



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 10-123

**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, Tracy Silignmueller, Esq., of counsel

Mayerson & Associates, attorney 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') daughter and ordered it to reimburse the parents for their daughter's tuition costs at the Rebecca School for July and August 2009 and the Manhattan Children's Center (MCC) for September through June of the 2009-10 school year, the cost of 20 hours per week of applied behavior analysis (ABA) services, and the amount the parents paid for transportation during the 2009-10 school year. The appeal must be sustained.

At the time of the impartial hearing, the student was attending MCC and receiving after-school 1:1 home and community-based ABA/special education itinerant teacher (SEIT)<sup>1</sup> services, speech-language therapy, and occupational therapy (OT); the parents were receiving parent training and counseling (Tr. pp. 1119-21, 1146-47, 1150). MCC has not been approved by the

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<sup>1</sup> The terms ABA and SEIT have been used interchangeably in the hearing record to refer to the student's home-based services. In this decision, for the purposes of consistency and clarity, the home-based services received by the student will be referred to as ABA/SEIT services. The Education Law defines special education itinerant services (commonly referred to as "SEIT" services) as "an approved program provided by a certified special education teacher . . . , at a site . . . , including but not limited to an approved or licensed prekindergarten or head start program; the child's home; a hospital; a state facility; or a child care location as defined in [§ 4410(8)(a)]" (Educ. Law § 4410[1][k]).

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 hearing record indicates that the student exhibits global delays and has received diagnoses of a pervasive developmental disorder-not otherwise specified (PDD-NOS), "verbal apraxia," hyperactivity, and anxiety (Tr. pp. 491, 567, 1126; Parent Exs. L; M; see Parent Ex. NNN at p. 3). The student demonstrates cognitive delays and attending difficulties, as well as oral motor/articulation difficulties, deficits in receptive and expressive language, and weaknesses in socialization and pragmatic language skills (Dist. Ex. 6 at pp. 4-6; see Parent Ex. NNN at p. 3). She communicates using verbal approximations, gestures, the Picture Exchange Communication System (PECS), and an augmentative and alternative communication (AAC) device (Dist. Ex. 6 at pp. 4-5). The student demonstrates deficits in sensory processing, difficulty with motor planning, delays in fine and gross motor development, and difficulty with activities of daily living (ADLs), including toileting (id. at p. 3). In addition, she exhibits delays in adaptive functioning, but is described as highly social (Parent Ex. NNN at p. 3). The student engages in aggressive behavior and also mouths cloth or string (Parent Ex. D at p. 4). 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]).

The student was referred to the Early Intervention Program (EIP) following a hospitalization at age seven months and subsequently received services through EIP due to developmental delays (Parent Ex. NNN at p. 1).<sup>2</sup> At age three, the student transitioned to a center-based pre-kindergarten program where she attended a 10:1+1 special class, which reportedly employed an ABA approach (id.). The following year the student attended a 12:1+1 special class which followed a "supportive behavioral approach" (id.). During this time, the student continued to receive home-based speech-language therapy and ABA/SEIT services (id. at pp. 1-2).

When the student was four years old, her parents sought a private psychological evaluation in order to obtain more information about the student's cognitive abilities, school functioning, and overall developmental status, as well as to assist the parents in securing an appropriate kindergarten placement for the student (Parent Ex. NNN at p. 1). The evaluation included the administration of standardized testing and behavioral and classroom observations (Parent Ex. NNN). The evaluating psychologist reported that the student had "very significant" expressive language and articulation problems and that she "essentially" communicated using one-word utterances that were difficult to understand; however, he noted that the student also pointed and used gestures (id. at p. 2). Administration of a nonverbal measure of intelligence yielded an IQ of 73, which fell in the "[b]orderline" range (id. at pp. 2, 3). According to the psychologist, the student's difficulty with attention significantly affected her performance and lowered her overall score (id. at p. 3). The psychologist reported that on a measure of adaptive behavior, the student scored below the first percentile in the areas of communication, daily living skills, and motor skills; however, the student's socialization skills fell at the 9th percentile (id.). The psychologist noted that the student almost always had a positive affect and despite her communication difficulties exhibited interest in both peers and adults (id.). As reported by the psychologist, the student had received a diagnosis of a PDD-NOS from two of her physicians (id.).

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<sup>2</sup> The hearing record suggests that the student began receiving ABA services at age two; however, it is not clear if these services were provided as part of the student's EI program (Parent Ex. AAA at p. 144). The student received OT, physical therapy (PT), speech, and feeding therapy through the EIP (Parent Ex. NNN at p. 1).

For the 2006-07 school year, the student attended kindergarten at a state approved private school that reportedly employed ABA methodology (see Parent Ex. AAA at pp. 142-144). In September 2007, when the student was six years old, she transferred to the Rebecca School (Dist. Ex. 6 at p. 9; Tr. p. 422). The student remained at the Rebecca School for the 2008-09 school year, where she attended an 8:1+4 special class and received OT, physical therapy (PT), speech therapy, music therapy, drama, and "adaptive" physical education as part of her individualized weekly program (Dist. Ex. 6 at p. 1). She also received 20 hours a week of home-based ABA/SEIT services and four hours a week of home-based OT (see Parent Ex. B at pp. 5, 18, 36, 43).

A December 2008 multidisciplinary progress report from the Rebecca School indicated that the student had made gains in her ability to regulate her attention and behavior and that her engagement and pragmatic skills had improved, although she continued to demonstrate difficulty in these areas (Dist. Ex. 6 at pp. 1, 4, 5). The report indicated that the student remained dependent on a teacher to keep her emotionally regulated and to control her impulses (*id.* at p. 1). The December 2008 report noted that student had the capacity for engagement and relating with adults and peers, but needed support to relate with peers (*id.* at p. 2). The report characterized the student's ability to engage with others in two-way purposeful communication as a strength for the student and indicated that the student had made significant gains in her spontaneous verbal approximations (*id.*). According to the report, when the student wanted something in the classroom she would communicate her desire but had trouble sequencing the steps to reach her goal (*id.*). The student made progress in the amount of time it took her to follow through with a sequence, as well as progress in motor planning, but she required support to sequence an activity (*id.*). The report described the student's ability to engage in pretend play as a strength; however, it noted that the student had difficulty expanding on pretend play scenarios and tended to leave an interaction when challenged with a new idea (*id.*).

With respect to academics, the December 2008 progress report indicated that the student was able to recognize all of the letters of the alphabet and was beginning to associate words with corresponding letters (Dist. Ex. 6 at p. 8). The report noted that the student's comprehension of the print/sound code was enhanced by the use of class rhymes, songs, and chants (*id.*). According to the report, the student was able to sit and attend to lessons for approximately twenty minutes with 1:1 teacher support (*id.*). In math, the student had shown proficiency in recognizing colors and shapes, and sorting objects by one attribute (big/small) (*id.*). The student was also working on rote counting to thirty and 1:1 correspondence (*id.*).

