



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 11-047

**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, Diane da Cunha, Esq., of counsel

Susan Luger Associates, attorneys for respondents, Lawrence D. Weinberg, Esq., of counsel

### **DECISION**

Petitioner (the district) appeals from that portion of the decision of an impartial hearing officer which ordered it to reimburse respondents (the parents) for the costs of a nonrefundable deposit paid to the Rebecca School and to directly pay the Rebecca School for the remainder of the costs of the student's tuition for the 2010-11 school year. The appeal must be sustained.

#### **Limited Issues on Appeal**

Before turning to the merits of the appeal, it is noted that the district affirmatively indicates in the petition for review that it is not appealing the impartial hearing officer's determination that the district failed to offer the student a free appropriate public education (FAPE) for the 2010-11 school year; therefore, the impartial hearing officer's determination that the district failed to offer the student a FAPE for the 2010-11 school year is final and binding and will not be addressed in this decision (Pet. ¶ 6; see 34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[j][5][v]). In addition, the district does not appeal the impartial hearing officer's determination that the student continued to require home-based services through the conclusion of the 2010-11 school year; therefore, this portion of the impartial hearing officer's decision is also final and binding and will not be addressed in this decision (see 34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[j][5][v]). Given the limited issues on appeal, the parties' familiarity with the student's educational history will be presumed and only those facts necessary to render a decision will be recited.

## Background

At the time of the impartial hearing, the student was attending the Rebecca School and received the following home-based services pursuant to an interim decision issued with respect to the student's pendency (stay put) placement: 16 hours per week of special education itinerant teacher (SEIT) services; three 60-minute sessions per week of physical therapy (PT); four 30-minute sessions per week of speech-language therapy; four 60-minute sessions per week of occupational therapy (OT); and a full-time, 1:1 health paraprofessional to provide services to the student both at the Rebecca School and at home (Tr. pp. 1-19, 115-19; see Parent Ex. A at pp. 1-2, 5; IHO Interim Order on Pendency at p. 2).<sup>1</sup> The Commissioner of Education has not approved the Rebecca School as a school with which school 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 multiple disabilities is not in dispute in this proceeding (see 34 C.F.R. § 300.8[c][7]; 8 NYCRR 200.1[zz][8]).

According to the hearing record, the student has a genetic disorder characterized by significant delays in cognitive skills, gross motor skills, fine motor skills, and speech-language development (Tr. pp. 197-99; Dist. Exs. 2-4; Parent Ex. F). The student exhibits ataxia, characterized by tremors and fluctuating muscle tone, and a seizure disorder (Tr. p. 199; Dist. Ex. 3 at p. 3). The student is nonverbal and communicates by using a few vocalizations, gestures, facial expressions, pulling at objects, and at times, selecting from a choice of two pictures on a communication board (Tr. pp. 161-63; Dist. Exs. 3 at p. 3; 4 at p. 1). He navigates his environment by crawling, cruising along the wall, and walking with assistance (Tr. pp. 190-91; Dist. Ex. 3 at p. 3). The student exhibits highly distractible behaviors, poor skills related to activities of daily living (ADL), and difficulty regulating sensory information (Tr. pp. 145-47; Dist. Exs. 2; 3 at pp. 1, 3; Parent Ex. F at p. 4).

## Due Process Complaint Notice

By due process complaint notice, dated July 15, 2010, the parents asserted that the district failed to offer the student a FAPE for the 2010-11 school year based upon both procedural and substantive violations (Parent Ex. A at pp. 1-5). The parents further alleged that the Rebecca School was an appropriate placement for the student and that equitable considerations did not preclude an award of tuition reimbursement (id. at p. 6). As a proposed resolution, the parents requested a pendency placement comprised of home-based SEIT, PT, OT, and speech-language therapy services; prospective funding and/or reimbursement for the costs of the student's tuition at the Rebecca School for the 2010-11 school year; the continuation of the student's home-based services for the 2010-11 school year; the cost of evaluations; the cost of the student's related services or the provision of Related Services Authorizations (RSAs); round-trip transportation to the Rebecca School; and attorneys' fees (id. at pp. 5-7).

