



The University of the State of New York

The State Education Department

State Review Officer

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No. 11-051

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 and Associates, attorneys for respondents, Gary S. Mayerson, Esq., and Brianne N. Dotts, Esq., of counsels

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 them for their daughter's tuition costs at the Manhattan Children's Center (MCC) for the 2010-11 school year, in addition to 20 hours of private 1:1 after-school applied behavior analysis (ABA) therapy, including three hours per month of parent training and three hours of 1:1 private after-school speech-language therapy. The appeal must be dismissed.

Recent standardized testing of the student revealed that she functions in the very low range both cognitively and academically (Dist. Ex. 9 at p. 4). The student demonstrates severe deficits in communication, social skills, activities of daily living (ADL) skills, fine motor skills, sensory integration, motor planning, and attention as well as exhibits self-injurious and aggressive behaviors (Dist. Exs. 2 at pp. 1-8; 9 at pp. 7, 8; 12 at pp. 1-3; 16 at p. 1; 18 at pp. 1-2; 19 at pp. 1-3; 21; Parent Ex. K at p. 1).

At the time of the impartial hearing, the student was attending MCC where she was receiving full-time 1:1 instruction utilizing ABA techniques, three 30-minute individual speech-language therapy sessions per week, and two 30-minute occupational therapy (OT) sessions per week (Tr. pp. 111-12, 1623). In addition to her school-based program, the student was also receiving approximately 20 hours per week of ABA services which were delivered in various

locations including the school, the student's home, in the providers' office, and in the community, and included three hours per month of parent training and counseling, and three hours per week of private speech-language therapy (Tr. pp. 82-83, 85, 87-88, 1824, 1677-78, 1696).¹ The hearing record describes MCC as a 12-month specialized school primarily serving students on the autism spectrum that employs a 1:1 ABA model as well as a multidisciplinary approach (Tr. pp. 1515-16, 1763). The Commissioner of Education has not approved MCC 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 autism is not in dispute in this proceeding (Dist. Ex. 1 at p. 1; see 34 C.F.R. § 300.8 [c][1]; 8 NYCRR 200.1[zz][1]).

Background

The hearing record reflects that in 2002, at the age of three, the student initially received a diagnosis of an autism spectrum disorder and she received special education services in a preschool setting pursuant to an individualized education program (IEP) (Tr. pp. 1867-68; Dist. Ex. 21 at p. 1).² According to the student's mother, the student had a "very difficult time" in the program, so a 1:1 paraprofessional was added to her IEP (Tr. p. 1868). The student's mother reported that, as this was "not successful," a private special education itinerant teacher was added to work with the student 1:1, utilizing ABA techniques, in her preschool classroom (*id.*). However, the classroom was reportedly too overwhelming for the student because it was over-stimulating and contained too many children (*id.*). According to the student's mother, the student did not have "enough baseline skills to be able to take any advantage of being in a group environment" and the student lacked the attention skills necessary to focus, reduce her anxiety, and be available for learning (Tr. pp. 1868-69). The hearing record reflects that the student was "home-schooled" by Incidental Behavioral Intervention (IBI) Associates for five or six years due to the severity of her behaviors (Tr. pp. 1644, 1655-56). In September 2008, the student began attending MCC, and upon her admission, she underwent a three-week transition to acclimate her to the school setting (Tr. pp. 1656-57; Dist. Exs. 9 at p. 1; 19 at p. 1). The student has since attended MCC and has also been receiving a home-based/after-school program provided by IBI consisting of 20 hours per week of 1:1 ABA therapy and three hours per month of ABA parent training as well as three hours per week of private after-school speech-language therapy (Tr. pp. 1656, 1824-25).^{3, 4}

¹ The student's private after-school speech-language provider testified that on Wednesdays, the student's one-hour session was limited to 45 minutes due to scheduling problems, and that they were working to correct the problem (Tr. p. 1824).

² The student has been the subject of four previous State-level appeals (Application of the Dep't of Educ., Appeal No. 10-107; Application of the Dep't of Educ., 08-134; Application of the Dep't. of Educ., Appeal No. 07-134; Application of the Dep't of Educ., Appeal No. 05-073).

³ The hearing record also indicates that the student had been receiving twice weekly physical therapy (PT) sessions; however, in May 2010, the student was receiving three 60-minute sessions per week of "physical training" for gross motor difficulties (Dist. Exs. 6 at p. 1; 11 at p. 2). The parents are not requesting reimbursement for the student's physical training sessions.

⁴ Hereinafter, I will refer to private services obtained by the parent but provided to the student outside of MCC as "after-school" services.

On January 13, 2010, a special education teacher conducted a classroom observation of the student in her MCC classroom (Dist. Exs. 7 at p. 1; 9 at p. 2).⁵ The resultant observation report reflected that the student was observed during 1:1 instruction and was difficult to engage, required constant redirection and prompting, and exhibited intermittent yelling, foot stomping, and sitting on the floor (Dist. Ex. 7 at p. 2). The observer noted that the student did not initiate any eye contact during the activity and that the student did not demonstrate language appropriately related to the activities presented (id.). Additionally, the observer stated that at times, the student demonstrated echolalic speech (id.).

On April 27, 2010, the student underwent a psychoeducational evaluation by a district school psychologist to assist in the student's educational planning for the 2010-11 school year (Dist. Ex. 9 at p. 1). The resultant report summarized the results of past evaluations and progress reports and noted that the student had previously received a diagnosis of autism (id. at pp. 1-2, 7). The report reflected that during the evaluation the student presented with characteristics of a diagnosis of autism (id. at p. 7). The student demonstrated limited language skills consisting of "delayed scripts" which she repeated when she became upset or distracted (id.). The report indicated that the student also made noncontextual comments or noises and engaged in limited social interaction with the school psychologist, occasionally making eye contact when a test item was presented (id.). During the testing, the student was initially compliant with test demands but when frustrated, she hit the test easel, stomped her feet on the ground, shouted "all done" and exhibited self-injurious behavior (id. at pp. 3, 7). According to the school psychologist, the student also appeared to demonstrate an avoidance strategy by indicating on three occasions that she needed to use the bathroom (id. at p. 3).

Administration of the Stanford-Binet Intelligence Scales-Fifth Edition yielded a full scale IQ of 40 in the very low range (age equivalent two years, six months) (Dist. Ex. 9 at p. 4). The school psychologist indicated that the student's functioning was more meaningfully interpreted in terms of her age equivalencies which ranged from a two year, two month level on the nonverbal scale to a two year, 11 month level on the verbal scale (id.). The student's academic achievement was assessed by the administration of the WJ-III ACH which yielded age equivalent subtest scores ranging from less than two years in applied (math) problems to two years, six months in passage completion, three years, six months in picture vocabulary and five years, five months in letter word identification (id.). The school psychologist noted that while the student's scores indicated a significant delay based on her age, it also demonstrated that the student had responded to instructional intervention because her performance on several academic achievement subtests was higher than her cognitive scores (id. at p. 6). The school psychologist further explained that the evaluation results should be interpreted with caution because, on some occasions, the student's mother presented the items to the student per the school psychologist's request and also at times, the psychologist provided more reinforcement than permitted by the standardized instructions for the assessment, however, the school psychologist indicated that the prompts were necessary in order to maintain the student's attention and ensure compliance throughout the session (id. at pp. 3-4). With regard to the student's social/emotional development, the student's mother's responses to questions on the Social Responsiveness Scale (SAS) yielded ratings in the severe range for all

⁵ I note that the observation report reflects that the observation took place on January 13, 2010; however, the observation report is dated January 31, 2010 (Dist. Ex. 7 at p. 1). In addition, I note that the hearing record is unclear as to whether the observation was conducted by a district employee.

areas of social functioning and for autistic mannerisms (id. at p. 7). To measure the student's functioning in communication, daily living skills and socialization, the student's mother also responded to questions from the Vineland Adaptive Behavior Scales, Second Edition (VABS-II) which yielded scores in the low range in all areas and age equivalent scores ranging from one year ten months to five years five months (id. at p. 8).

In a progress report dated April 22, 2010, the lead teacher in the student's classroom at MCC indicated that the student received intensive 1:1 instruction using ABA techniques at MCC in verbal behavior (receptive and expressive communication), social skills, academic skills, a "community of reinforcers", and self management behaviors (Dist. Ex. 19 at p. 1-4). The report reflected specific skills on which the student was working and indicated that the student had made progress across all repertoires (id. at p. 4). Additionally, the student's teacher reported that the student's functional communication had increased because the student learned to use words instead of aggressions (id.). The student's teacher also stated that the student's skills were expanding in a group setting and that she continued to work on having smooth and appropriate transitions to group settings (id.). The report also reflected that an FBA had been conducted and that a BIP had recently been developed to address both self-injurious behaviors, including hitting the sides of her head with her palms, and aggressive behaviors including scratching, biting and grabbing the hair of others (id. at pp. 1, 3). The results of the FBA indicated that these behaviors occurred in order for the student to gain access to reinforcers and attention from others (id. at p. 3). The student's teacher opined that the student's progress was directly related to the intensive, individualized, 1:1 instruction with ABA techniques (id. at p. 4).

On April 30, 2010, the student's occupational therapist at MCC completed a progress report which indicated that the student was receiving 30-minute sessions of OT twice per week (Dist. Ex. 18 at p. 1). The report reflected that the student's therapy focused on improving her sensory processing and regulation, attention to gross and fine motor activities, and participation in multi-step motor planning activities (id.). The student was reported to present with hypersensitivity and a heightened arousal level (id.). Additionally, the therapist noted that the student demonstrated difficulty regulating how her body changed in response to her emotions, and that she was easily distracted by auditory and visual external stimuli, and became over stimulated in noisy environments (id.). The progress report reflected that sensory strategies that integrate the tactile, vestibular and proprioceptive systems were employed throughout the day to assist the student in regulating and navigating the school environment (id.). Reportedly, the student had made progress using these strategies to remain attentive and focused but she continued to have difficulty expressing herself appropriately prior to behavioral overreactions and was unable to sustain a regulated state for a prolonged period of time (id.). The progress report indicated that although the student required moderate verbal and physical assistance to complete them, participation in multi-step activities had increased her sensory regulation skills and allowed her to remain better modulated and engaged for fine motor and handwriting based activities (id. at pp. 1-2). However, the student's rigidity during these activities continued to be a challenge and continued to require both verbal and physical assistance (id. at p. 2). The therapist also reported that the student's ability to transition from preferred to non-preferred activities without exhibiting aggressive behaviors during therapy sessions had significantly increased (id.). The therapist recommended that the student continue to receive twice weekly 30-minute sessions of OT (id.).