According to the December 2008 progress report, the student attended OT two times per week individually and two times per week in a group of four (Dist. Ex. 6 at p. 2). The student's individual sessions focused on her sensory processing for regulation and body awareness, fine motor and gross motor coordination, motor planning, upper extremity and core strengthening, and improving ADLs (*id.* at p. 3). The group therapy sessions were offered to provide the student with the opportunity to increase her interactions with peers and build on the relationships she had formed with adults (*id.*). The student also received PT three times a week individually (*id.*). According to the report, the student enjoyed sensory motor play with classroom staff and was engaged throughout most of her day (*id.*). However, the student required consistent redirection for attention and focus during gross motor tasks (*id.*). The report indicated that the student's ability to motor plan was strongly dependent on her level of regulation and that when asked to perform a novel task the student became frustrated and would kick or pinch to express her dislike (*id.*). The

student had difficulty imitating novel body postures or poses (id.). According to the report, the student lacked adequate postural control to perform distal activities such as throwing, kicking, or catching a ball consistently (id.). The student displayed decreased muscle strength and tone throughout her trunk and extremities and most often moved in a linear fashion (id. at p. 4). The student had trouble coordinating graded muscle control and displayed decreased endurance (id.). The report noted that improvements in muscle strength were evidenced by the student's ability to independently jump on a trampoline and bear weight on her upper extremities if supported at the pelvis (id. at p. 3).

With regard to the student's speech and language abilities, the December 2008 progress report indicated that the student received speech and language therapy four times a week individually, the focus of which was engagement/pragmatic, receptive, and expressive language skills, as well as oral motor and articulation skills (Dist. Ex. 6 at p. 4). The report noted that the student was able to sustain a continuous pleasurable back and forth flow of exchanges for 15-20 circles of communication while maintaining regulation and engagement (id.). The report described the student's receptive language/auditory processing as a relative strength, but noted that she had difficulty in this area as well (id. at p. 5). According to the report, at the beginning of the school year, the student had difficulty responding to others' intentions to regulate her behavior, but was currently able to respond to requests paired with intonation, facial expressions, gestures, and contextual cues (id.). In addition, the student was able to respond to familiar words and phrases in context and follow familiar one-step directions given contextual/gestural cues (id.). The report indicated that the student demonstrated great difficulty in motor planning for the production of speech and used PECS, word approximations, and nonverbal cues in order to make requests (id.). The student was also able to use an AAC device to make requests with moderate assistance (id.; see Parent Ex. AAA at p. 115). The report indicated that the student exhibited delays in her oral-sensory system which were demonstrated by her mouthing of inedible objects (Dist. Ex. 6 at p. 6). According to the report, the student's need for increased oral input was addressed through the use of an oral motor protocol (id.). The student's production of new sounds was addressed through the use of tactile cues (id.). The progress report detailed the goals that the Rebecca School would be addressing in the coming months (id. at pp. 9-11).

The student's mother reported that toward the end of December 2008, the student's behavior began to change and the student became "a little more anxious, a little less social" and that the parents were contacted by Rebecca School staff to discuss the student's behavior (Tr. p. 1081). According to the student's mother, the director of the Rebecca School and the student's teacher expressed concern that the student was "tending toward having someone with her all the time for safety purposes and redirection" and that that was not the model for the Rebecca School (Tr. p. 1082). At that time the Rebecca School determined that one of its teacher assistants would be paired with the student more often (Tr. p. 1083). After observing the student in her Rebecca School classroom in February 2009, the parents determined that they needed to look for a more structured program for the student "like an ABA program" (Tr. p. 1084).

On February 17, 2009, the parents completed a "preliminary" application to MCC (Parent Ex. AAA at p. 144). In their application, the parents indicated that the student had learned academics through the use of ABA principles and that as a result of the Floortime methodology used by the Rebecca School, they had seen tremendous improvement in the student's social "needs" (id.). The parents noted, however, that the lack of structure at the Rebecca School made it more

difficult for the student to learn academic skills (id. at p. 140). They indicated that they were very interested in MCC as it could provide the student with both social and academic opportunities (id. at p. 144).

On March 10, 2009, a special education teacher from the district conducted a classroom observation of the student at the Rebecca School (Dist. Ex. 5 at p. 1). In her observation report, the teacher noted that she observed the student in two settings, the sensory gym and the student's classroom (id.). The observing teacher reported that the student appeared to enjoy a brushing program administered by the teacher assistant in the sensory gym and noted that the student activated a communication board by pushing a button (id.). In the classroom, the student participated in a group math lesson by watching another student go on "number walk" and by placing her stuffed animals on each number when it was her turn (id. at p. 2). According to the observer, the student was able to point to several letters in her name using picture cards (id.). The observer noted that the student mouthed and licked inedible objects (id.). The observer described a reading activity in which the teacher read a book to the class and a teacher assistant supported the student by sitting behind her (id.). The student participated in the activity by looking at the book, pointing to her favorite number, and gesturing in response to the text (id.). The observer concluded that the student had tremendous affection for the teacher assistant (id.). She noted that the student responded to the classroom teacher, but required much 1:1 support and assistance in attempting class activities (id.). The observer reported that the student had a limited vocabulary and expressed herself using gestures and single words and that at times the student pointed to things she wanted and often made various sounds, including short screams, to express her emotions (id.). The observer opined that the student appeared to understand much of what was said to her (id.).

The district's Committee on Special Education (CSE) convened on March 26, 2009 for the student's annual review and to develop an individualized education program (IEP) for the student for the 2009-10 school year (Dist. Ex. 4; Parent Ex. D). Present for the meeting were the district representative, who was also a special education teacher, a school psychologist, the student's mother, and an additional parent member (Parent Ex. D at p. 2). The student's teacher from the Rebecca School participated in the CSE meeting telephonically (id.). The school psychologist drafted portions of the IEP in advance, using the December 2008 Rebecca School multidisciplinary report, and CSE members reviewed the draft and the multidisciplinary report at the CSE meeting (Tr. pp. 206, 210, 215, 1073). The IEP created by the March 26, 2009 CSE indicated that with respect to academic performance and learning characteristics, the student presented with significant delays in speech-language development, social skills, and daily living skills (Parent Ex. D at p. 3). It further indicated that the student had a short attention span and was easily distracted (id.). According to the IEP, the student was developing readiness skills and, based on teacher observation, the student was functioning at a kindergarten instructional level for academics (id.). The IEP indicated that the student required environmental modifications and human/material resources to address her academic management needs, including verbal prompts and visual cues, redirection, repetition, and the use of manipulatives (id.). According to the March 2009 CSE meeting minutes, the student's mother was "invited to add/correct participate" in the discussion of the student's academic functioning (Dist. Ex. 4).

