, attention, language, and social-emotional needs could be appropriately addressed in the recommended 6:1+1 special class placement with related services of speech-language therapy and OT.

Overall, the hearing record reflects that the proposed program would have provided the student with individual classroom assistance, an appropriate behavior intervention plan based on an FBA, as well as parent counseling and training to address the student's behavioral, self-regulation, social-emotional, communication, and academic needs. Accordingly, the hearing record demonstrates that the district recommended program for the 2008-09 school year offered the student a FAPE because it offered an IEP designed to meet the unique needs of the student.

Having found that the district offered the student a FAPE, I need not reach the issue of whether the private educational services obtained by the parents was appropriate for the student and the necessary inquiry is at an end (Mrs. C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134; Application of a Child with a Disability, Appeal No. 05-038; Application of a Child with a Disability, Appeal No. 03-058).

I have considered the parties' remaining contentions and find that it is unnecessary to address them in light of my determinations herein.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the portions of the impartial hearing officer's decision dated June 14, 2010 which determined that the district failed to offer the student a FAPE for the 2008-09 school year and directed the district to reimburse the parents for the student's tuition at McCarton and the student's home-based ABA services are annulled.

Dated: Albany, New York
September 8, 2010

PAUL F. KELLY
STATE REVIEW OFFICER