The student's speech-language pathologist at MCC also completed a progress report of the student on April 30, 2010 (Dist. Ex. 16 at p. 1). The report summarized the student's progress in

receptive, expressive and pragmatic language as well as her progress in remaining emotionally regulated during speech-language therapy sessions (id.). The student was reported to demonstrate the ability to remain seated for the 30-minute session when emotionally regulated; however, when agitated or frustrated the student demonstrated aggressive behavior toward herself and others (id.). The report further reflected that once the student became upset it was difficult to redirect her to a structured task and that she often remained agitated for the remainder of the session (id.). The student's speech-language pathologist indicated that the student's episodes of agitation were often precipitated by the presentation of new materials and tasks, however, frequent breaks and access to highly desirable items and edibles increased the student's flexibility and tolerance of new tasks and materials (id.). With regard to receptive language, the report reflected that the student demonstrated the ability to independently respond to yes/no questions regarding her wants and needs and that she had improved significantly in her ability to respond to "where" questions by responding with a locative term, although the student required moderate verbal cueing to respond with the correct preposition (id.). However, the speech-language pathologist noted that the student's ability to respond to "when" questions was limited to rote responses (id.). According to the report, although the student's poor ability to visually scan objects affected her responses on all identification tasks, she had significantly improved in her ability to identify objects belonging to different categories when provided with minimal cues and demonstrated an emerging ability to identify objects by size attributes when provided with maximal cues (id.). With regard to expressive language, the speech-language progress report reflected that the student exhibited scripting behaviors throughout therapy sessions which were not decreased when the speech-language pathologist provided the student with appropriate verbal models (id.). However, the student was reported to have improved her ability to use language to regulate her environment (id.). Given frequent verbal models, the student was increasing her ability to use appropriate verbal protesting phrases such as "I don't want it" or "I need a break" and when given maximal verbal cues and frequent models, the student could say "This is hard" (id.). Similarly, the student continued to require verbal models to indicate "I am happy" during periods of compliant behavior and "I'm angry" during periods of noncompliance instead of becoming aggressive (id.). According to her speech-language pathologist, the student had also developed the ability to comment during book reading and correctly label objects when asked (id.). The student required minimal verbal cues to comment using a full sentence (id.). The report also revealed that the student generally produced phrases and sentences no longer than three words, and that she exhibited difficulty repeating phrases longer than three words (id.). With regard to pragmatics, the student demonstrated the ability to initiate greetings with familiar adults, but had difficulty initiating and responding to greetings using "Hi + name" without moderate cues, and exhibited fleeting eye contact during requests and greetings (id. at p. 2). The student's use of appropriate vocal volume had improved when she was emotionally regulated and producing purposeful speech; however, during times of frustration and when scripting, the student used an increased vocal volume that often escalated to a high pitched scream, at which time she responded well to cues such as "[u]se a big girl voice" (id.). The speech-language pathologist recommended that the student continue to receive speech-language therapy at the then-current frequency of three 30-minute sessions per week (id.).

On May 6, 2010, the student's ABA providers from IBI completed a report of the student's progress (Dist. Ex. 12 at p. 1). The progress report reflected that IBI staff conducted bi-weekly observations of the student at MCC, attended monthly meetings with the teachers and staff at MCC, and had regular contact with all of the student's therapists in order to create a consistent

program between all disciplines (id.). Parent training was also provided by IBI on a weekly basis to facilitate consistency within the home environment (id. at p. 4). With regard to behavior, the student was reported to present with a number of maladaptive behaviors including aggressive behaviors such as kicking, biting, screaming/screeching and scratching as well as self-injurious behaviors such as hitting herself in the head and perseverative verbal behaviors (using a monotone voice or clustering words or phrases) (id. at p. 1). According to her therapists, such behaviors served to preoccupy the student and left her unavailable for learning or the behaviors served as an escape or avoidance of tasks that the student did not want to complete (id. at pp. 1-2). Although the therapists stated that some behaviors had been extinguished, they noted that new behaviors had replaced older ones (id. at p. 1). The therapists indicated that rigidity continued to be the catalyst for many of the student's behaviors particularly when her schedule was changed or in situations that were less structured, therefore, an ongoing intervention plan was implemented consisting of a systematic presentation of steps designed to alleviate anxiety while promoting flexibility (id. at p. 2). The therapists described the student as increasingly tolerant of unplanned events, change in direction, unknown people, tasks and new foods (id.). The student was also reported to be highly motivated to be alone, accordingly, the therapists opined that it was critical that the student not be left alone during "break" or "reward" time (id.). The therapists noted that they employed an over correction/consequence procedure to extinguish the student's scratching behavior (id. at pp 1-2). Additionally, redirection and having the student answer known questions was utilized to bring the student out of "clustering behavior" and get her back on task (id. at p. 1). The report reflected that although the student previously had a limited repertoire of items and experiences that motivated her to learn, through a process of paired reinforcement and constant exposure, the student had developed an array of reinforcing activities including books, snacks with peers, playing a game, drawing, listening to music, and peer interaction (id. at p. 2). As a result, through a series of reinforcement schedules and programming, the therapists found that the student learned to remain on task and follow directions (id.). The report also reflected that the student demonstrated marked improvement and increased interest in reading four and five-letter sight words, writing (pictures and letters), problem solving, and following a four-part receptive instruction (id.).

With regard to socialization, the May 2010 IBI report reflected that as part of her after-school therapy, the student participated in a social group that met four times per week (Dist. Ex. 12 at p. 4). At that time, the therapists stated that the student's socialization with peers was a byproduct of knowing one of her routines and an earnest interest in familiar peers (id.). Additionally, with prompting, the student had participated in turn-taking games and reciprocal conversation with peers (id. at p. 3). The report also reflected the student's functioning with regard to speech-language skills, noting that the student's receptive language was significantly stronger than her expressive language (id.). Although the student could provide one to three words in a reciprocal conversation when provided with pre-taught information and prompting, the therapists reported that the student required an intense level of expressive prompting in order to fully communicate and converse with others and to ask with more than a one-word utterance (id.). The student's deficits in attending, engaging in verbal reciprocity, and keeping up with the speed in which her peers engaged in tasks and conversation inhibited her ability to join in social games (id.). The report also reflected that the student's extreme difficulty with word retrieval resulted in a gross increase in behaviors including verbal perseveration and overall frustration (id.). However, the therapists further reported that she had improved in her ability to request a favorite game or snack (id.). With regard to natural environment teaching, the report noted that the student was working on learning street signs, safety issues in and out of the home setting, as well as daily living

skills in the community including making purchases (of pre-taught items) (id.). In addition, the therapists were also working with the student on crossing the street and gaining a better understanding of the function of a variety of places including stores, the bank, etc., in order to facilitate the student's eventual independence within the community (id.).

In summary, the report reflected that given the severity of the student's deficits, she continued to require all of her therapies described above in order to make appropriate progress and not demonstrate regression (Dist. Ex. 12 at p. 4). The therapists further opined that the student's needs could not be met within the school day alone at MCC, but that the student also required additional after-school intervention to promote meaningful progress and prevent regression (id.).

On May 10, 2010, the two speech-language pathologists who provided the student's private after-school speech-language therapy prepared a progress report of the student (Dist. Ex. 21 at p. 1). The report reflected the student had made slow, yet steady progress toward her goals and objectives in the areas of expressive, receptive and pragmatic language and it included updated goals and objectives for the future (id. at pp. 2-4). However, the report also indicated that in the community the student struggled to maintain self-regulation during transitions and required significant prompting in order to follow directions, which was not required in a structured setting (id. at p. 2). According to the report, the student had become extremely self-directed at times and if she could not immediately follow through on a request she had made, she would scream, cry, and aggress toward others and herself (id.). The report further reflected that during recent months the student's affect had been more variable in that her mood would swing from happy and smiling in one moment to crying in the next and that frustrating moments were characterized by screaming, scratching, grabbing, hitting herself on the sides of her head and crying (id.). When this occurred, the therapists gave the student a verbal model to indicate her mood (upset, frustrate, angry) and she was immediately redirected to the task at hand, given several redirections, and directed to count to 10 (id. at p. 3). The report further indicated that a successful strategy to aid the student in maintaining self-regulation and sustaining attention during book sharing activities was to provide her with a sensory squeeze toy to hold in her hands (id.). The speech-language pathologists recommended the student's speech-language therapy continue three times per week as a supplement to services provided in the school setting and continued collaboration between all therapists and teachers (id.).

On May 14, 2010, a district social worker conducted an updated social history of the student to provide information for the next Committee on Special Education (CSE) review to determine educational placement, with the student's mother serving as the informant (Dist. Ex. 6 at p. 1). According to the student's mother, the student had made significant progress at MCC in all areas of her program (id. at p. 2). The student's mother indicated that MCC had been important in helping the student adapt to having people around her, that the student participated in both group and individual activities, and that although there was noise and stimulation occurring around her the student managed very well at MCC (id.). The social history update also reflected that when the student became frustrated and could not get her needs met, she would "scratch," although the student's mother reported that behavior had improved (id.). With regard to the home environment, the student's mother described the student as "a loving, affectionate child" who was unable to "fully manage" on her own despite progress in daily living and adaptive skills (id. at p. 3). The student's mother further noted that the student had mastered more tasks that she could perform with less assistance (id.). The student's mother added that the student could feed herself independently, but that she required prompts some of the time for toileting (id.). The student's mother stated that the

student's eye contact was also improving (id.). Turning to the student's health status, the update reflected that the student was a healthy child despite a prior history of difficulty sleeping through the night (id. at p. 4). The update further indicated that the student resided with her parents and two older brothers who, along with the parents had been trained by the student's providers so they were consistent and part of her educational program (id.).