With respect to the student's social emotional performance, the March 2009 IEP indicated that the student presented with an active demeanor and while in unpredictable environments she

demonstrated anxiety by mouthing string or cloth (Parent Ex. D at p. 4). The IEP further indicated that when overwhelmed the student could become aggressive and would bite and pinch others (*id.*). According to the IEP, the student was able to stay calm and pay attention in many circumstances; however, she was dependent on adult support to keep her regulated (*id.*). The IEP noted that the student's behavior seriously interfered with instruction and that the student required additional adult support (*id.*). The IEP indicated that the student required environmental modifications and human/material resources to address her social emotional management needs, including frequent sensory/movement breaks, modeling of appropriate social interactions, a 1:1 paraprofessional due to aggression, access to sensory materials, and a brushing protocol (*id.* at p. 4). According to CSE meeting minutes, the CSE members discussed the student's social emotional functioning and both the student's teacher and mother agreed "on p. 4" (Dist. Ex. 4).<sup>3</sup> With the input of the student's teacher and mother, the CSE developed a behavior intervention plan, which was attached to the IEP (*id.*; Parent Ex. D at p. 16).

To address the student's academic, social, and behavioral needs, the CSE recommended that the student be classified as a student with autism and placed in a 6:1+1 special class with the support of a 1:1 crisis management paraprofessional (Parent Ex. D at pp. 1, 15).<sup>4</sup> In addition, to address the student's speech-language, motor, and sensory needs the CSE recommended that the student receive individual speech-language therapy five times per week, individual OT five times a week, and individual PT three times a week (*id.* at p. 15). The CSE further recommended the student attend a 12-month program and receive adapted physical education and special transportation (*id.* at p. 1).<sup>5</sup> The IEP developed by the March 2009 CSE included goals and objectives related to the student developing reading and math readiness skills, improving motor planning and sequencing skills, improving muscle strength and endurance, improving visual spatial and coordination skills, improving engagement and pragmatic language skills, improving receptive and expressive language skills, increasing oral motor and articulation skills, improving play skills, demonstrating increased independence in ADLs, improving fine motor skills, and improving sensory processing and regulatory skills (*id.* at pp. 6-12). The student's mother did not provide the CSE with reports from the student's home-based providers and the CSE did not

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<sup>3</sup> This notation appears to refer to page four of the IEP that describes the student's social/emotional performance (*see* Parent Ex. D at p. 4).

<sup>4</sup> The hearing record indicates that in previous years, the student had been provided with a health paraprofessional rather than a crisis management paraprofessional (Tr. pp. 230-31, 292-94, 1090-01). The school psychologist testified that the CSE essentially agreed that the student required a 1:1 paraprofessional due to aggression and wandering around the classroom (Tr. pp. 293-95). However, the student's mother opined that the student's needs were health related and therefore she required a health paraprofessional (Tr. p. 1091). The student's mother testified that she understood a crisis management paraprofessional to be an individual who was trained to subdue a dangerous child and that she did not believe that her child was dangerous (Tr. p. 1148). According to the student's mother, at the CSE meeting the student's teacher from the Rebecca School indicated that the student's hitting and punching behaviors occurred when she was dysregulated and that the student required a health paraprofessional to regulate the student (Tr. p. 1149).

<sup>5</sup> Due to medical and safety concerns, the student's physicians recommended that she receive special transportation (*see* Parent Exs. L; M; LL at p. 3).

recommend a home based component for the student for the 2009-10 school year (Tr. p. 1158; see Parent Ex. D).<sup>6</sup>

The behavior intervention plan developed by the CSE and attached to the student's IEP identified numerous behaviors that interfered with the student's learning, including distractibility and a short attention span as demonstrated by out of seat behavior, chewing and shredding of clothes, and hitting and kicking when frustrated (Parent Ex. D at p. 16). In addition, the plan detailed the expected behavior changes such as the student remaining in her seat for up to 20 minutes with no more than four requested breaks; using words/gestures/pictures to indicated her feelings when frustrated and to communicate protest, request, continuation or ending of a task/activity; decreasing the frequency of chewing/shredding her clothes; and decreasing aggression (id.). The behavior intervention plan indicated that the following strategies would be tried to change the student's behavior: positive reinforcements that are intrinsic; redirection and modeling of appropriate behaviors; use of appropriate sensory support as required, such as brushing; consistent and contingent use of reinforcers; and access to sensory materials prior to engagement in activities (id.). The behavior intervention plan also indicated the supports of speech, OT, PT, and the 1:1 paraprofessional would be employed to help the student change the targeted behaviors (id.).

The minutes from the March 2009 CSE meeting indicated that the proposed academic goals were discussed with parent and teacher input; that the student's teacher wanted to continue the student's play goals from the previous IEP; and that the OT goals were reviewed and revised based on the student's previous IEP (Dist. Ex. 4). In addition, the hearing record indicates that the speech and PT goals were taken from Rebecca School reports (Tr. pp. 208-09). Finally, the meeting minutes indicated that the student's teacher believed that a 6:1+1 class was appropriate for the student (Dist. Ex. 4; Tr. p. 231).

The director of the Rebecca School reported that over the course of the 2008-09 school year, the student's sensory needs became "magnified" resulting in an increase in the student's use of physical behaviors, such as hitting and kicking, to express her needs (Tr. pp. 430-31).<sup>7</sup> The director determined that the student required more 1:1 support and in spring 2009 assigned a teacher assistant to the student who eventually worked 1:1 with the student full-time (Tr. pp. 429-30, 432, 439-40, 442-44).

A May 2009 multidisciplinary progress report written by the student's teacher and therapists at the Rebecca School, detailed the student's progress at the school since December 2008 (Parent Ex. K). According to the report, the student continued to make progress in terms of her regulation throughout the day (id.). The student was dependent on her 1:1 teacher to maintain a "co-regulated" state, but could stay regulated through more complex ideas and problem solving

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<sup>6</sup> The student's mother indicated that she had intended to bring the student's home based program supervisor to the CSE meeting before the date of the meeting was changed (Tr. pp. 1158-59). According to the student's mother, the student's teacher from the Rebecca School discussed the home program during the CSE meeting (Tr. p. 1076). The student's mother reported that she requested extended day services but was told that the district could not offer them (Tr. pp. 1077, 1079).

<sup>7</sup> The parents' witnesses opined that changes in the student's behavior were related to the onset of puberty (Tr. pp. 801, 878-79, 922, 933, 1027-28, 1143).

scenarios (id. at p. 1). The report indicated that the student could become dysregulated when she felt the demands placed on her were too high and she had trouble sitting for long periods of time (id. at p. 2). According to the report, the student was able to expand the number of staff members with whom she could engage in deep interactions and had begun to increase the number of purposeful interactions in the classroom using imitation (id.). In addition, the report noted that the student was able to participate in a back and forth flow of communication for approximately 60 circles of communication and that she had made gains in her complex problem solving abilities and used the sign for help more spontaneously (id.).<sup>8</sup> The report stated that the student had expanded her pretend play to include a wider range of ideas, including initiating play with pretend food (id. at p. 3). The student was also making gains in logical thinking (id.).