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<sup>1</sup> Neither party appealed the Interim Order on Pendency, dated September 28, 2010; therefore, the impartial hearing officer's order is final and binding upon the parties (see 34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[j][5][v]).

## **Impartial Hearing Officer Decision**

In a decision dated April 4, 2011, the impartial hearing officer determined that the district did not offer the student a FAPE, that the parents sustained their burden to establish the appropriateness of the student's unilateral placement at the Rebecca School for the 2010-11 school year, and that equitable considerations did not bar prospective funding or reimbursement of the costs of the student's tuition (IHO Decision at pp. 1-6). The impartial hearing officer found that the parents presented "substantial evidence" to support a finding that the Rebecca School was appropriate to meet the student's special education needs, that the student's program had been "described in depth," and that the "specific manner in which the program has met [the student's] needs was described as well" (*id.* at p. 5). The impartial hearing officer noted that the Rebecca School's "instructional model" had been "effective" for the student, that the student's "instructors and providers ha[d] regular team meetings" to discuss the student's "progress and performance," and that the student's "program and instruction [were] modified as needed" (*id.* at pp. 5-6). She further indicated that the Rebecca School's "educational program" specifically targeted the student's needs and that the student made progress (*id.* at p. 6). Having found the Rebecca School appropriate and that the parents did not have the financial resources to directly pay the student's tuition costs to the Rebecca School, the impartial hearing officer directed the district to directly pay the student's remaining tuition to the Rebecca School and to reimburse the parents for their nonrefundable deposit (*id.* at pp. 6-7).

In addition, the impartial hearing officer concluded that the parents sustained their burden to establish the student's continued need for home-based SEIT, PT, OT, speech-language therapy, and full-time, 1:1 health paraprofessional services for the remainder of the 2010-11 school year (IHO Decision at pp. 7-8). The impartial hearing officer also granted the parents' request for round-trip transportation to the Rebecca School (*id.* at p. 8).

## **Appeal for State-Level Review**

The district appeals, and contends that the impartial hearing officer erred in concluding that the parents sustained their burden to establish the appropriateness of the student's unilateral placement at the Rebecca School for the 2010-11 school year and that equitable considerations did not preclude an award of tuition reimbursement. The district argues that because the Rebecca School is a for-profit institution, prospective funding and/or tuition reimbursement are not available remedies. The district seeks to annul those portions of the impartial hearing officer's decision that determined the Rebecca School was appropriate, that equitable considerations favored an award of tuition reimbursement, and that direct payment or tuition reimbursement was an appropriate remedy for parents who enroll students in for-profit institutions.

In their answer, the parents assert general admissions and denials, as well as additional arguments in support of upholding the impartial hearing officer's decision in its entirety.

## **Applicable Standards—Unilateral Placement**

Given the district's concession in the petition that it failed to offer the student a FAPE for the 2010-11 school year, I will now consider whether the parents sustained their burden to establish the appropriateness of the student's unilateral placement at the Rebecca School. 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 Individuals with Disabilities Education Act (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).

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129; Matrejek, 471 F. Supp. 2d at 419). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own individualized education program (IEP) for the student (Carter, 510 U.S. 7; Application of the Bd. of Educ., Appeal No. 08-085; Application of the Dep't of Educ., Appeal No. 08-025; Application of the Bd. of Educ., Appeal No. 08-016; Application of the Bd. of Educ., Appeal No. 07-097; Application of a Child with a Disability, Appeal No. 07-038; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-105). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ., 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement...'" (Gagliardo, 489 F.3d at 112; Frank G. v. Bd. of Educ., 459 F.3d at 364 [2d Cir. 2006] [quoting Rowley, 458 U.S. at 207 and identifying exceptions]). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether the parents' unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether that placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115 [citing Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] [stating "evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"])). A private placement is only appropriate if it provides education instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; 34 C.F.R. § 300.39[a][1]; Educ. Law § 4401[1]; 8 NYCRR 200.1[ww]; Rowley, 458 U.S. at 188-89; Gagliardo, 489 F.3d at 114-15 [noting that even though the unilateral placement provided special education, the evidence did not show that it provided special education services specifically needed by the student]; Frank G., 459 F.3d at 365; Stevens v. New York City Dep't of Educ., 2010 WL 1005165, \*9 [S.D.N.Y. Mar. 18, 2010]).