On May 24, 2010, the student's lead teacher and the educational coordinator from MCC completed an FBA of the student (Dist. Ex. 2 at pp. 1-8). The FBA indicated that the student exhibited persistent behaviors that impeded her learning or that of others and placed the student or others at risk of harm of injury (id. at p. 1). The target behaviors identified by the FBA included self-injury in the form of hitting her head/temple area with the heel of her palm or wrist and aggressive behaviors including scratching, hair pulling and tantrums consisting of screaming and jumping up and down (id.). The FBA reflected that the student's preferences for reinforcement included edible reinforcers (nuts and fruits); however, the student more frequently chose activities such as the use of the computer, magna doodle, puzzles or books (id. at p. 2). The student was also reported to be highly motivated by her token economy system (pennies); however, there were times when the student was not motivated by the pennies or possibly the backup reinforcers (id.). Direct and indirect sources of information were utilized to assess the student's behavior including the Functional Assessment Screening Tool (FAST), the Motivation Assessment Scale (MAS), the Functional Assessment Interview (FAI) and the Problem Behavior Questionnaire (id. at pp. 2-6). The FBA reflected that the results of both direct and indirect sources of information indicated that the student's targeted behaviors most often functioned to obtain attention or gain access to preferred items, escape demands, or to gain access to sensory stimulation (id. at p. 6). Additionally, further analysis of the direct data collected in the MCC classroom indicated that the student's "escape maintained" behaviors most often occurred to gain access to tangibles while simultaneously terminating demands (id.). According to the FBA, target behaviors emitted within the group setting were to terminate demands (id.). The FBA included a 14-point treatment plan, which included among other things replacement behavior goals, procedures for collecting data on the target behaviors, specific crisis management strategies and procedures, provision for home coordination/communication, and criteria for discontinuation of the treatment plan (id. at pp. 6-8). In addition, the FBA contained a detailed description of staff procedures for when the student emitted the target behaviors including: (1) teaching the student to use a tap on the teacher's shoulder to access attention and use communication cards to gain access to preferred items; (2) how to redirect the student to her individual work area, and present simple pre-selected tasks for the student to complete; (3) procedure for the implementation of the Premack Principle (first-then); and (4) implementation of a "wait" program to teach the student to wait to access materials or breaks and a program for accepting "no" as a response to a request for a preferred item (id. at p. 7).⁶

⁶ With regard to the use of the "Premack Principle," the FBA indicates that several visual schedule components would be incorporated into the student's schedule (Dist. Ex. 2 at p. 7). The first would be a "first/then" board with a picture and words of the activities, which would be used to show the student that access to highly preferred activities was contingent upon performance of a low frequency behavior (id.). According to the FBA, the schedule would be implemented through difficult activities or routines (tokens would be employed for all other activities) (id.). The second component would incorporate a picture activity schedule into her day of activities, which would incorporate a choice of activities to allow the student the opportunity to exercise choices throughout the day (id.).

On May 26, 2010, the CSE convened to develop the student's IEP for the 2010-11 school year, which is the subject of this appeal (Dist. Ex. 1). The following individuals attended the May 2010 meeting: a district representative, the student's mother who was accompanied by a therapist from IBI, a district special education teacher, an additional parent member, a district school psychologist, and a district "autism network leader" (Tr. pp. 238, 344, 521, 1882-83; Dist. Exs. 1 at p. 2; 4 at p. 1). Additionally, the director from MCC, and the student's classroom teacher, occupational therapist and speech-language therapist from MCC took part in the meeting by telephone (Tr. pp. 1385, 1431, 1553, 1882-83; Dist. Exs. 1 at p. 2; 4 at p. 1). The May 2010 CSE reviewed updated evaluative material regarding the student (Dist. Ex. 4 at p. 2). The May 2010 CSE recommended a 12-month program for the student with placement in a 6:1+1 special class in a specialized school with a full-time behavior management paraprofessional and related services consisting of three 40-minute sessions of 1:1 OT per week, one 30-minute session of 1:1 PT per week, four 40-minute sessions of 1:1 speech-language therapy per week, and one weekly 40-minute session of speech-language therapy in a group of two (Dist. Exs. 1 at p. 31; 4 at p. 1). Academic performance and learning characteristics contained in the resultant IEP noted that the student's academic skills were well below those expected for a 10 year old student, which the May 2010 CSE noted represented a "significant delay" based on her age, but also demonstrated a response to instructional intervention (Dist. Ex. 1 at p. 3). Present levels of academic performance were also reported with respect to speech and language and the student's classroom performance (id. at pp. 4-5). The following academic management needs were also incorporated into the May 2010 IEP: redirection and refocusing, positive behavior training, personal choosing of rewards, use of manipulatives, use of visual and icon cuing, and organization of a personal work station (id. at p. 6). The IEP included 44 annual goals with corresponding short-term objectives related to the student's deficits in behavior, speech and language, ADLs, reading, math, sensory processing, attention, and fine and gross motor skills (id. at pp. 13-27). MCC provided the goals contained in the May 2010 IEP to the CSE, which were individually reviewed during the meeting (Tr. p. 293; Dist. Ex. 4 at p. 2).

Regarding the student's present levels of social/emotional performance, the May 2010 CSE determined that the student's behavior required highly intensive supervision and developed a BIP (Dist. Ex. 1 at p. 8). According to the resultant IEP, the student's behavior seriously interfered with instruction and required additional adult support (id. at p. 9). Social/emotional management needs incorporated into the May 2010 IEP indicated that the student's behaviors would be addressed programmatically, with a 1:1 paraprofessional and with a BIP (id.). The May 2010 CSE prepared a BIP using the May 2010 FBA developed by MCC (Tr. pp. 384-85; Dist. Ex. 1 at p. 30). The May 2010 CSE also considered a 12:1+4 class as a program option for the student; however, that program was rejected because the CSE determined that the student did not require the level of habilitation provided by such a program (Tr. p. 301; Dist. Ex. 1 at p. 29). The resultant IEP also reflected that the student's mother and representatives from MCC requested the provision of home-based services; however, the CSE rejected their requests, because the CSE determined that the student's needs could be met within the school day and through the parent component of the recommended 6:1+1 program (Tr. pp. 380-81; Dist. Exs. 1 at p. 29; 4 at p. 3). The May 2010 CSE also rejected the student's mother's request for a 1:1 teacher for the student because the CSE did not consider a 1:1 teacher to be an appropriate educational intervention for the student (Dist. Exs. 1 at p. 29; 4 at p. 2). CSE meeting minutes reflected that the student's mother and the representatives from MCC disagreed with the CSE's program recommendation (Dist. Ex. 4 at p. 3).

In a letter to the parents dated June 10, 2010, the district summarized its May 2010 recommended classification, program, and related services, and assigned the student to a specific school (Dist. Ex. 5). The district also provided the parents with the contact information of an individual with whom they could speak in the event that they wanted to further discuss the district's decision or arrange for another meeting (id.).

On June 17, 2010, the student's mother visited the assigned school (Tr. p. 1915; Parent Ex. M). By letter dated June 17, 2010, the student's mother stated that based on her observations of the assigned school, she concluded it was not appropriate for the student (Parent Ex. M at p. 1). She also reiterated her disagreement with the May 2010 IEP, and emphasized that the "placement decision itself was made without [her] participation or involvement" (id. at p. 2). The student's mother outlined her reasons for rejecting the particular school building to which the student had been assigned, which included, among other things, its size, the functioning levels of the students in the 6:1+1 classrooms, and the lack of 1:1 extended day educational and therapeutic services (id.). Additionally, the student's mother raised her concerns that the assigned school would not fulfill the student's related services mandates in her IEP, and that there was no plan in place at the school in the event that the student should transition from MCC to the assigned school (id.). The student's mother invoked her right to the student's pendency (stay put) placement and advised that she planned to seek reimbursement for the cost of MCC and the student's after-school program (id.).

On July 1, 2010, the parents entered into an enrollment contract with MCC in which they agreed to pay for the student's enrollment at MCC for the 2010-11 school year (Parent Ex. T).

Due Process Complaint Notice and District Response

In an amended due process complaint notice dated August 2, 2010, as relief, the parents requested, among other things, tuition reimbursement for MCC for the 2010-11 school year and reimbursement for the student's private 1:1 after-school ABA therapy, as well as reimbursement for the student's private 1:1 after-school speech-language therapy (Parent Ex. D).⁷ The parents alleged that the district denied the student a free appropriate public education (FAPE) during the 2010-11 school year because, among other things: (1) the district failed to properly document the student's progress; (2) in developing the student's program, the district failed to appropriately communicate with the student's teachers and providers; (3) the district engaged in "impermissible predetermination" in developing the May 2010 IEP; (4) the district failed to develop an IEP tailored to the student's individual and unique needs; (5) the district failed to provide the student with consistent 1:1 support throughout the school day; (6) the May 2010 IEP failed to promote the student's self-sufficiency and independence; (7) the district failed to develop an appropriate FBA and BIP, despite the student's interfering behaviors; (8) the district "failed to have any meaningful discussion about observations;" (10) the district failed to properly address the student's need for 1:1 teaching; and (11) the district failed to properly review the BIP created for the student by MCC (id. at pp. 3-7). In addition, the parents challenged the particular school to which the district assigned the student (id. at pp. 7-9).

⁷ The parents' original due process complaint notice was dated June 30, 2010 (Parent Ex. A).

In a due process response dated September 29, 2010, the district denied many of the allegations raised in the parents' due process complaint notice (Dist. Ex. 3). The district further asserted that it offered the student an appropriate program and that the assigned school was reasonably calculated to enable the student to obtain meaningful educational benefits (*id.* at p. 3).