With respect to the student's speech and language development, the report indicated that, at her best, the student was able to sustain an interaction for 15-20 minutes (Parent Ex. K at p. 12). According to the report, the student relied on multimodal language to initiate interaction, using verbal approximations, gestures, and her communication book (id.).<sup>9</sup> The report stated that the student used these modalities to answer "who," "what," and "where" questions (id.). The report cited the student's difficulty maintaining regulation and attention as a key factor regarding her difficulty with comprehension of language (id.). According to the report, the student had made "considerable" progress in her expressive language skills and her verbal approximations had become significantly more intelligible (id. at p. 13). The student could verbally approximate 2-3 word utterances (id.).<sup>10</sup>

With respect to academics, the May 2009 multidisciplinary report indicated that the student demonstrated high interest in her math lessons and with the support of an assistant had shown proficiency in pointing and verbally approximating numbers 1-10 while counting, counting with understanding and recognizing the number of objects up to 10, sorting objects by one attribute (color), and visually tracking an object through one plane (Parent Ex. K at p. 5). The report stated that the student continued to show her abilities in math by continued work in gross motor games involving numbers and that the student was able to demonstrate her understanding of 1:1 correspondence through the use of a song and a counting game (id.). According to the report, the student was able to recognize all the letters of the alphabet and was working toward recognizing corresponding letter sounds with more consistency (id.). The report indicated that the student was able to spell some words using a letter board and was building her bank of sight words (id. at p. 6). The student was reportedly able to attend to a lesson for 30 minutes with 1:1 teacher support (id.). According to the report, the student made progress in her handwriting, was able to hold the writing utensil with hand-over-hand support to write her favorite words, and was able to independently "use pre-writing forms, which consist of scribbles" (id. at p. 7).

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<sup>8</sup> The report later indicates that the student is able to participate in a pleasurable back and forth interaction for approximately 20 circles of communication when interactions were centered on the student's favorite songs and activities (Parent Ex. K at p. 12).

<sup>9</sup> Staff noted that the student had begun using a communication book in place of an AAC device (Parent Ex. K at p. 15).

<sup>10</sup> The report indicated that, among other things, Prompts for Restructuring Oral Muscular Phonetic Targets (PROMPT) was used to address the student's oral motor difficulties (Parent Ex. K at p. 13).



With respect to OT, the report indicated that the student was making progress participating in a variety of sensory based therapeutic activities and was able to attend more often and for longer periods of time to fine motor tasks after receiving sensory input (Parent Ex. K at p. 8). The student was able to complete a three-step obstacle course when regulated and follow two-step verbal directions with minimal support (id. at p. 9). The report indicated that the student was making progress in problem solving and initiated motor plans to get a snack or toy (id.). In addition, the student was beginning to show interest in fine motor and visual motor tasks and engaged in these activities more often and more willingly (id.). While the student was able to independently navigate through her environment, she required visual and verbal support to avoid unseen or potential obstacles (id.). With respect to PT, the report indicated that the student generally preferred self-directed and sedentary activities (id. at p. 3). The report stated that when motivated the student could complete an obstacle course that included gross motor activities, but that the student had difficulty generating novel sequences on her own (id. at p. 10). According to the report, the student had great difficulty with balance activities as they required "a good deal" of focus and concentration (id. at p. 11). The report indicated that the student's muscle strength had improved with respect to gross motor activities such as wheelbarrow walking and scooter board games (id. at pp. 10-11). The student required maximal prompting to participate in activities involving ball skills as the student struggled with concentration, motor planning, and coordination (id. at p. 11). According to the report, the student required verbal and manual cues to remain on task (id.). Lastly, the report noted that the student had demonstrated an increase in aggressive behaviors since the last progress report and that the student often became dysregulated during sessions and would hit or kick to express her frustration (id. at pp. 4, 10).

A June 2009 home therapy progress report, composed by the student's home-based ABA/SEIT therapists, indicated that during the 2008-09 school year, the student had made "tremendous strides" in her abilities across all domains (Parent Ex. J at p. 1). According to the student's therapists, the student had become more verbally expressive and socially interactive over the course of the year (id.). In addition, the therapists noted development in the student's reciprocal play skills that now included abstract thinking, reflected in the student's pretend play (id.). The therapists reported that the student possessed "exceptionally high" receptive language skills and noted that they were encouraging more expressive language development by helping the student to increase her vocabulary (id.). The therapists indicated that the student enjoyed spelling and noted that the student was expanding the number of three-letter words she could spell using a picture cue and field of six letters (id. at p. 2). With regard to mathematics, the therapists indicated that the student was working on basic number skills such as rote counting, identifying and sequencing numbers, and matching numerals to a corresponding number of objects (id.). According to the therapists, the student demonstrated marked improvement in the ability to dress herself independently and increased independence in the bathtub, though she was not yet toilet trained (id.). The therapists reported that the student continued to exhibit oral motor "issues" in that she would mouth string from clothes or rugs until it was small or she swallowed it (id.). The therapists indicated that the student required assistance with feeding including the use of utensils and pacing (id. at pp. 2-3). A June 2009 OT progress report, completed by the student's home-based occupational therapist, indicated that the focus of the student's therapy had been on improving the student's discrimination and processing of sensory input, strength and endurance, balance and coordination, attention to task, and self-help skills (Parent Ex. I at p. 3). The progress report detailed the student's sensory processing and motor planning difficulties (id. at pp. 1-2). According to the report, the student's self-help skills were scattered between the 12-36 month range

and included things such as holding and drinking from a cup and removing socks and partially pulling a shirt over head (id. at p. 2).

In a letter dated June 11, 2009, the district notified the parents of the assigned school for the 6:1+1 special class placement that was recommended for the student for the 2009-10 school year (Parent Ex. GG). By letter to the district also dated June 11, 2009, the parents expressed concern that they had not yet received the student's IEP or a notice of a proposed placement and requested that the information be sent to them as soon as possible (Parent Ex. FF). By letter to the district dated June 16, 2009, the parents advised that they still had not received the student's IEP or notice of a proposed placement and further notified the district of their intention to send the student to the Rebecca School "with transportation, additional OT and SEIT services" at public expense absent an appropriate recommendation by the district (Parent Ex. VVV).

By letter dated June 17, 2009, the parents informed the district that they were in receipt of the district's June 11, 2009 letter identifying the student's assigned school and had left several messages with the assigned school about arranging a visit, but had not yet received a response (Parent Ex. EE; see Parent Ex. MMM). The parents further advised the district that until they had the opportunity to visit the assigned school and assess its appropriateness, the student would continue to attend the Rebecca School for the 2009-10 twelve-month school year and receive 20 hours of ABA/SEIT services and four hours of OT services a week (Parent Ex. EE). In addition, the parents stated they would be seeking reimbursement from the district for the costs of these services and the student's tuition at the Rebecca School (id.). On or about June 24, 2009, a copy of the March 2009 IEP was mailed to the parents (Tr. pp. 1093-94; see Parent Ex. HHH).