The Second Circuit has set forth the standard for determining whether parents have carried their burden of demonstrating the appropriateness of their unilateral placement.

No one factor is necessarily dispositive in determining whether parents' unilateral placement is reasonably calculated to enable the child to receive educational benefits. Grades, test scores, and regular advancement may constitute evidence that a child is receiving educational benefit, but courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs. To qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special service necessary to maximize their child's potential. They need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.

(Gagliardo, 489 F.3d at 112; see Frank G., 459 F.3d at 364-65).

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]).

## **Discussion**

### **Parents' Unilateral Placement—2010-11 School Year**

In this case, the director of the Rebecca School (director) testified that before enrolling a student, a family would tour the school, submit an application, provide documentation about the student to the school, and complete a Functional Emotional Assessment Scale with a Rebecca School clinical psychologist (Tr. p. 94). Based on that process, the Rebecca School would determine whether it could provide the student with an appropriate program and whether an appropriate classroom existed for the student (id.). During the first weeks of the school year, the student's classroom "team," which consisted of a social worker, a psychologist, a physical therapist, an occupational therapist, and a speech-language pathologist, would determine "how best" to meet that student's needs with related services or accommodations (Tr. pp. 95-96). The director testified that based upon the information gathered about the student in this case, it was decided that the "right model to put in place for his educational needs" at the Rebecca School included PT, OT, speech-language therapy, and as "much one-on-one support as he could get" because the student needed those services "to be able to move throughout his day and be able to participate in all the activities" (Tr. p. 96).

Based upon an independent review of the hearing record, I find that the parents did not sustain their burden to establish the appropriateness of the student's unilateral placement at the Rebecca School during the 2010-11 school year because, contrary to the impartial hearing officer's decision and as explained more fully below, the parents failed to provide sufficient evidence to establish that the Rebecca School provided education instruction specially designed to meet the

student's unique needs, supported by such services as are necessary to permit the student to benefit from instruction.

### **Full-Time, 1:1 Health Paraprofessional Services**

Initially, a review of the evidence reveals while it is undisputed that the student requires the services of a full-time, 1:1 health paraprofessional throughout the school day at the Rebecca School in order to ambulate, attend, perform his ADLs, and otherwise attend school safely, the Rebecca School did not provide this service to the student during the 2010-11 school year (Tr. pp. 96, 120-21, 123, 125; see generally Dist. Ex. 1 at pp. 5-6, 14-15, 17; Parent Ex. H). Absent the district's agreement to provide the full-time, 1:1 health paraprofessional services at the Rebecca School as part of the student's pendency placement, the parents did not present any evidence to establish that the Rebecca School would have otherwise provided this required service to the student during the 2010-11 school year (see Tr. pp. 4-17; IHO Interim Order on Pendency at p. 2). Moreover, a provision in the Rebecca School enrollment contract, which the parents executed on June 4, 2010, indicated the following:

The agreed-upon tuition set forth in Paragraph 2 (a) does not include the cost of a one-to-one health paraprofessional or behavior management paraprofessional. If the medical or behavior management needs, as indicated on the child's IEP, warrant the additional support of a Related Service Health or Behavior Management Paraprofessional, I understand that such support is not included in the tuition under this contract. I agree to approach the [district] to arrange a related services authorization and sign the necessary documentation to obtain funding.