Impartial Hearing Officer Interim Decision

On August 9, 2010, an impartial hearing convened to determine the student's pendency placement and after two days of testimony, concluded on September 7, 2010 (Tr. pp. 1-199). In an interim decision dated September 28, 2010, the impartial hearing officer determined that the student's "last agreed upon" placement was identified in a prior impartial hearing officer's decision dated October 7, 2008 (IHO Interim Decision at p. 3). The impartial hearing officer also determined that the "MCC program [wa]s clearly a school-type program" and that it was "dissimilar to home-based ABA instruction to such a degree" that she was "unable to find that MCC [wa]s a component of [the student's] pendency placement" (*id.*). The impartial hearing officer found that because the prior October 2008 impartial hearing decision specified that the student receive "'up to 50 hours of ABA therapy per week exclusive of all work performed on weekends and holidays,'" the district was required to fund the 20 hours of 1:1 home-based ABA services that the student was receiving at the time of the impartial hearing (*id.* at pp. 3-4 [emphasis in IHO Interim Decision]).⁸ The impartial hearing officer ordered that the district fund 20 hours per week of 1:1 ABA services; five hours per week of speech-language therapy; 1 1/2 hours per week of PT; and three hours per week of parent training, exclusive of all work performed on weekends and holidays (*id.* at p. 4).⁹

Impartial Hearing Officer Decision on the Merits

The impartial hearing continued on October 7, 2010, and after 12 additional days of testimony, concluded on February 14, 2011 (IHO Decision at pp. 1-4). In a decision on the merits dated April 12, 2011, the impartial hearing officer awarded the parents tuition reimbursement for MCC for the 2010-11 school year, in addition to up to 20 hours per week of ABA therapy, up to three hours per month of parent training and three hours per week of private after-school speech-language therapy (exclusive of all work performed on weekends and holidays) (*id.* at p. 64).

Specifically, the impartial hearing officer found that the placement set forth in the May 2010 IEP did not offer the student a FAPE (IHO Decision at p. 59). Given the student's "extreme behavioral challenges," the impartial hearing officer concluded that the recommended placement of a 6:1+1 classroom and a behavioral management paraprofessional was "grossly inadequate" to meet the student's educational needs and to ensure her safety and the safety of her classmates and her teachers (*id.* at pp. 53-54). Additionally, the impartial hearing officer found that the student was "extremely distractible," and further found that she required constant prompting and

⁸ While addressing the issue of the student's pendency placement, the impartial hearing officer took note of the parents' argument that MCC was an appropriate placement for the student, but declined to address it because she determined that this issue should be addressed during the portion of the impartial hearing on the merits (IHO Interim Decision at p. 3).

⁹ In a decision dated December 23, 2010, the impartial hearing officer's interim decision was reviewed and upheld (Application of the Dep't of Educ., Appeal No. 10-107).

reinforcement to participate in any learning-related activity (id. at p. 53). Moreover, the impartial hearing officer noted testimony showing that the student required more than 1:1 support to address her behaviors and distractibility in order for her to learn (id. at p. 54). Next, the impartial hearing officer determined that the BIP called for in the IEP was inappropriate, in part, because the May 2010 CSE "failed to accept the severity and dangerousness of [the student's] behaviors" (id. at p. 55). She further found that although the CSE was on "clear notice of [the student's] extreme behaviors, the educational implications of those behaviors, and the strategies MCC personnel used to address those behaviors," the strategies contained in the BIP were "inadequate" (id.). Furthermore, the impartial hearing officer opined that the strategies listed in the proposed BIP would not permit the student to be available for learning, nor would they ensure the student's safety or the safety of others (id.).

The impartial hearing officer also concluded that the assigned school was not appropriate for the student (IHO Decision at p. 56). She found that the hearing record failed to offer "a realistic explanation" of how the assigned school would address the student's "extreme behavioral challenges and ensure her safety and the safety of her classmates and teachers" (id.). Additionally, the impartial hearing officer concluded that the district attempted to show that the student's behavioral needs could be met at the assigned school using "'after-the-fact testimony'" of what the classroom teacher would have done had the student attended her class (id. at p. 57). In any event, the impartial hearing officer deemed such testimony to be irrelevant, further stating that the only information upon which the parents can rely in determining whether a proposed program is appropriate is the IEP itself (id.). Lastly, the impartial hearing officer found that "the evidence permits an inference" that the May 2010 CSE engaged in predetermination, given that the CSE offered the student placement in a 6:1+1 classroom, which was the only program that the district had available for students who were the same age as the student in this case and had a diagnosis of autism, and because despite the student's mother's requests for after-school services, district participants in the May 2010 CSE came to the meeting knowing that the student's IEP would not include such services (id. at p. 59).

With regard to the appropriateness of the parents' unilateral placement, the impartial hearing officer found that MCC was appropriate, in part because it provided the student with the requisite amount of adult support (IHO Decision at p. 60). She also concluded that MCC addressed the student's needs for 1:1 instruction with respect to communication skills, academics, social, self-management, ADLs, and leisure skills (id.). According to the impartial hearing officer, the student had made "slow[,] but discernable progress in line with her extreme behavioral difficulties, communication deficits and cognitive functioning" (id. at p. 61). The impartial hearing officer further determined that MCC addressed the student's needs in order to enable the student to benefit from instruction, particularly "her 'difficulties regulating her senses and behavior' which 'inhibited her ability to participate in traditional forms of classroom learning'" (id. at p. 62 [citing A.D. v. Bd. of Educ., 690 F. Supp. 2d 193, 210-11 [S.D.N.Y. 2010]]).

Additionally, notwithstanding the district's claims that IBI was unduly restrictive, the impartial hearing officer found that the student required an intense level of 1:1 instruction to address her deficits, maintain the skills she has learned, practice skills learned at MCC in her home and community, and work on ADL skills (IHO Decision at p. 62). Lastly, she found that the parents had demonstrated the student's need for after-school speech-language therapy (id. at p. 63). The impartial hearing officer found that the student needed that additional therapy to develop, practice, and generalize language skills in order to "function in society with some degree of self-

sufficiency" (*id.*). Based on the foregoing, given the "'totality of the circumstances,'" the impartial hearing officer concluded that the program at MCC and the after-school services were appropriate (*id.*). Lastly, the impartial hearing officer did not find any evidence showing that equitable considerations precluded the parents' claim for relief (*id.* at pp. 63-64).

Appeal for State-Level Review

This appeal ensued. As a threshold matter, the district asserts that although the parents have received reimbursement relief for the student's after-school program, the instant appeal has not been rendered moot, because the parents have not been reimbursed for tuition at MCC for the 2010-11 school year. Next, the district alleges, in pertinent part, that it provided the student with a FAPE for the 2010-11 school year because the program recommendation of a 6:1+1 class together with a 1:1 behavior management paraprofessional would have addressed the student's special education needs. The district also asserts that the student's mother participated in the development of the May 2010 IEP and the program recommendation was not predetermined. Regarding the FBA/BIP, the district argues that both were appropriate, in part, because MCC provided the FBA to the May 2010 CSE, which formed the basis of the BIP developed by the CSE. The district maintains that the BIP identified the student's aggressions toward others and that the strategies in the BIP mirror those contained in MCC's FBA. The district also challenges the impartial hearing officer's findings that the May 2010 IEP did not contain services tailored to the student's needs for generalization of skills and that the lack of an after-school program rendered the district program inappropriate. Additionally, the district contends that the assigned school would have been able to implement the student's recommended program and meet the student's related services needs.

The district also contends that MCC was not appropriate because the student's related services needs were not met there. Moreover, the district argues that in reaching her determination on the appropriateness of MCC, the impartial hearing officer focused her analysis on the number of staff available to intervene as opposed to whether the school could actually control the student's behaviors and meet her unique needs. Further, the district asserts that the student's behaviors have been increasing in frequency and in intensity during the 2010-11 school year. With respect to the parents' request for reimbursement for 1:1 ABA therapy, the district argues that the parents have failed to show that the after-school services were necessary for the student to make educational progress. The district further asserts that the hearing record demonstrates that the after-school speech-language therapy was not appropriate because it was obtained in order to compensate for the lack of sufficient 1:1 speech-language therapy provided during the student's school day. Lastly, the district alleges that equitable considerations bar the parents' request for relief in its entirety, because the parents had no intention of enrolling the student in a public school program. However, in the event that the parents are eligible for relief, the district claims in the alternative that the amount of the relief should be reduced because the evidence indicated that the rates charged by the private providers were unreasonable and excessive.

The parents submitted an answer requesting that the impartial hearing officer's determination be upheld. The parents concur with the district that the case at bar is not moot. The parents further maintain, in part, that the student was denied a FAPE for the 2010-11 school year for the following reasons: (1) in selecting the assigned school for the student, the district engaged in predetermination; (2) the district refused to consider the provision of after-school services for the student, which further resulted in predetermination; (3) the selection of the assigned school

was not reasonably calculated to enable the student to receive meaningful educational benefits; (4) the assigned school has a history of failing to meet its students' related services mandates; and (5) the proposed BIP was inadequate to successfully manage the student's extreme and dangerous behaviors. The parents also contend that given the severity of the student's behaviors, MCC in conjunction with the student's after-school program was reasonably calculated to meet the student's special education needs and constituted the least restrictive environment (LRE). With respect to equitable considerations, the parents allege that they acted reasonably and equitably, and that the rates paid to the student's outside providers were not excessive or unreasonable.

Applicable Standards

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]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; A.H. v. Dep't of Educ., 2010 WL 3242234, at *2 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an impartial hearing officer's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 130 [2d Cir. 1998]; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley,

458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the LRE (20 U.S.C. § 1412[a][5][A]; 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs (34 C.F.R. § 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. Dep't of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008]), establishes annual goals related to those needs (34 C.F.R. § 300.320[a][2]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (34 C.F.R. § 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

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]).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 C.F.R. § 300.148).