By due process complaint notice dated June 29, 2009, the parents asserted that the district failed to offer the student a free appropriate public education (FAPE) for the 2009-10 school year and requested an impartial hearing to adjudicate claims for pendency and reimbursement for tuition at the Rebecca School (Parent Ex. A). On or about July 7, 2009, the district submitted an answer to the parents' due process complaint notice, asserting that the placement recommended by the CSE was reasonably calculated to enable the student to obtain meaningful educational benefits (Parent Ex. C at p. 3).

According to the parents, in July 2009 they were contacted by MCC and informed that the student would be allowed to "interview" for the school (Tr. pp. 1113-14). On July 16, 2009, the student participated in an intake assessment conducted by MCC (Parent Ex. AAA at p. 140).

The impartial hearing convened on July 24, 2009 at which time the parties discussed the student's pendency (stay put) placement for the duration of the impartial hearing (Tr. pp. 1, 5). On July 31, 2009, the impartial hearing officer issued an interim decision followed by an amended interim decision dated August 7, 2009. In the amended interim decision, the impartial hearing officer found that a prior, unappealed impartial hearing officer decision dated June 8, 2009 formed the basis for establishing the student's pendency placement for the current proceedings (IHO Amended Interim Decision at p. 2). Based on the June 8, 2009 decision, the impartial hearing officer determined that the student's pendency placement was the Rebecca School with 20 hours of ABA/SEIT services per week, 4 hours of OT per week, and transportation to and from the school not to exceed 30 minutes each way (id.).

In a letter to the parents dated July 28, 2009, the chief administrative officer for MCC informed the parents that the student had been accepted for admission (Parent Ex. P). The parents signed an enrollment contract with MCC for the 2009-10 school year shortly thereafter (Parent Ex. S).

In a letter to the district dated July 30, 2009, the parents indicated that they had not yet received a response to their June 17, 2009 letter (Parent Ex. F; see Parent Ex. EE). The parents informed the district that they had enrolled the student in the summer program at the Rebecca School and noted that until they heard from the district regarding "any appointment to view a school" that the student would remain enrolled at the Rebecca School and in September 2009 would attend MCC (Parent Ex. F). The parents also indicated that the student would continue to receive additional OT and ABA/SEIT services as outlined in their June 17, 2009 letter, as well as an unspecified amount of speech-language therapy, and that they would be seeking payment from the district for these services (id.).

On September 15, 2009, the student began attending MCC and continued to receive home-based ABA/SEIT services and OT (Tr. p. 481; Parent Exs. TT; XX; YY).

The parents filed an amended due process complaint notice on September 21, 2009 reflecting that the student had left the Rebecca School and begun to attend MCC (Parent Ex. E at p. 1). The parents indicated that beginning in September 2009 and continuing through June 2010, the student would be attending MCC and, in addition, would continue to receive home and community-based services of ABA/SEIT, speech-language therapy, and OT (id. at p. 6). In the amended due process complaint notice, the parents modified their request for relief and sought reimbursement for the student's tuition at the Rebecca School for summer 2009 and tuition at MCC for the period of September 2009 through June 2010 (id.). Additionally, the parents sought reimbursement for 20 hours per week of home based 1:1 ABA/SEIT services, two hours per week of 1:1 speech and language therapy, four hours per week of 1:1 OT, and transportation to and from school, all as part of a 12-month program (id.).

With regard to the nature of the problem, the parents claimed in their amended due process complaint notice that the district failed to offer the student a FAPE for the 2009-10 school year because the March 2009 CSE failed to properly evaluate the student, failed to assign a needed 1:1 health paraprofessional and instead assigned a "crisis" paraprofessional, did not develop a placement at the CSE meeting with the parents' participation, did not indicate the staffing ratio for the student during adaptive physical education, failed to recommend extended day services, did not consider assistive technology, failed to develop proper goals and objectives, did not base the behavior intervention plan on a functional behavioral assessment (FBA), and failed to properly address the student's communications needs given that she is non-verbal (Parent Ex. E at pp. 2-6). The parents also claimed that the March 2009 IEP did not adequately address the student's specific aggressive behaviors (id.). They further argued that the IEP did not provide sufficient related services, services outside of school, and 1:1 instruction (id.). The parents also argued that the Rebecca School and MCC were appropriate placements and that the equities favored awarding the parents tuition reimbursement (id. at p. 6).

On February 1, 2010, the district conducted an assistive technology evaluation of the student, in response to a request from the educational coordinator of MCC, in order to determine

whether or not the student required an AAC system in order to meet her IEP goals and the type of system that would best meet the student's educational and community needs (Parent Exs. AAA at p. 115; SS). At the conclusion of the evaluation, the student was "loaned" a device described as a "PECS book with voice output" for a trial period (*id.* at p. 117).

On April 8, 2010, the impartial hearing reconvened, following a delay of more than eight months which was not explained in the hearing record, and concluded on July 13, 2010 after a total of eight days of testimony (Tr. pp. 1, 12, 198, 316, 555, 747, 940, 1061).<sup>11</sup> During the impartial hearing, the district called three witnesses and entered six documents into evidence (Tr. pp. 45, 202, 327; Dist. Exs. 1-6). The parents called 11 witnesses and entered 75 documents into evidence (Tr. pp. 414, 456, 559, 674, 776, 829, 868, 950, 995, 1000, 1068; Parent Exs. A-WWW).

In a written decision dated November 8, 2010, the impartial hearing officer found in favor of the parents and ordered the district to reimburse the parents for their daughter's tuition costs at the Rebecca School for July and August of the 2009-10 school year as well as for tuition costs at MCC for September through June of the 2009-10 school year, the cost of 20 hours per week of ABA/SEIT services during the 12-month 2009-10 school year, and for the amount the parents paid for transportation during the 2009-10 school year (IHO Decision at pp. 76-77).

In the decision, the impartial hearing officer set forth detailed descriptions of the testimony of each of the witnesses and credited the testimony of all the witnesses (IHO Decision at pp. 5-63, 65). The impartial hearing officer determined that the district did not offer a FAPE to the student for the 2009-10 school year because the student required a small class with 1:1 instruction due to her behavior needs and her need for "constant regulation" (*id.* at pp. 65-66). Additionally, the impartial hearing officer found that the class in the district's assigned school had a student-to-teacher ratio that was not appropriate for the student and that the school would be too noisy for the student and would require her to use stairs, which the student had difficulty navigating (*id.* at pp. 66-67). The impartial hearing officer also found that there was insufficient evidence about the training and credentials of the district's proposed behavioral paraprofessional and how one would "approximate a one-to-one instructor" (*id.*).