(Parent Ex. N at pp. 1-2, 5; see Parent Ex. I).<sup>2</sup> Based upon the contractual language, it is unlikely that the Rebecca School would have otherwise been obligated to provide this service to the student for the 2010-11 school year (Parent Ex. N at pp. 1-2, 5). Therefore, the parents' failure to establish with sufficient evidence that the Rebecca School would have or could have provided the services of a full-time, 1:1 health paraprofessional to allow the student to attend the Rebecca School—which the director of the Rebecca School testified was required for the student to move through his day and to participate in all of the activities at the Rebecca School—weighs heavily against their assertion that the Rebecca School was appropriate to meet the student's special education needs and that the student's unilateral placement at the Rebecca School was reasonably calculated to enable the student to receive educational benefits.

### **Related Services Provided at the Rebecca School**

Next, a review of the evidence reveals that although the student's Rebecca School program incorporated the provision of PT, OT, and speech-language therapy as required components of the "right model to put in place for his educational needs" at the Rebecca School, the parents introduced little, if any, evidence about the related services provided to the student at the Rebecca

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<sup>2</sup> The parents made payments to the Rebecca School on May 4 (\$66.00) and June 4, 2010 (\$10,000.00 nonrefundable deposit) (see Parent Exs. I; N at pp. 2, 5; O).

School, including how the Rebecca School's related services—which were all delivered to the student using the "DIR model"—met the student's unique needs, whether the student made progress as a result of these services, and in particular, how the related services provided by the Rebecca School enabled the student to receive educational benefits (Tr. pp. 103, 120; see Tr. pp. 92-216; Parent Exs. A-P).<sup>3</sup>

### **Physical Therapy**

The hearing record reflects in a January 2010 PT progress report that the student demonstrated "moderately severe ataxia with tremors" and fluctuating "muscle tone" throughout his body (Dist. Ex. 3 at p. 3). Stiffness and tightness in the student's lower extremities, in conjunction with his cognitive skill deficits, interfered with the student's "balance and motor movement control, motor planning for gross motor skills and ultimately all upright movement through space" (id.). During the 2009-10 school year, the use of ankle foot orthotics and an "aggressive stretching routine 3 times a week . . . made it more possible for [the student] to be more erect and stable in standing" (id.). The physical therapist reported that, while the student still used "reciprocal creeping for mobility," he could "now pull up to standing and often cruise[d] along the wall independently" (id.). In addition, the student ascended stairs "with a railing with hand over hand assistance to advance his hand and hold it to the railing;" descending stairs, however, was more difficult for the student and required "moderate physical assistance" (id. at p. 4). According to the physical therapist, the student exhibited poor balance when standing still or walking on soft or unstable surfaces (id. at p. 4). At that time, the student could not bend to retrieve a toy from the standing position, "carry a large toy with 2 hands while walking," independently assume a standing position from the floor, or "play in a squat position," and his gross motor skills were assessed to be within the 14 to 15 month level (id.).

Despite noting that the student made progress in his functional mobility skills, the physical therapist indicated that he student continued to demonstrate "significant motor impairment and large delays in his gross motor skills" (Dist. Ex. 3 at p. 4). The physical therapist recommended continuing the student's three sessions of PT services per week to address the following goals: ascending and descending stairs with "railing forward progression and with light support" at his shoulder; increasing control in a single leg stance, as demonstrated by the student's ability to step up and down on a wide three inch high step with a forward progression independently; independently assuming a standing position from the floor; and independently bending and retrieving a toy from a standing position with good control (id.).

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<sup>3</sup> According to the hearing record, the Rebecca School implemented a "relationship based model" to work with students with neurological and developmental delays, and followed the DIR/Floortime methodology (Tr. pp. 92-93, 117). The director testified that the DIR model looked at "where the child's development has gone off course and address those needs and we can move the child up the development ladder" (Tr. p. 92). According to the director, the "I" represented the child's individual differences in sensory integration and processing, and how the child took information from the environment and used it functionally (id.). The "R" portion of the DIR model described the relationship base; looking at the child's relationships in his or her life, and whether the child's motivation was intrinsic or extrinsic (Tr. pp. 92-93). The director and the student's head teacher described the application of the DIR model as "following the children's lead" and that the approach was "very individualized and tailored to each specific child" (Tr. pp. 93, 95, 109, 113, 118-19).