Discussion

May 2010 CSE Process—Predetermination

With respect to the first prong of the Burlington/Carter test, I must determine whether the district complied with the procedural requirements of the IDEA (see Cerra, 427 F.3d at 192). I

begin by reviewing the parties' dispute regarding whether the May 2010 CSE engaged in impermissible predetermination in formulating the student's IEP. The impartial hearing officer found that the evidence permitted an inference that the May 2010 CSE engaged in predetermination because the recommended 6:1+1 program was the only program that the district had available for autistic students that were the same age as the student in the instant case (IHO Decision at p. 59). Likewise, she drew a similar inference that the CSE engaged in predetermination because CSE meeting participants came to the meeting knowing that after-school services would not be included on the IEP (*id.*). As set forth below, I find that the impartial hearing officer's findings with respect to predetermination are not supported by the hearing record. The consideration of possible recommendations for a student, prior to a CSE meeting, is not prohibited as long as the CSE understands that changes may occur at the CSE meeting (see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]; Nack v. Orange City Sch. Dist., 454 F.3d 604, 610 [6th Cir. 2006] ["predetermination is not synonymous with preparation"]; Deal v. Hamilton County Bd. of Educ., 392 F.3d 840, 857-60 [6th Cir. 2004]; A.G. v. Frieden, 2009 WL 806832, at *7 [S.D.N.Y. Mar. 26, 2009]; P.K. v. Bedford Central Sch. Dist., 569 F. Supp. 2d 371, 382-83 [S.D.N.Y. 2008]; Danielle G. v. New York City Dep't of Educ., 2008 WL 3286579, at *6-*7 [E.D.N.Y. 2008]; M.M. v. New York City Dep't of Educ., 583 F. Supp. 2d 498, 507 [S.D.N.Y. 2008]; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 147-48 [S.D.N.Y. 2006]; Application of the Dep't of Educ., Appeal 10-070). Courts have rejected predetermination claims where the parents have actively and meaningfully participated in the development of the IEP or where there was credible evidence that the school district maintained the requisite open mind during the CSE meeting (J.G. v. Kiryas Joel Union Free School District, 2011 WL 1346845, at *30-31 [S.D.N.Y. Mar. 31, 2011] [rejecting the parents' assertion that the offer of a "cookie-cutter" placement rose to the level of impermissible predetermination]).

Here, the hearing record reflects meaningful and active parental participation in the development of the student's May 2010 IEP and a willingness among the CSE members to consider different program options for the student. The student's mother attended the May 2010 CSE meeting accompanied by the student's teachers and therapists from MCC, and a service provider from IBI (Dist. Exs. 1 at p. 2; 4 at p. 1). Both testimony from the CSE chairperson and the May 2010 CSE meeting minutes further reflect that a "collaborative" discussion took place regarding the student's needs and the development of her IEP (Tr. pp. 340-41; Dist. Ex. 4 at p. 2). Moreover, the hearing record does not reflect that the student's mother was denied an opportunity to ask questions or offer input regarding the student's proposed program during the May 2010 CSE meeting (Dist. Ex. 4 at pp. 2-3). Rather, the hearing record reveals that the student's mother and MCC representatives were able to communicate their dissatisfaction with the proposed program (Tr. pp. 1386, 1906-07; Dist. Ex. 4 at p. 3).

The hearing record also indicates that the goals listed in the resultant IEP were provided to the CSE by MCC; however, the CSE chairperson described the meeting "as an opportunity to elaborate, modify, extend those goals, change those goals, [and] add more goals to them" (Tr. p. 367; see Dist. Ex. 4 at p. 3). He further noted that pursuant to the student's mother's request, goals were added to the May 2010 IEP (Tr. p. 367). Additionally, the hearing record reveals that the May 2010 CSE discussed other program options for the student (Tr. pp. 379-80; Dist. Ex. 1 at p. 29; see Dist. Ex. 4 at p. 3). Lastly, although the impartial hearing officer found that the hearing record gave rise to the inference that the CSE meeting participants came to the meeting knowing that home-based services would not be recommended for the student, the CSE chairperson testified

that he was not aware that any policy against home-based services existed (Tr. p. 406; see IHO Decision at p. 59). Based on the foregoing, I find that the evidence in the hearing record does not support a finding that the district predetermined the student's program for the 2010-11 school year, but shows that the parent meaningfully participated and contributed to the development of the student's IEP during the May 2010 CSE meeting.

May 2010 IEP

Turning to the impartial hearing officer's substantive determinations with regard to the May 2010 IEP, as set forth in greater detail below, further review of the hearing record supports the impartial hearing officer's conclusion that the district's recommended program and services were not reasonably calculated to enable the student to receive educational benefits during the 2010-11 school year, thereby resulting in a denial of a FAPE (IHO Decision at pp. 53, 56, 59).

6:1+1 Program Recommendation

A review of the hearing record supports the impartial hearing officer's conclusion that given the student's "extreme behavioral challenges," a 6:1+1 special class placement "[wa]s inadequate to address the [the student's] unique and identified special education needs" (IHO Decision at p. 53). In the instant case, the student's mother testified that during the May 2010 CSE meeting, together with the student's teachers and therapists from MCC and IBI, she discussed that due to the student's many maladaptive behaviors, distractibility, and difficulty focusing, 1:1 teaching was the only method of instruction that actually imparted information that the student then took in and utilized (Tr. pp. 1888-89). The educational coordinator from MCC testified that the student was able to function in a group setting, but she further explained that the student required 1:1 support to do so and that this constant support also was required as "protection [for] the other students" (Tr. p. 1616). In contrast, the teacher of the district's recommended classroom testified that during summer 2010, the 6:1+1 program provided only two 45-minute periods of 1:1 instruction per day to each student (Tr. pp. 1160-61). Testimony by the MCC occupational therapist indicated that she opposed the 6:1+1 recommendation during the CSE meeting and that she had previously observed a district 6:1+1 classroom where paraprofessionals were assisting children with autism and she opined that such a program would be completely inappropriate for the student because it would not only inhibit the student's ability to learn but would also hinder the ability of other children in the classroom to learn as well (Tr. pp. 1386, 1388). Likewise, the student's lead teacher at MCC explained that the student would be "highly disruptive" to a 6:1+1 special class, that such a program would be unsafe for her and for others, and that it would not be appropriate for her to reach her IEP goals, particularly those related to her behavioral difficulties and attending deficits (Tr. p. 1766).

The education coordinator of MCC testified regarding the extent of the student's problem behaviors, indicating that at times the student's behavioral episodes started with very distinct signals such as very loud screaming or face slapping, which indicated that the student was becoming agitated (Tr. p. 1545). According to the educational coordinator, the student may exhibit 20 to 30 behavioral incidents per day (Tr. pp. 1589-90, 1617). The student's lead teacher at MCC described the student's behaviors as "dangerous at times," and added that the student might bite, kick or pull someone's hair (Tr. pp. 1546, 1755). For example, according to the educational coordinator, at one moment the student will be engaged in instruction, and then turn over a desk and grab a staff member by the shirt or hair, biting at their head, arms and hands; or dig her

fingernails into their hands, chest or other exposed areas, all within a two-second time frame (Tr. pp. 1545-46, 1548). The MCC education coordinator explained that once the student got a hold on a staff member, it required a second person to free the student's grasp and redirect her to a chair (Tr. p. 1547).

The student's lead teacher also testified that the student's behaviors have required the support of up to five adults (Tr. p. 1759). In response to the student's behaviors, the educational coordinator testified that MCC developed a protocol that was implemented when the student exhibited two combined behaviors (Tr. pp. 1547-48). If the student could not be verbally redirected to keep her hands down or engage in the directives being given, crisis interventions were employed, for which the staff had received training (Tr. p. 1548). Moreover, the student's lead teacher stated that anyone who worked with the student underwent specific training because individuals had to be "highly qualified ... trained and skilled" to be able to work with the student (Tr. pp. 1811-12). Additionally, the hearing record reveals that MCC staff wear protective clothing including gloves and zippered jackets to prevent the student access to exposed skin (Tr. pp. 1546-47). I also note that the teacher who would have taught the 6:1+1 special class at the assigned school during summer 2010 testified that if a student was violent to the extent that he or she needed to be restrained, the student would probably not be in the 6:1+1 public school setting (Tr. p. 1208).

Given the above circumstances, despite the inclusion of behavioral supports, such as the provision of a 1:1 behavior management paraprofessional in the May 2010 IEP, the hearing record supports the impartial hearing officer's conclusion that a 6:1+1 special class program was "inadequate to address [the student's] educational needs and to ensure her safety and the safety of her classmates and teachers" (IHO Decision at p. 54).

Special Factors in an IEP and Interfering Behaviors

Under the IDEA, a CSE may be required to consider special factors in the development of a student's IEP. Among the special factors in the case of a student whose behavior impedes his or her learning or that of others, the CSE shall consider positive behavioral interventions and supports, and other strategies, to address that behavior (20 U.S.C. § 1414[d][3][B][i]; 34 C.F.R. § 300.324[a][2][i]; see 8 NYCRR 200.4[d][3][i]; see also E.H. v. Board of Educ., 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; A.C., 553 F.3d at 172; J.A. v. East Ramapo Cent. Sch. Dist., 603 F. Supp. 2d 684, 689 [S.D.N.Y. 2009]; M.M., 583 F. Supp. 2d at 510; Tarlowe, 2008 WL 2736027, at *8; W.S., 454 F. Supp. 2d at 149-50; Application of a Student with a Disability, Appeal No. 09-101; Application of a Student with a Disability, Appeal No. 09-038; Application of a Student with a Disability, Appeal No. 08-028; Application of the Dep't of Educ., Appeal No. 07-120). To the extent necessary to offer a student an appropriate educational program, an IEP must identify the supplementary aids and services to be provided to the student (20 U.S.C. § 1414[d][1][A][i][IV]; 34 C.F.R. § 300.320[a][4]; 8 NYCRR 200.4[d][2][v][a], [b][3]; Piazza v. Florida Union Free Sch. Dist., 2011 WL 1458100, at *1 [S.D.N.Y. Apr. 7, 2011]; Gavrity v. New Lebanon Cent. Sch. Dist., 2009 WL 3164435, at *30 [N.D.N.Y. Sept. 29, 2009] [discussing the student's IEP which appropriately identified program modifications, accommodations, and supplementary aids and services]; P.K., 569 F. Supp. 2d at 380 ; see also Schreiber v. East Ramapo Central Sch. Dist., 700 F. Supp. 2d 529, 556 [S.D.N.Y. 2010] [noting that when defending a unilateral placement as appropriate under the IDEA, a parent in some circumstances may also be required to demonstrate that appropriate "supplementary aids and services" are provided to the student]).