The impartial hearing officer further determined that the Rebecca School was an appropriate placement for the student in part because the school adjusted to the student's changing needs by deviating from its "2:1 model" and assigning a 1:1 staff person to the student (IHO Decision at pp. 67-69). The impartial hearing officer also found that MCC was an appropriate placement because it provided 1:1 ABA services to the student, worked together with instructors from the student's home-based program to ease her transition from the Rebecca School to MCC, addressed the student's specific needs, and that the student made progress in several areas at MCC (*id.* at pp. 69-72). Although some witnesses testified that the student's needs could not be met without the home program, the impartial hearing officer found that MCC was appropriate because

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<sup>11</sup> The impartial hearing officer is reminded that both federal and State regulations require an impartial hearing officer to render a decision not later than 45 days after the expiration of the 30-day resolution period or the applicable adjusted time periods (34 C.F.R. § 300.515[a]; 8 NYCRR 200.5[j][5]), unless an extension has been granted at the request of either party (34 C.F.R. § 300.515[c]; 8 NYCRR 200.5[j][5][i]). Extensions may only be granted consistent with regulatory constraints and an impartial hearing officer must ensure that the hearing record includes documentation setting forth the reason for each extension (8 NYCRR 200.5[j][5][i]).

it was not a residential school and could not be accountable for the student's educational needs after the school day was over (id. at p. 72). According to the impartial hearing officer, the student's home program was a necessary component of the student's education because she had evidenced regression without the home program, it was coordinated with the MCC program, and it furthered her IEP goals (id. at pp. 72-74).

The impartial hearing officer next determined that equitable considerations favored the parents in their requests for reimbursement for the Rebecca School, MCC, and the student's home-based ABA/SEIT program because the parents had cooperated with the March 2009 CSE and had made multiple attempts to visit the district's assigned school (IHO Decision at pp. 74-76). The impartial hearing officer also found that the parents were open to a public school placement and that the fact that they had signed a contract for summer school at the Rebecca School in May 2009 did not weigh against the parents because at the time they had not yet received a copy of the student's IEP or a notice of placement (id. at p. 75). However, the impartial hearing officer determined that the equities did not support reimbursement for the OT and speech-language therapy portions of the home program because the parents chose to place the student at MCC, knowing that the school would provide fewer related services than recommended by the CSE, and "therefore must be responsible for providing the mandated services that the school fails to provide" (id.).

This appeal by the district ensued. The district argues that the impartial hearing officer's decision with respect to the Rebecca School, MCC, and the home-based ABA services should be vacated because the district offered the student a FAPE, the unilateral placements at the Rebecca School and MCC were inappropriate, the home program was not necessary for the student to make educational progress, and that equitable considerations did not favor the parents. The district contends that the impartial hearing officer properly found that equitable considerations precluded the parents' request for relief with regard to the at-home related services. More specifically, the district contends that the proposed program addressed the student's need for 1:1 adult support by mandating a 1:1 behavioral paraprofessional and that the behavior intervention plan describes some of the roles the paraprofessional would play. The district also argues that the proposed program offered appropriate related services and goals and objectives and that although the IEP should have indicated that the student used an AAC device, she would have come to the assigned school with the device and it would have been apparent that she uses it. The district contends that although a January 2006 private psychological evaluation recommended home-based ABA, the evaluation was written when the student was a pre-school student and that while home-based ABA is common for early intervention, it is not for school-aged students. The district next contends that the assigned school would have been able to fulfill the related services mandates on the student's IEP and that it would have provided parent training and the small class instruction in a small school setting that the student required. The district argues that the proposed placement would have offered instruction using TEACCH and ABA methodologies and those students who needed it spent the entire day in 1:1 instruction. The district argues that the support that the student would have received in the assigned school would not have differed significantly from that offered by MCC because at both locations students receive instruction 1:1, in small groups and with the entire class and that the 1:1 assistance during the day at both locations would assist the student with prompting if needed, help regulate the student, and assist with toileting and other ADLs. The district argues that the impartial hearing officer erred in finding that the assigned school would have been "unsafe" for the student because the parents did not raise this argument in their due

process complaint notice and because both the assigned school and MCC required the student to use stairs.

The district further contends that the unilateral placements were inappropriate. According to the district, the Rebecca School was inappropriate because the parents learned that the school was no longer suitable in January 2009 and only continued the placement through August 2009 because MCC did not have room for the student. The district contends that MCC was inappropriate because it failed to provide the student with sufficient speech-language therapy and OT and failed to offer any PT. The district argues that the student's home placement is not reimbursable because the hearing record fails to show that the home program was necessary to address the student's special education needs. Instead, the district contends that the hearing record shows that the home ABA/SEIT providers focused on ADL skills, socialization, play, and community skills in an effort to regulate the student's behavior at home. According to the district, the home program was intended to generalize skills, maximize the student's potential, and provide behavioral assistance for the student's waking hours while she was not in school—a level of services that the district contends it is not responsible to provide.

Lastly, the district contends that the equitable considerations did not favor the parents because while they claimed that they unilaterally placed student at a private school because they were unable to visit the district's assigned school, the evidence showed that student's mother chose not to visit the assigned school. According to the district this demonstrated that the parents never seriously considered placing the student at a public school.

In their answer, the parents argue that the impartial hearing officer's decision should be affirmed as written, principally for the reasons cited by the impartial hearing officer and for other reasons put forth in their due process complaint notice but not addressed in the decision. The parents' arguments primarily focus on the student's need for intensive 1:1 instruction in school, after-school, and in the home in order to make meaningful educational progress. The parents also argue that the district failed to present evidence regarding the student's assigned school placement for the entire school year, as the parents assert that the district only offered evidence regarding the assigned school for the student's summer program and did not present evidence about the student's assigned school for the remainder of the 2009-10 school year.

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]).

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, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 C.F.R. § 300.148).

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at \*7 [S.D.N.Y. Aug. 27, 2010]).

In the instant case, I will turn first to the district's argument that the impartial hearing officer erred in finding that the district did not offer the student a FAPE during the 2009-10 school year.

The hearing record shows that the district relied on information provided by the student's then-current teacher and therapists, as well as input from the student's mother, when developing the March 2009 IEP. According to the hearing record, the March 2009 CSE was provided with the December 2008 Rebecca School multidisciplinary progress report prior to the CSE meeting and the district's school psychologist reviewed the report, along with the student's file, in preparation for the CSE meeting (Tr. pp. 205-09; see Tr. pp. 1070-71). Further, the student's mother confirmed that the Rebecca School report was considered at the CSE meeting (Tr. pp. 210, 1073). The parties also reviewed the report of the district's classroom observation of the student (Tr. pp. 207, 210, 230, 1170-71). At the beginning of the CSE meeting, the classroom observation report was provided to the student's mother, who was given time to review the document (Tr. pp. 210, 230, 1070-71). The student's mother did not voice any concerns with the observation report (Tr. p. 230; Dist. Ex. 4). The hearing record also shows that the student's mother and teacher from the Rebecca School had the opportunity to participate in the development of the March 2009 IEP (Tr. pp. 211-13, 307-08). The school psychologist reported that she prepared draft portions of the IEP and brought the draft IEP to the CSE meeting (Tr. p. 206). She indicated that information contained in the draft came from the Rebecca School multidisciplinary report and that she read the draft aloud and invited all CSE members to contribute and participate in modifying or changing the draft (Tr. p. 215). Minutes from the CSE meeting indicated that the student's present levels of performance were discussed with the student's mother and teacher and that they provided input regarding the student's functioning as well as on goals and objectives and helped to develop a behavior intervention plan for the student (Tr. pp. 217, 219-20, 229; Dist. Ex. 4).