According to the evidence, the student was scheduled to receive three 30-minute sessions per week of individual PT at the Rebecca School (Parent Ex. H). However, when the student's home-based physical therapist testified at the impartial hearing, she stated that she had not been in communication with the student's Rebecca School physical therapist because according to the student's mother, the Rebecca School therapist had "left" (Tr. pp. 186, 188-89, 190). The home-based physical therapist also testified that she had been providing the "full extent of [the student's] physical therapy needs" and that the student required the three 60-minute sessions per week of individual PT services at home in order to make "meaningful progress" (Tr. pp. 190, 194).

However, the director of the Rebecca School—who was not responsible for implementing any portion of the student's program—described the student's "interactions" with his Rebecca School physical therapist as "positive" and that the therapist worked "a lot" on the student's gross motor and gross motor planning skills (Tr. p. 102). The director testified that the student could "now . . . ambulate down the stairs holding on to a handrail and taking steps independently" (*id.*). According to her testimony, the student's therapy occurred in a sensory gym and on the stairs (*id.*). The hearing record does not contain any progress reports prepared by the Rebecca School physical therapist and the Rebecca School physical therapist did not testify at the impartial hearing.

Given the limited evidence presented, it is unclear whether the student received PT at the Rebecca School consistent with his daily schedule or alternatively, to what extent the student did not receive PT services upon the departure of the physical therapist. However, the director's testimony, alone, is not sufficient to establish that the student's PT services at the Rebecca School met the student's special education needs and weighs heavily against a finding that the Rebecca School program was reasonably calculated to enable the student to receive educational benefits.

### **Occupational Therapy**

The hearing record reflects in a January 2010 OT progress report that the student displayed both resting and intention tremors in his upper extremities, trunk, and lower extremities; used a "quick burst of gross force when manipulating objects;" and that the student's "constant motion" created movement patterns that "negatively affect[ed] his ability to interact with his environment and manipulate objects" (Dist. Ex. 3 at p. 1). A sensory diet, including "vestibular input and heavy work," was used to calm the student and regulate "his affect and movement patterns" (*id.*). The student demonstrated progress in his ability to "sit down and manipulate one pop up toy when seated in a controlled environment for 3-5 minutes" (*id.*). The progress report noted that the student made progress in the area of "functional hand use" and could close the flaps of a pop up toy, pick up and place large toys in a bucket, and grasp pegs out of a resistive foam board (*id.*). At that time, the student had been focusing on "self feeding with an adapted spoon," and required assistance with utensils and a cup during mealtime (*id.*). The occupational therapist recommended continuing the student's OT services due to his "significant delay in self help skills, fine motor skills, and sensory processing delays" (*id.*).

At the impartial hearing, one of the student's home-based occupational therapists during the 2010-11 school year testified that the student exhibited an "extensive" amount of weaknesses (Tr. pp. 144-45). She described the student as having a "very poor" sensory system and attention span, as well as a "very poor" ability to interpret his environment (Tr. p. 145). The occupational therapist also described the student's motor planning skills, fine motor coordination, grasp patterns,



and ADL skills as "very poor" (*id.*). The student exhibited a high level of distractibility, a lack of awareness of where his body or his joints were in space, he overreacted to environmental stimuli, and he had difficulty focusing (Tr. pp. 145-48). According to her testimony, the student's home-based OT services addressed basic identification of objects, understanding and following simple directions, performing ADL skills, and improving attention and focus (Tr. p. 149).