In New York State, policy guidance explains that the "the IEP must include a statement (under the applicable sections of the IEP) if the student needs a particular device or service (including an intervention, accommodation or other program modification) to address one or more of the following needs in order for the student to receive a [FAPE]" ("Guide to Quality Individualized Education Program [IEP] Development and Implementation," at p. 25, Office of Special Educ. [Dec. 2010], available at <http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf>). "The behavioral interventions and/or supports should be indicated under the applicable section of the IEP," and if necessary, "[a] student's need for a [BIP] must be documented in the IEP" (*id.*).¹⁰ State procedures for considering the special factor of a student's behavior that impedes his or her learning or that of others may also require that the CSE consider having an FBA conducted and a BIP developed for a student in certain non-disciplinary situations (8 NYCRR 200.4[d][3][i], 200.22[a], [b]). An FBA is defined in State regulations as "the process of determining why a student engages in behaviors that impede learning and how the student's behavior relates to the environment" and "include[s], but is not limited to, the identification of the problem behavior, the definition of the behavior in concrete terms, the identification of the contextual factors that contribute to the behavior (including cognitive and affective factors) and the formulation of a hypothesis regarding the general conditions under which a behavior usually occurs and probable consequences that serve to maintain it" (8 NYCRR 200.1[r]). According to State regulations, an FBA shall be based on multiple sources of data and must be based on more than the student's history of presenting problem behaviors (8 NYCRR 200.22[a][2]). An FBA must also include a baseline setting forth the "frequency, duration, intensity and/or latency across activities, settings, people and times of the day," so that a BIP (if required) may be developed "that addresses antecedent behaviors, reinforcing consequences of the behavior, recommendations for teaching alternative skills or behaviors and an assessment of student preferences for reinforcement" (8 NYCRR 200.22[a][3]). Although State regulations call for the procedure of using an FBA when developing a BIP, the failure to comply with this procedure does not automatically render a BIP deficient (*A.H.*, 2010 WL 3242234).

With regard to a BIP, the special factor procedures set forth in State regulations further note that the CSE or Pre-school Committee on Special Education (CPSE) "shall consider the development of a [BIP] for a student with a disability when: (i) the student exhibits persistent behaviors that impede his or her learning or that of others, despite consistently implemented general school-wide or classroom-wide interventions; (ii) the student's behavior places the student or others at risk of harm or injury; (iii) the CSE or CPSE is considering more restrictive programs or placements as a result of the student's behavior; and/or (iv) as required pursuant to" 8 NYCRR 201.3 (8 NYCRR 200.22[b][1]). Once again, "[i]f a particular device or service, including an intervention, accommodation or other program modification is needed to address the student's behavior that impedes his or her learning or that of others, the IEP shall so indicate" (8 NYCRR 200.22[b][2]). If the CSE determines that a BIP is necessary for a student "the [BIP] shall identify: (i) the baseline measure of the problem behavior, including the frequency, duration, intensity

¹⁰ While the student's need for a BIP must be documented in the IEP, and prior to the development of the BIP, an FBA either "has [been] or will be conducted" ("Guide to Quality Individualized Education Program [IEP] Development and Implementation," at p. 25 [emphasis in original]), it does not follow that in every circumstance an FBA must be conducted and a BIP developed at the same time as the IEP (*see Cabouli v. Chappaqua Cent. Sch. Dist.*, 2006 WL 3102463 [2d Cir. Oct. 27, 2006] [noting that it may be appropriate to address a student's behaviors in an IEP by noting that an FBA and BIP will be developed after a student is enrolled at the proposed district placement]).

and/or latency of the targeted behaviors . . . ; (ii) the intervention strategies to be used to alter antecedent events to prevent the occurrence of the behavior, teach individual alternative and adaptive behaviors to the student, and provide consequences for the targeted inappropriate behavior(s) and alternative acceptable behavior(s); and (iii) a schedule to measure the effectiveness of the interventions, including the frequency, duration and intensity of the targeted behaviors at scheduled intervals (8 NYCRR 200.22[b][4]).¹¹ Neither the IDEA nor its implementing regulations require that the elements of a student's BIP be set forth in the student's IEP ("Student Needs Related to Special Factors," Office of Special Education [April 2011], available at <http://www.p12.nysed.gov/specialed/formsnotices/IEP/training/QA-411.pdf>). However, once a student's BIP is developed and implemented, "such plan shall be reviewed at least annually by the CSE or CPSE" (8 NYCRR 200.22[b][2]). Furthermore, "[t]he implementation of a student's [BIP] shall include regular progress monitoring of the frequency, duration and intensity of the behavioral interventions at scheduled intervals, as specified in the [BIP] and on the student's IEP. The results of the progress monitoring shall be documented and reported to the student's parents and to the CSE or CPSE and shall be considered in any determination to revise a student's [BIP] or IEP" (8 NYCRR 200.22[b][5]).

In this case, as discussed in greater detail below, I concur with the impartial hearing officer's conclusion that the May 2010 BIP developed by the CSE bore no relation to the student's severe and explosive behaviors (IHO Decision at p. 53).

Although the district maintains on appeal that the May 2010 CSE was "fully aware" of the student's aggressive and self-injurious behaviors, a review of the May 2010 IEP does not accurately depict the student's behavioral needs; specifically, the extent of those behaviors. In this case, while the challenged IEP contained limited information regarding the extent of the student's self-injurious and aggressive behaviors in both the student's present levels of performance and in the BIP, the hearing record demonstrates that the May 2010 CSE had before it information that accurately and adequately described the extent of the student's behaviors including her self-injurious and aggressive behaviors and the effect they had on her availability for learning (Dist. Ex. 1 at pp. 4, 8, 30). The district's school psychologist testified that in preparation for the May 2010 CSE meeting, she reviewed the social history, a classroom observation of the student at MCC, and progress reports from MCC (Tr. pp. 238-39). I note that these reports all referred to the student's aggressive and/or self-injurious behaviors including scratching, hair pulling, pinching, biting, and hitting the sides of her head (Dist. Exs. 2 at pp. 1-8; 16 at p. 1; 18 at pp. 1-2; 19 at pp. 1, 3, 4). More specifically, the student's MCC lead teacher indicated in her report that the student was working on vocally asking for things rather than just taking the item, engaging in self-injury or aggressing toward others, and that these behaviors were being addressed at MCC via an FBA and a BIP (Dist. Ex. 19 at pp. 1, 3). The student's MCC speech-language pathologist stated in her report that the student was showing only emerging ability to express her feelings appropriately without exhibiting aggressive behaviors (Dist. Ex. 16 at p. 1). The district's school psychologist testified that she also reviewed a classroom observation of the student, which reflected the intensive level of redirection and reinforcement that was necessary in order to instruct the student due to her behavior (Tr. pp. 238-39; Dist. Ex. 7 at pp. 1-2). The observation report also reflected

¹¹ The Official Analysis of Comments to the federal regulations explains that the decision regarding whether a student requires interventions such as a BIP rests with the CSE and is made on an individual basis (Consideration of Special Factors, 71 Fed. Reg. 46683 [August 14, 2006]).

that the student screamed loudly each time she was refocused and redirected, that it was difficult to engage the student and she required constant redirection and prompting, and that her behavior manifestations were characterized by yelling, foot stomping, and sitting on the floor (*id.*). Testimony by the MCC education coordinator further reflected that the student required staff who were fluent in running instruction because the student had a very difficult time waiting, in addition to staff that were able to follow the student's complex behavior plan and collect data for self-injury and aggression toward others, and using hand counters and a clock to time the duration of behaviors in the midst of the student's behavioral episodes (Tr. pp. 1549-50).

The hearing record also reveals that the FBA developed by MCC staff was referenced and reviewed during the May 2010 CSE meeting (Tr. p. 725; Dist. Ex. 4 at p. 2). As noted above, the FBA from MCC included a comprehensive analysis of the student's self-injurious and aggressive behaviors, and included an extensive treatment plan that described in detail the specific action that staff should take to intervene in the student's behavior, including when necessary, the use of crisis management strategies to "block" the duration and intensity of the student's self-injurious behaviors using a prompting hierarchy (vocal directive to put her hands down, hand-over-hand prompt to remove her hand from her temples when hitting), and Crisis Prevention Institute (CPI) (nonviolent crisis prevention) techniques with respect to bites or scratches to minimize the risk of injury (to safely remove themselves from a grab or bite) (Dist. Ex. 2 at pp. 1-8). Based on the above, the hearing record reflects, and the impartial hearing officer correctly found that that the May 2010 CSE was "on clear notice" of the severity of the student's behaviors and the extent of the intervention required in order to address those behaviors and maintain a safe environment (IHO Decision at p. 55).

In contrast, I note that the BIP created by the May 2010 CSE reflected that the student's aggressive behavior toward others included only hair pulling of staff and peers; and although the BIP listed five strategies to be tried in order to change the student's behavior (redirection and refocusing, choice of preferred activities, "first-then," teaching alternate methods of getting attention, and teaching the student to wait for access to items), the hearing record reflects that neither the BIP nor the challenged IEP provided guidance regarding how the student's self-injurious and aggressive behaviors should be addressed (Dist. Ex. 1; *see* IHO Decision at p. 55).

Notwithstanding the district's assertion that the BIP looked quite brief but constituted a distilled summary of a lengthy discussion and lengthy evaluations, the hearing record is consistent with the impartial hearing officer's finding that in light of severity of the behavioral challenges that the student exhibited in this case, the strategies contained in the BIP were not adequately designed and would not allow her to be available for learning nor would they ensure the student's safety or the safety of her classmates and teachers (IHO Decision at p. 55). Likewise, the May 2010 IEP did not in this instance appropriately reflect the student's behaviors or rectify the deficiency in the BIP by identifying supports to address them (Dist. Ex. 1). The MCC education coordinator testified that although the BIP briefly identified the student's target behaviors it did not outline the instructional strategies to the extent that they could be executed with the student and it was not adequate to address the severity of the student's behaviors at the time that it was formulated (Tr. pp. 1555-56). Furthermore, the May 2010 BIP provided no baseline measure of the problem behaviors including the frequency, intensity, duration, or latency of the targeted behavior (Dist. Ex. 1 at p. 30). While the BIP identified several intervention strategies as described above; it did not include a schedule to measure the effectiveness of these interventions (*id.*). A final factor in this case weighing against the district is its concession that its own expert witness at the impartial

hearing stated that the BIP was not an appropriate or adequate BIP to address the student's needs in this case (Tr. pp. 2025, 2027; Pet. ¶ 54).¹²

Based on the above, the hearing record supports the impartial hearing officer's determination that severity and dangerousness of the student's behaviors was not properly addressed (IHO Decision at p. 55). I find that the failure of the CSE to accurately describe in the May 2010 IEP the student's maladaptive behaviors that interfered with her learning or to develop a BIP that was designed to measure and monitor the student's self-injurious and aggressive behaviors, as well as the student's response to strategies implemented by the district, or to otherwise note appropriate supplementary aids and services in the IEP resulted in the denial of a FAPE (see R.K. v. New York City Dep't of Educ., 2011 WL 1131492, at *18-19 [E.D.N.Y. Jan. 21, 2011]; Application of a Student with a Disability, Appeal No. 10-050; Application of a Student with a Disability, Appeal No. 10-007; cf. A.C., 553 F.3d at 172; E.M. v. New York City Dep't of Educ., 2011 WL 1044905, *9 [S.D.N.Y. Mar. 14, 2011]; Oberti v. Bd. of Educ., 995 F.2d 1204, 1217, 1220-21 [3d Cir. 1993]). Accordingly, I find that the district's failure to comply with State regulations resulted in a substantive deficiency in this instance and deprived the student of educational benefits by failing to sufficiently address the student's behaviors which impeded her learning.