A review of the March 2009 IEP shows that the district identified and provided for the student's educational needs. The March 2009 IEP reflected the student's academic deficits and her significant delays in speech-language development, social skills, and skills of daily living (Parent Ex. D at pp. 3, 4). The IEP also noted the student's attending difficulties, difficulty remaining "regulated," and tendency to become aggressive when overwhelmed or mouth cloth or string when



anxious (id. at p. 4). The IEP further indicated that the student was not toilet trained and had food sensitivities (id. at p. 5).

To address the student's academic, social, and behavioral needs the CSE recommended that the student be placed in a 6:1+1 special class with the support of a 1:1 crisis management paraprofessional (Parent Ex. D at pp. 1, 15). The March 2009 IEP indicated that academically the student was developing readiness skills (id. at p. 3). The IEP included goals and objectives which targeted the development of academic readiness skills such as letter sound correspondence, recognizing functional sight words, answering yes/no and "wh" questions, identifying numbers, counting, matching groups of like numbers, and adding objects up to 10 (Tr. pp. 221-22; Parent Ex. D at p. 6). The student was noted to have attending problems and the IEP provided for academic management supports of verbal prompts and visual cues, redirection, repetition, and the use of manipulatives (Tr. pp. 213-14; Parent Ex. D at p. 3). The IEP addressed the student's aggressive and "stringing" behaviors through the development of a behavior intervention plan and the assignment of a 1:1 crisis management paraprofessional to the student (Tr. pp. 216-20, 253, 258-59; Parent Ex. D at p. 4). In addition, the IEP provided for social-emotional management supports of frequent sensory/movement breaks between activities, modeling of appropriate social interactions, access to sensory materials, and the use of a brushing protocol (Tr. pp. 215-16; Parent Ex. D at p. 4). The IEP also included a recommendation for related services to assist the student in the 6:1+1 special class (Parent Ex. D at p. 15). The student demonstrated oral motor/articulation difficulties, deficits in receptive and expressive language, and weaknesses in socialization and pragmatic language skills (Dist. Ex. 6 at pp. 4-6). To address these needs, the IEP included a recommendation for individual speech-language therapy five times per week for thirty minutes, as well as goals and objectives related to each area of identified weakness (Parent Ex. D at pp. 8, 9, 10, 15). The student also demonstrated deficits in sensory processing, difficulty with motor planning, delays in fine and gross motor development, and difficulty with ADLs, including toileting (Dist. Ex. 6 at p. 3). To address these needs, the IEP provided for individual OT five times a week and individual PT three times a week (Parent Ex. D at p. 15). In addition, the IEP included goals and objectives that targeted the student's sensory processing and motor needs, as well as the development of ADL skills (id. at pp. 7-8, 11-12). Specifically, the IEP included goals and objectives related to motor planning and sequencing skills; improving muscle strength and endurance; improving visual, spatial, and coordination skills; increasing independence in ADLs; improving fine motor skills; and improving sensory processing skills (id. at pp. 7, 8, 11, 12). The CSE also recommended that the student receive adapted physical education (id. at p. 5). The IEP also reflected the following supports to assist the student with her health/physical management needs: assistance with toileting and ADLs as well as use of a letter board to assist with communication (id.).<sup>12</sup> The CSE further recommended the student attend a 12-month program and receive special transportation (id. at p. 1).

The hearing record shows that the student's mother was in agreement with the CSE's recommendations for speech-language and OT and that she also agreed that the student required PT (Tr. pp. 225-26; 1089, 1149-50). With respect to the goals and objectives contained in the IEP,

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<sup>12</sup> The district's school psychologist testified that she erred in indicating that the student required the use of a letter board to communicate and that the IEP should have indicated that the student needed a communication board (Tr. p. 270). The May 2009 multidisciplinary report from the Rebecca School indicated that the student used a letter board as part of her communication book (Parent Ex. K at p. 6).

the hearing record indicates that they were developed based on the Rebecca School's December 2008 multidisciplinary report and with input from the student's teacher and mother (Tr. pp. 211, 220, 222-24; Dist. Ex. 4).

In light of the above, I find that the March 2009 CSE had adequate evaluative information regarding the student's present levels of academic performance and special education needs and that the IEP created by the CSE accurately reflected the results of the evaluative information and adequately identified the student's needs (34 C.F.R. § 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe, 2008 WL 2736027, at \*6 [S.D.N.Y. July 3, 2008]; see L.R. v. Manheim Township Sch. Dist., 540 F. Supp. 2d 603, 617-18, 620 [E.D. PA 2008] [finding that even when an evaluation conducted after the creation of an IEP showed that a student's deficit was more serious than what was previously known, it did not follow that the IEP was based on insufficient evaluations, nor did it render the services offered by the district substantively inappropriate]).

The special education teacher of the student's assigned class described how the 6:1+1 special class employed elements of TEACCH and ABA (Tr. pp. 56, 133-34, 137, 181-82) and that the classroom teacher had access to an autism coach (Tr. pp. 51-52, 144, 158-59).<sup>13</sup> Within the school there was a sensory room that included a trampoline, ball pit, tunnels, and mats (Tr. pp. 55, 88, 131-32). The teacher of the proposed class testified that students in the class received 30-50 minutes of 1:1 instruction during the school day and that the maximum amount of 1:1 instruction was dependent on a student's needs (Tr. p. 138). The teacher noted that some students in the program received 1:1 instruction throughout the day, with at least one period being provided by the teacher (Tr. pp. 138-39). According to the teacher, classroom staff collected and maintained data to track students' progress (Tr. pp. 52, 149-50). Students' behaviors were tracked using ABC charts and a computer program (Tr. pp. 88-89, 140, 189-90). Included in the daily schedule was an instructional breakfast and lunch staffed by the speech-language therapist, which focused on developing students' communication skills (Tr. pp. 64-65, 68, 332, 363). One-cell AAC devices were used throughout the school and the school owned several multi-cell devices which could be used by any student, regardless of whether the device was listed on their IEP (Tr. pp. 81-82, 185-86, 335-36, 373). Although the student did not ultimately attend the placement proposed in the March 2009 IEP, and the implementation of the student's March 2009 IEP is a separate issue not relevant here (A.P. v. Woodstock Bd. of Educ., 2010 WL 1049297 [2d Cir. Mar. 23, 2010]; see Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811 [9th Cir. 2007]; see also L.K. v. Dep't of Educ., 2011 WL 127063, 10 [E.D.N.Y. Jan. 13, 2011]). I note that the evidence regarding the assigned class is not inconsistent with the mandates of the proposed March 2009 IEP.