During the 2010-11 school year, the home-based occupational therapist observed the student's improvement in his ability to sit at a table, indicate "give me" in sign language, put objects "in," respond to his name, and follow a direction to "wait" (Tr. pp. 150-51). She also testified that the student required the four 60-minute sessions per week of individual home-based OT services because the home and school environments had different sets of cues, explaining that "what you need to teach [the student] to function in a classroom [was] entirely different than [what] you need to teach him to function at home" (Tr. pp. 144-45, 151-56). She added that the student's skills were generally "poor," and therefore, his ability to carryover skills from school to home was also "poor" (Tr. pp. 152-53). The home-based occupational therapist did not offer any testimony about communications with the student's Rebecca School occupational therapist (Tr. pp. 138-56). She further testified that given the student's "extensive physical disability," four 30-minute sessions per week of OT services at the Rebecca School would not be sufficient to meet his needs (Tr. pp. 155-56).

According to the evidence, the student was scheduled to receive three 30-minute sessions per week and one 15-minute session per week of individual OT at the Rebecca School (Parent Ex. H). The director—who was not responsible for implementing any portion of the student's program—testified that the student had "sensory integration issues" and that he was "very responsive" in occupational therapy (Tr. p. 101). She also testified that the student would receive OT services in a sensory gym, which helped the student be "more regulated and not be so sensory seeking through the day" (Tr. pp. 101-02).

Given the limited evidence presented about the student's OT services provided at the Rebecca School, and in light of the home-based occupational therapist's testimony that the duration and frequency of the Rebecca School's OT services were not sufficient to meet the student's needs, the evidence again weighs heavily against a finding that the Rebecca School program was reasonably calculated to enable the student to receive educational benefits.

### **Speech-Language Therapy**

The hearing record reflects in a January 2010 speech-language therapy progress report that the student exhibited significant delays in both receptive and expressive language skills (Dist. Ex. 3 at p. 2). Receptively, the student demonstrated early, brief symbolic play, such as feeding a baby doll and brushing its hair (*id.*). The speech-language pathologist indicated that the student produced greater vocalizations and speech sounds, and at times, he produced varied consonant-vowel productions in apparent babbling jargon (*id.*). He had also been observed to gesture for "yes," "no," and "bye" (*id.*). She recommended continuing the student's three 30-minute sessions per week of individual speech-language therapy services to address the following goals: to increase receptive language skills in the areas of object and picture discrimination and play; to increase expressive language skills in the areas of speech and sound production, word approximation, and augmentative communication; and to increase oral motor skills in the areas of oral muscle activity

(*id.*). The student's providers reported that he communicated by selecting one picture icon when given a choice, touching peers, crying, smiling, grunting, and vocalizing "mmm" to represent a request for "more" (Dist. Exs. 2 at p. 2; 3 at p. 2; 4 at p. 2).

In her testimony at the impartial hearing, the student's home-based speech-language pathologist during the 2010-11 school year described the student as nonverbal and as exhibiting low oral facial muscle tone (Tr. pp. 157-61). She identified the two main goals of the home-based speech-language therapy as increasing the student's functional communication skills and improving the student's feeding skills (Tr. p. 161). During typical sessions, the speech-language pathologist provided instruction to the student and training to the parents in the student's use of the picture exchange communication system, which the student also used at the Rebecca School (Tr. pp. 161-62).<sup>4</sup> At the time of the speech-language pathologist's testimony, the student could select the picture of a desired object from a field of two choices (Tr. p. 162; *see* Tr. p. 126). The speech-language pathologist testified that she also provided oral massage and oral-motor exercises before foods were introduced to strengthen the student's oral musculature and desensitize him to the introduction of particular foods (Tr. p. 163). She indicated that the student consistently used the "mmm" sound to request "more," a skill he had been working to increase in spring 2010 (Tr. p. 163). According to the speech-language pathologist, the student improved his ability to consistently vocalize the "mmm" sound to communicate, respond to directions, and follow simple commands during the 2010-11 school year (Tr. pp. 165-66).