In summary, the hearing record demonstrates that the CSE failed to adequately and accurately identify the extent of the student's behavioral needs and recommend a program that would have appropriately addressed the student's educational needs and therefore, the district denied the student a FAPE for the 2010-11 school year.

The Parents' Unilateral Private Placement

Having found that the district failed to offer the student a FAPE, I turn now to the appropriateness of the parents' placement of the student at MCC. A unilateral 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 have its own 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). 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]).

¹² I further note that the description of the student's behavior on the district's CSE placement referral form reflected that the student merely exhibited mild self-injurious behavior and mild assaultive behavior toward peers and staff (Parent Ex. BB at p. 1).

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"]]).

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).

Before I address the appropriateness of the parents' unilateral placement, initially, I note that pursuant to the district's obligation to provide student's pendency placement there is no dispute that the parents are entitled to reimbursement for the student's 1:1 after-school ABA therapy and 1:1 after-school speech-language therapy sessions (Application of the Dep't of Educ., Appeal No. 10-107).¹³ Therefore, the remaining issue before me is the appropriateness of the parents' unilateral placement of the student at MCC.

MCC

The hearing record reflects that during the 2010-11 school year, the student attended a 12-month program at MCC where her classroom was comprised of six students, six instructors and one lead teacher (Tr. p. 1763; Parent Ex. L at p. 1). The ages of the students in the class ranged from 9 to 11 years and the student fit within this age range (Tr. p. 1754). The student's day

¹³ Even if I were to reach the issue raised by the district and make a determination with regard to the reasonableness of the rates charged by IBI, I note that the student's main therapist from IBI testified that he charged a lower rate to the parents than what he charged to other families because he considered the student to be a "long-term case," and IBI had decided not to raise her rate (Tr. p. 1670). He also testified that IBI's rates were comparable to those of other private providers located in the area (see Tr. p. 1739). The district did not further explore this issue during the impartial hearing.

consisted of five hours of 1:1 instruction using ABA techniques and one hour of 2:1 instruction during lunch and leisure skills (Parent Ex. L at p. 1). The student also received her 1:1 instruction in a group setting and participated in small group instruction and morning meeting daily, as well as art group, story time, and music twice per week (id.). She also received three 30-minute individual speech-language therapy sessions and two 30-minute individual OT sessions per week (id.).

The hearing record also reflects that the student's IEP goals and objectives, which were addressed at MCC, were derived from parent participation, the student's history of instruction, and results from the administration of the Assessment of Basic Language and Learning Skills-Revised (ABLRS), a criterion-based assessment (Tr. p. 1752; Parent Ex. L at p. 1). According to the hearing record, the student received instruction in the areas of expressive and receptive communication, social skills, academic skills, "community of reinforcers," and self-management of behaviors (maintaining, monitoring and controlling her own behaviors) (Parent Ex. L at pp. 1-4). Data regarding the student's performance on IEP goals was collected, graphed, and analyzed daily (Parent Ex. L at p. 1). The lead teacher in the student's classroom and the education coordinator of MCC conducted an FBA and developed a BIP that was designed to address the student's self-injurious and aggressive behaviors, and which was implemented on September 27, 2010 and was shared with all those who worked with the student as well as with her parents (Tr. pp. 1761-62; Parent Ex. H at pp. 1-12). The student's lead classroom teacher testified that an additional staff person was always on call within the classroom to address the student's behavior if needed (Tr. p. 1759).

Additionally, the hearing record reflects that MCC provided a clinical team meeting every eight weeks, one hour per week for parent observation time in the classroom, a twice yearly home visit, and a Parent Education Workshop Series twice per month (Parent Ex. L at p. 1). The student's MCC occupational therapist testified that she and the MCC staff made suggestions to the student's mother to address the student's needs in the home setting (Tr. pp. 1399, 1403). The hearing record further reveals that MCC also offered sibling programs that both of the student's siblings have participated in, to learn about appropriate activities that they could do to engage the student in the home (Tr. p. 1404).

Related Services

The district argues that MCC was not appropriate because, in part, it did not provide the student with a sufficient amount of related services; however, as explained below, a review of the hearing record compels a contrary conclusion. According to MCC's educational coordinator, there was collaboration between the school's different disciplines (Tr. p. 1600). She further explained that within that model, MCC utilized "co-treat sessions" between related services (e.g. speech-language therapy and OT), which the educational coordinator described as sessions where staff attended with students and obtained instructional strategies that they carried back to use in the classroom, gym, or another discipline (id.). The educational coordinator added that such a model permitted MCC staff to collaborate across different disciplines, while bringing in areas of expertise, and effectively communicate any adjustments or changes in the behavior plan or instructional programming to the related services professionals (id.). For example, the student's occupational therapist from MCC testified that she also went into the classroom and instructed staff on how to carry over sensory activities, and that sensory equipment was brought to the classroom specifically for the student to utilize (Tr. pp. 1380-81, 1398-99). The student's

occupational therapist also noted that MCC's teaching staff sought out the assistance of the therapy department to make sure that they were effectively incorporating the student's therapy goals (Tr. pp. 1398-99). She added that the student's teacher always attended the student's therapy sessions, thereby allowing the teacher to address areas of concern noted by the student's therapist (Tr. p. 1399).

Likewise, the student's occupational therapist testified that she spent a lot of time in the student's classroom and that the student had a specific sensory diet or exercise schedule posted by her desk that classroom staff could access (Tr. p. 1399). The student's speech-language therapist also testified that all three of the student's weekly speech-language therapy sessions took place in the classroom and during the student's sessions, the speech-language therapist worked with the student's lead teacher and that the educational coordinator or assistant educational coordinator also participated in the student's therapy sessions (Tr. p. 1452).

Based on the above, the hearing record supports a finding that the amount of OT and speech-language therapy provided at MCC, in conjunction with the carryover of instructional strategies by MCC classroom staff, was appropriate to meet the student's related services needs (see Application of the Dep't of Educ., Appeal No. 11-031).

Progress

While evidence of progress at MCC would not, by itself, be sufficient to establish that MCC is appropriate; progress is nevertheless a relevant factor to consider in this case. As set forth below, a review of the hearing record supports the impartial hearing officer's conclusion that at MCC, the student "has made slow, but discernable progress in line with her extreme behavioral difficulties, communication deficits and cognitive functioning" (IHO Decision at p. 61). Further review of the hearing record reflects that the student's program at MCC was specially designed to address her needs beginning with the identification of those needs using the ABLLS and through the development and implementation of ABA programs, an FBA, and a correlating BIP to address these needs (Tr. p. 1761; Parent Exs. H at pp. 1-12; J at pp. 1-3; K at pp. 1-2; L at pp. 1-5).

The student's progress at MCC was reflected in testimony by the student's lead teacher at MCC and in an August 2010 progress report (Tr. p. 1761; Parent Ex. L at pp. 1-5). The lead teacher in the student's classroom reported that there had been significant improvement in the student's ability to communicate her wants and needs (Parent Ex. L at p. 5). The teacher further reported that the student was more frequently speaking in full sentences in order to access a reinforcer; for example, the student was reported to say, "I want the computer please" or to mand that she was all done with something, with a sentence such as, "I'm all done with the book" (*id.*). In addition, the August 2010 report reflected that the student had on several occasions, demonstrated independent spontaneous speech; for example, by verbally labeling a phone in the hallway and a skateboard she saw while looking at a book during leisure skills, as a result of a program that was designed to increase her spontaneous communication while also generalizing acquired tacts (labels) (*id.* at p. 1). The student's teacher also reported that the increase in the student's use of functional communication phrases had also decreased the frequency of her inappropriate behaviors (*id.* at p. 5).

With regard to behavior, the August 2010 progress report indicated that the student had decreased the incidence of her self-injurious behaviors (Parent Ex. L at p. 5). Although the

student's aggressive behavior continued to fluctuate between pinching, scratching, biting, hair pulling and turning over or lifting her desk with her legs, the report reflected that the student was exhibiting new less aggressive behaviors when she was upset, including stomping her feet and smacking her legs together, which were lower in intensity and did not pose injury to herself or others (id.). According to the August 2010 report, the student was working to reduce her inappropriate behaviors by increasing her functional communication skills (id.). The report further reflected that the student had increased her ability to vocally communicate her desire to remove an item or activity instead of emitting inappropriate behaviors by utilizing large icon cards that said, "I don't want it" and "this is hard," as visual cues to prompt her to verbally express herself (id.).

The student was also reported to have made gains in the area of self-management (Parent Ex. L at p. 4). For example, she had demonstrated progress in waiting for access to a reinforcer in contrived situations, in sitting nicely/still (quiet with hands on lap), and attending (providing eye contact to the speaker) during instruction (id.). Additionally, the student's need for the use of a vocal antecedent had decreased, as she often vocally reminded herself by repeating "sit still" (id.). The August 2010 progress report also revealed that the student had improved her ability to visually attend and to scan materials during the implementation of a program designed to address these skills (id.). Further, according to the progress report, the student had also demonstrated the ability to generalize that skill to other parts of her day (id.).