The impartial hearing officer determined that "it is clear from the evidence" that the student required a small class with a 1:1 instructor during the 2009-10 school year and that all of the witnesses who actually knew the student agreed that she required a 1:1 instructor with her at all times (IHO Decision at pp. 65, 66). At the impartial hearing, the parents' witnesses testified that the student required a 1:1 instructor due to her sensory needs, tendency to mouth string and engage in aggressive behavior, and communication difficulties (Tr. pp. 429-30, 51-12). The student also required a 1:1 to provide her with structure, stimulate her, redirect her, and keep her focused (Tr.

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<sup>13</sup> According to State regulations, a 6:1+1 class is designed to address the needs of students "whose management needs are determined to be highly intensive, and requiring a high degree of individualized attention and intervention" (8 NYCRR 200.6[h][4][ii][a]).

pp. 885-86, 1004-5, 1143-44). The parents' witnesses further stated that the student required "intensive direct teaching" and "one-to-one intensive teaching" (Tr. pp. 603, 665). Although the impartial hearing officer acknowledged that the district recommended a "behavior" management paraprofessional for the student, she concluded that there was no evidence presented at the impartial hearing as to how the paraprofessional would "approximate a one-on-one instructor" (IHO Decision at p. 66). I disagree and find that the hearing record provides sufficient detail to determine how the district's recommended program would meet the student's need for 1:1 instruction.

The school psychologist testified that the role of the recommended 1:1 crisis management paraprofessional was delineated at the March 2009 CSE meeting and outlined in the student's behavior intervention plan (Tr. pp. 216-17). A review of the district's behavior intervention plan shows that it addressed many of the student's deficits that, according to the parents' witnesses, necessitated 1:1 instruction. Specifically the plan, which the district's paraprofessional would implement under the direction of a "licensed" special education teacher, addressed the need to provide the student with redirection and sensory support, the need to assist the student with communication, and the need to decrease the student's mouthing of string and aggressive behaviors (Tr. pp. 301-02; Parent Ex. D at p. 6). With respect to intensive teaching, I note that testimony from the special education teacher of the proposed class indicated that all of the students in the class received daily 1:1 instruction from her, and that the amount of 1:1 instruction provided was determined by students' individual needs (Tr. pp. 138-39). In addition, the student was scheduled to receive thirteen sessions per week of individual related services in the form of speech-language therapy, OT, and PT (see Parent Ex. D at p. 15). Based on the above, I find that the district's recommended program was appropriate to address the student's needs for 1:1 instruction.

The impartial hearing officer also found that the assigned school would have been an "unsafe atmosphere" for the student due to the student's difficulties navigating stairs, noise, and the presence of large number of other students (IHO Decision at p. 67). However, the district correctly asserts that no concerns regarding the safety of the assigned school were raised in the parents' due process complaint notices (see Parent Exs. A; E). State regulations provide that 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 notice 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 WL4773417, 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. 10-055; Application of a Student with a Disability, Appeal No. 09-140).<sup>14</sup>

The impartial hearing officer also found that the student's home services were a "necessary component of the [student's] program" primarily in light of the severity of the student's disabilities

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<sup>14</sup> In any event, the hearing record shows that the student's assigned 1:1 paraprofessional would have been available to assist the student in safely navigating the stairs at the assigned school, as had been the practice at MCC (Tr. pp. 300, 578, 586).

and her "regulation" needs (IHO Decision at pp. 72-74). In general, the evidence suggests that the parents may require assistance in the supervision and custodial care of their daughter in the home and that the student may benefit from the generalization of skills afforded by the home instruction. During the impartial hearing, I note that the student's mother stated that she did not want her daughter placed in a residential setting, and that the home services were in place in part to "maximize" the student's potential (Tr. pp. 1127-28). However, there is insufficient evidence in the record to find that this student's supervision and custodial care on the weekends, holidays, and vacations must be provided in the form of home-based 1:1 ABA services (see Thompson R2-J Sch. Dist. v. Luke P., 540 F.3d 1143, 1155 [10th Cir. 2008] [holding that "[t]he Act does not require that States do whatever is necessary to ensure that all students achieve a particular standardized level of ability and knowledge. Rather, it much more modestly calls for the creation of individualized programs reasonably calculated to enable the student to make some progress towards the goals within that program]). Although it is understandable that the parents, whose daughter has substantial needs, desired greater educational benefits through the auspices of special education, that does not mean that district has failed to comply with its obligations to offer the student an educational plan that was specially designed for the student and from which there reasonable likelihood that the student would receive some educational benefits. If the parents continue to need assistance to provide supervision and custodial care of their daughter when she is not at school, I encourage them to utilize the resources through the district's CSE and/or with the help of a social worker or a case manager to research available respite, residential habilitation, or other services and funding which may be available through the New York State Office of People with Developmental Disabilities or New York City agencies that could provide support services with trained providers for the child when she is not receiving educational services (see, e.g., Application of the Bd. of Educ., Appeal No. 08-074; Application of a Child with a Disability, Appeal No. 07-050).

In summary, upon an independent review of the hearing record, I conclude that the CSE's recommendation of a 6:1+1 special class with related services of speech-language, OT, PT, and a behavior management paraprofessional was reasonably calculated to enable the student to receive educational benefits, and thus, the district offered the student a FAPE for the 2009-10 school year (Rowley, 458 U.S. at 206-07; Cerra, 427 F.3d at 192). In addition, I find that the hearing record demonstrates that the district's proposed program is consistent with LRE requirements (see 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]). Having determined that the district offered the student a FAPE, I need not reach the issue of whether the Rebecca School, MCC, and the student's home program were appropriate for the student and the necessary inquiry is at an end (M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134; Application of a Student with a Disability, Appeal No. 10-055; Application of a Student with Disability, Appeal No. 08-158). I have also considered the parents' arguments that the impartial hearing officer failed to address certain issues that they had raised in their due process complaint notice, but given that the parents did not cross-appeal any aspect of the impartial hearing officer's decision, I find that such issues are not properly before me and I decline to address them.<sup>15</sup>

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<sup>15</sup> 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]).

**THE APPEAL IS SUSTAINED.**

**IT IS ORDERED**, that the portions of the impartial hearing officer's decision dated November 30, 2010 that determined that the district failed to offer the student a FAPE for the 2009-010 school year and ordered the district to pay for the student's tuition costs at the Rebecca School, at MCC and for the student's home program for the 2009-10 school year is annulled.

**Dated:**           **Albany, New York**  
                      **February 14, 2011**

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**JUSTYN P. BATES**  
**STATE REVIEW OFFICER**