The home-based speech-language pathologist relied upon a "communication notebook" sent home daily from the Rebecca School to communicate with the student's Rebecca School speech-language services provider and to "follow through" with "what it is they're working on" (Tr. pp. 163-64). She also used the "PECS" book sent home by the Rebecca School to "carry over at home" with the student (*id.*). In addition, the home-based provider would speak directly with the Rebecca School provider to ensure that they both "carried through with the same goals at home and at school" (Tr. pp. 164, 168, 170-71). She also testified that the student's home-based speech-language therapy services were "necessary and required" in order for the student to "make meaningful progress" during the school year, and that she had observed "slight regression" in the student's skills when she could not provide services four days per week (Tr. pp. 164-65, 167-68).

Based upon her communication with the Rebecca School speech-language therapy provider, the student progressed at school in his ability to choose a picture when given a choice of two (Tr. pp. 168-69). She also testified, however, that the five 30-minute sessions per week of individual speech-language therapy—as recommended in the student's IEP for the 2010-11 school year—would not sufficiently meet the student's needs, and suggested that perhaps five 45-minute sessions per week of individual speech-language therapy at school would "really help a little bit more" due to the student's difficulties with transitions (Tr. pp. 169-70).

According to the evidence, the student was scheduled to receive three 30-minute sessions per week of individual speech-language therapy services at the Rebecca School (Parent Ex. H).

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<sup>4</sup> The director, home-based speech-language pathologist, and home-based SEIT described the student's picture communication board as the "Picture Exchange Communication System" (PECS) (Tr. pp. 108, 161-62, 179). However, the student's head teacher at the Rebecca School indicated the student did not use an "official" PECS, but instead used "a communication book with pictures" (Tr. pp. 126, 130).

The director—who was not responsible for implementing any portion of the student's program—testified that the student exhibited a "good relationship" with his speech-language therapist and that "[t]hey work a lot on, . . . two main things[:]" the student's "oral motor capacity" to form words, and the student's ability to express himself using a "picture exchange system, where he has to choose between two pictures" to communicate (Tr. pp. 102-03). The student's head teacher at the Rebecca School testified that a speech-language therapist conducts a weekly "cooking activity" in the classroom to target mathematics goals, such as sequencing and measurement (Tr. p. 122).

Given the limited evidence presented about the student's speech-language therapy services provided at the Rebecca School, and in light of the home-based speech-language pathologist's testimony indicating that the student required five 45-minute sessions per week of individual speech-language therapy at school, the evidence once more weighs heavily against a finding that the Rebecca School program was reasonably calculated to enable the student to receive educational benefits.

### **Conclusion**

Having examined the evidence in the hearing record and totality of the circumstances in determining whether the Rebecca School reasonably serves the student's individual needs, I cannot conclude that the parents have met their burden of proof where the student's home-based providers believe the student requires additional related services in school, there is little objective evidence of how Rebecca School personnel address the student's needs, and the hearing record shows that the district, through the use of a 1:1 health paraprofessional, provides a substantial portion of the support that the student requires in order to function in the Rebecca School. Having determined that the parents failed to sustain their burden to establish the appropriateness of the student's unilateral placement at the Rebecca School for the 2010-11 school year for an award of tuition reimbursement, the necessary inquiry is at an end and I need not address the district's arguments regarding whether the for-profit status of the Rebecca School or equitable considerations precludes relief in this circumstance (see M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]).

### **THE APPEAL IS SUSTAINED.**

**IT IS ORDERED** that the impartial hearing officer's decision, dated April 4, 2011, is annulled to the extent that the impartial hearing officer determined that the parents sustained their burden to establish the appropriateness of the student's unilateral placement at the Rebecca School for the 2010-11 school year; and

**IT IS FURTHER ORDERED** that the impartial hearing officer's decision, dated April 4, 2011, is annulled to the extent that it ordered the district to reimburse the parents for the costs of a nonrefundable deposit paid to the Rebecca School and further ordered the district to pay the remainder of the costs of the student's tuition directly to the Rebecca School.

**Dated:**            **Albany, New York**  
                         **June 24, 2011**

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