With regard to self-help skills, the student's teacher reported that she had made progress in completing hand washing without prompts to use the soap and had recently demonstrated the ability to independently complete her morning routine at school including unpacking her backpack, putting her lunch in the refrigerator, placing her communication book on top of her cubby, and her backpack in her cubby (Parent Ex. L at p. 4). The August 2010 progress report further reflected that the student had also begun to learn and accept a routine to use the microwave to heat food (id.).

With regard to academics, the student's teacher reported that the student was able to read and match sight words to a picture and was utilizing the Edmark reading curriculum (Parent Ex. L at p. 3). Her teacher described her progress with respect to reading, noting that the student was working on matching words to pictures, identifying different sight words, and was reading the sight words (Tr. p. 1788). According to the student's teacher, the student had made "nice progress" in the beginning lessons of Edmark, which addressed matching and identifying various abstract shapes or letters (Parent Ex. L at p. 3). The student had expanded her ability to identify colors to doing so in a functional task; for example, to color with a purple crayon or put an item in the purple box (id.). In group instruction, given reinforcement, the student had shown some progress in attending to a story (id.). The teacher also noted that the student did well waiting for activities and required minimal prompts to pass an item or toy after taking her turn (id.). The report also reflected that the student was learning to follow vocal directions, to imitate (gross, fine motor and object imitation), and that she was working on prerequisite skills to handwriting (id. at p. 2).

The hearing record also demonstrates that the student had shown progress in her social skills programs (Parent Ex. L at p. 2). For example, the student's teacher noted that she was learning to identify familiar people by delivering an item to an adult in the classroom, which had resulted in an increase in her attention to the task, while teaching the student to identify the names of adults within the classroom (id.). The teacher also reported that the student had appropriately learned to recruit the attention of adults who had access to a reinforcing item, by tapping them on

the shoulder and requesting the item (id.). According to the student's teacher, in the past, this situation would have been a "setting event" for the student to emit inappropriate behaviors; however, the student had shown improvement with this skill and in her ability to generalize the skill to novel situations (id.).

The student's MCC speech-language pathologist testified with regard to the student's progress in speech-language therapy, and indicated in her August 2010 progress report that the student had improved significantly in her ability to respond independently to yes/no questions regarding her wants and needs and in her ability to differentiate between "what, where and who questions" (Tr. pp. 1442-43; Parent Ex. K at p. 1). According to the student's speech-language pathologist, the student had shown slow, but steady improvement in her ability to label emotions in pictures, use locative terms, and use phrases of three words or more given minimal cues (Parent Ex. K at p. 1). With regard to pragmatics, the student was reported to have begun to use the form "Hi, Bye + name" independently, readily respond to "[q]uiet voice" by lowering her vocal volume for up to five seconds, and was appropriately gaining attention given cues to use a shoulder tap (id.).

With regard to the student's OT, in an August 2010 progress report, the student's occupational therapist at MCC reported that the student was making slow and steady progress in all areas of her IEP goals (Parent Ex. J at p. 2). Although the student reportedly continued to exhibit significant deficits, her therapist explained that she had made improvements in her ability to motor plan movements involving two hands at the same time (id.). Additionally, the August 2010 OT progress report revealed that the student had improved her ability to complete visual-motor tasks that did not require her to physically navigate her environment, such as completing a bean bag toss (id.). The student's therapist also reported that she had demonstrated the ability to perform basic visual tracking exercises utilizing her pointer finger and a laser tracker to increase her visual-motor integration, and to attend to therapist-directed activities for a longer period of time (id.). The student's therapist also testified that the student was able to complete tasks which she was unable to do six months prior, including following verbal directives through sensory-based activities, sequencing steps for cooking activities, and imitation of handwriting strokes such as circles, lines, x's and tracing letters (Tr. p. 1395).

Additionally, testimony by the student's IBI therapist reflected that since the student had begun attending MCC, she demonstrated progress in that she was much more comfortable in a group setting, better able to deal with other students in her company, had increased her ADL skills such as dressing, hygiene and cooking skills, and that she was becoming more independent (Tr. pp. 1697-98).

Lastly, notwithstanding testimony by MCC providers that the student's MCC program could not "stand alone," separate from the IBI program, the hearing record reflects that MCC undertook proactive measures by collaborating with the student's private providers in order to ensure consistency of programming (Tr. pp. 1391-92, 1437, 1665, 1669, 1685-86, 1757-58, 1770, 1835-36). The student's primary IBI therapist testified that he observed the student at MCC every two weeks to assess how the 1:1 instruction was going, to discuss the student's behaviors with her teacher, and to provide suggestions when needed (Tr. p. 1718). Communication between IBI and MCC also occurred during morning drop-offs, phone calls and more formally at clinic meetings (Tr. pp. 1664, 1686). In addition, the IBI therapist communicated on a daily basis with the parents (Tr. p. 1686). The student's MCC occupational therapist also testified that the IBI therapist initially

assisted her with strategies to target behaviors during the student's OT sessions and that he stayed in contact via email in case issues arose that required his attention (Tr. pp. 1400-01). Based on the foregoing, the hearing reflects that MCC staff sought out the necessary support services from IBI to ensure that the student would receive educational benefits from her program at MCC.

Under the circumstances presented above, the hearing record demonstrates that the program at MCC was reasonably calculated to confer educational benefits to the student, providing educational instruction specially designed to meet the unique needs of the student, supported by services necessary for the student to benefit from instruction (Gagliardo, 489 F.3d at 112; see Frank G., 459 F.3d at 364-65).

Equitable Considerations

The final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; M.C. v. Voluntown, 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]). With respect to equitable considerations, the IDEA also provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; see S.W. v. New York City Dep't of Educ., 2009 WL 857549, at *13-14 [S.D.N.Y. March 30, 2009]; Thies v. New York City Bd. of Educ., 2008 WL 344728 [S.D.N.Y. Feb. 4, 2008]; M.V. v. Shenendehowa Cent. Sch. Dist., 2008 WL 53181, at *5 [N.D.N.Y. Jan. 2, 2008]; Bettinger v. New York City Bd. of Educ., 2007 WL 4208560, at *4 [S.D.N.Y. Nov. 20, 2007]; Carmel Cent. Sch. Dist. v. V.P., 373 F. Supp. 2d 402, 417-18 [S.D.N.Y. 2005], aff'd, 2006 WL 2335140 [2d Cir. Aug. 9, 2006]; Werner v. Clarkstown Cent. Sch. Dist., 363 F. Supp. 2d 656, 660-61 [S.D.N.Y. 2005]; see also Voluntown, 226 F.3d at n.9; Wolfe v. Taconic Hills Cent. Sch. Dist., 167 F. Supp. 2d 530, 533 [N.D.N.Y. 2001]; Application of the Dep't of Educ., Appeal No. 07-079; Application of the Dep't of Educ., Appeal No. 07-032).

The IDEA allows that reimbursement may be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent CSE meeting prior to removing the student from public school, or by written notice ten business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 C.F.R. § 300.148[d][1]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). Although a reduction in reimbursement is discretionary, courts have upheld the denial of reimbursement in cases where it was shown that parents failed to comply with this statutory provision (Greenland, 358 F.3d at 160; Ms. M. v. Portland Sch. Comm., 360 F.3d 267 [1st Cir. 2004]; Berger v. Medina City Sch. Dist., 348 F.3d 513, 523-24 [6th Cir. 2003]; Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 27 [1st Cir. 2002]); see Frank G. v. Bd. of

Educ., 459 F.3d 356, 376 [2d Cir. 2006]; Voluntown, 226 F.3d at 68; Lauren V. v. Colonial Sch. Dist.; 2007 WL 3085854, at * 13 [E.D. Pa. Oct. 22, 2007]).

The district argues that equitable considerations should preclude an award of reimbursement because the parents had no intention of placing the student in a public placement; however, this claim is not supported by the hearing record. Here, the hearing record reflects that the student's mother independently investigated the availability of home-based services offered by the district, which she explained was part of her efforts to "cobble" together an appropriate program for the student (Tr. p. 1908). Moreover, a review of the hearing record reflects that the student's mother actively participated in the development of the student's program and raised her concerns regarding the May 2010 IEP in a timely fashion. Specifically, the student's mother provided the May 2010 CSE with updated evaluative material regarding the student (Dist. Ex. 4 at p. 2). The hearing record further reveals that during the May 2010 CSE meeting, the student's mother articulated her concerns with respect to the proposed program, specifically, that she believed that the student required a full-time 1:1 teacher and was concerned about whether a 6:1+1 classroom was appropriate for the student (Tr. p. 1894; Dist. Ex. 4 at p. 2). Moreover, the student's mother availed herself of the opportunity provided by the district to visit the assigned school (Parent Ex. M at p. 1).

Lastly, in a June 17, 2010 letter to the CSE, the student's mother reiterated her concerns surrounding the proposed program and provided the district with appropriate and timely notice of their intention to enroll the student in MCC and seek reimbursement from the district (id. at pp. 1-3). I further note, that the hearing record does not otherwise suggest that the parents failed to cooperate with the district in developing an appropriate program for the student. Accordingly, the student's mother's actions in this case are clearly distinguishable from cases in which tuition reimbursement should be denied due to a delay in notifying the CSE of rejection of a district's IEP or due to misconduct, obfuscation or a lack of cooperation in identifying an appropriate public school placement warranting a limitation or denial of relief (see S.W., 646 F. Supp. 2d at 364; Carmel, 373 F. Supp. 2d at 417-18) and I find no basis in the hearing record to reasonably infer that the parents would not have considered placing the student in a public school program. Therefore, I will not disturb the impartial hearing officer's findings with regard to equitable considerations on the bases raised by the district.

Conclusion

Having concluded that the district did not offer the student a FAPE, that the parents' unilateral placement at MCC was appropriate, and that equitable considerations favored the parents, I will direct that the district reimburse the parents for tuition payments made to MCC for the 2010-11 school year. I have considered the parties' remaining contentions and find that it is not necessary to address them in light of the determinations herein.

THE APPEAL IS DISMISSED

IT IS ORDERED that the district shall reimburse the parents for any portion of the tuition paid to MCC for the 2010-11 school year upon submission of proof of attendance and payment.

Dated: **Albany, New York**
 July 13, 2011

JUSTYN P. BATES
STATE REVIEW OFFICER