



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 12-030

### **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, attorneys for petitioner, Ilana A. Eck, Esq., of counsel

Thivierge & Rothberg, P.C., attorneys for respondents, Christina D. Thivierge, Esq., of counsel

### **DECISION**

#### **I. Introduction**

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondents' (the parents') son and ordered it to reimburse the parents for the cost of services provided to their son at the Communication Clinic of Connecticut (CCC), private related services, and transportation expenses during the 2010-11 school year. The appeal must be sustained.

#### **II. Overview—Administrative Procedures**

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, at least one psychologist, and school district representatives (Educ. Law. § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process

hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; 34 CFR 300.151-300.152, 300.506, 300.511; Educ. Law § 4404[1]; 8 NYCRR 200.5[h]-[l]).

New York State has implemented a two-tiered system of administrative review to address disputed matters between parents and school districts regarding "any matter relating to the identification, evaluation or educational placement of a student with a disability, or a student suspected of having a disability, or the provision of a free appropriate public education to such student" (8 NYCRR 200.5[i][1]; see 20 U.S.C. § 1415[b][6]-[7]; 34 CFR 300.503[a][1]-[2], 300.507[a][1]). First, after an opportunity to engage in a resolution process, the parties appear at an impartial hearing conducted at the local level before an IHO (Educ. Law. § 4404[1][a]; 8 NYCRR 200.5[j]). An IHO typically conducts a trial-type hearing regarding the matters in dispute in which the parties have the right to be accompanied and advised by counsel and certain other individuals with special knowledge or training; present evidence and confront, cross-examine, and compel the attendance of witnesses; prohibit the introduction of any evidence at the hearing that has not been disclosed five business days before the hearing; and obtain a verbatim record of the proceeding (20 U.S.C. § 1415[f][2][A], [h][1]-[3]; 34 CFR 300.512[a][1]-[4]; 8 NYCRR 200.5[j][3][v], [vii], [xii]). The IHO must render and transmit a final written decision in the matter to the parties not later than 45 days after the expiration period or adjusted period for the resolution process (34 CFR 300.510[b][2],[c], 300.515[a]; 8 NYCRR 200.5[j][5]). A party may seek a specific extension of time of the 45-day timeline, which the IHO may grant in accordance with State and federal regulations (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5]). The decision of the IHO is binding upon both parties unless appealed (Educ. Law § 4404[1]).

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). The opposing party is entitled to respond to an appeal or cross appeal in an answer (8 NYCRR 279.5). The SRO conducts an impartial review of the IHO's findings conclusions and decision and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). The SRO must ensure that a final decision is reached in the review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.514[c]; 8 NYCRR 200.5[k][2]).

### **III. Facts and Procedural History**

The student has received a diagnosis of autism, and the hearing record shows that during the 2009-10 school year, he attended the Rebecca school<sup>1</sup> and received private home-based occupational therapy (OT), private language/play therapy provided by a speech-language

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<sup>1</sup> The Rebecca School is a nonpublic school that has not been approved by the Commissioner of Education as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

pathologist/social worker, and private home-based counseling services provided by a psychologist (Tr. pp. 208, 210-12, 620, 632-33, 646, 648-49; Parent Ex. K at p. 1).<sup>2</sup> In January 2010, the student began attending a 10:1+6 class at Celebrate the Children (CTC) - a private school, with a 1:1 aide and received OT, physical therapy (PT), speech-language therapy, counseling, and sessions of instruction using the "Floortime" approach (Dist. Ex. 9 at pp. 1, 9; Parent Exs. E at p. 1; G at p. 1; BB at p. 1). Also in January 2010, the student began receiving one session per week of clinic-based OT services (Dist. Ex. 7).

On May 21, 2010, the CSE convened to conduct the student's annual review and develop the student's IEP for the 2010-11 school year (Dist. Ex. 4 at pp. 1-2).<sup>3</sup> As a result of the CSE meeting, the CSE prepared an IEP recommending placement of the student in a 12-month program consisting of a 6:1+1 special class with full-time 1:1 crisis paraprofessional services, and related services of counseling, OT, PT, and speech-language therapy (id. at pp. 1, 22).

In a letter dated June 8, 2010 to the parents, the district summarized the May 2010 CSE's recommendations and notified them of the particular school to which the student was assigned for the 2010-11 school year (Dist. Ex. 10).

In a letter dated June 18, 2010, the student's mother informed the district that she was attempting to arrange a visit at the assigned school and further stated that "in an abundance of caution," in the event that the assigned school was not appropriate and the district failed to offer an appropriate placement to the student, she would continue the student's placement at CTC and seek tuition reimbursement (Parent Ex. N at p. 1).

In a letter dated June 22, 2010, the student's mother informed the district that she had visited the particular school and found it to be inappropriate for the student because, among other reasons, it did not offer sufficient 1:1 instruction, the sensory gym was inadequate, the functional grouping of the students in the assigned class was inappropriate, and providing lunch in a large group setting would be inappropriate for the student (Parent Ex. M at p. 1). The letter also stated that the student's mother intended to continue to unilaterally place the student at CTC and would seek tuition reimbursement from the district (id.).

In a letter dated June 28, 2010, the student's mother informed the district that she had received a recommended notice of placement from the district regarding the location of the assigned school for the student's summer program, but was unable to visit the assigned school for the summer because it had not yet opened and that absent any opportunity to view the site, she intended to continue the student's unilateral placement at CTC and would seek tuition reimbursement (Parent Ex. L).

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<sup>2</sup> The student's eligibility for special education programs and related services as a student with autism is not in dispute in this appeal (Parent Ex. BB at p. 1; Dist. Ex. 4 at p. 1; 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

<sup>3</sup> The hearing record contains duplicative exhibits. For purposes of this decision, only district exhibits were cited in instances where both district and parent exhibits were identical. I remind the IHO that it is her responsibility to exclude evidence that is irrelevant, immaterial, unreliable, or unduly repetitious (see 8 NYCRR 200.5[j][3][xii][c]).

On July 2, 2010, the parents filed a due process complaint notice alleging, among other things, that the May 2010 IEP was procedurally and substantively inappropriate for the student and failed to offer the student a free appropriate public education (FAPE) (Dist. Ex. 1). The parents requested services under pendency (stay put) and, for relief, they sought an order directing the district to pay for the student's tuition at CTC with a 1:1 aide for the 2010-11 school year, as well as to provide transportation and out-of-school related services (id. at p. 5).

On July 7 and August 4, 2010, the director of CCC conducted a private speech, language, and relatedness evaluation of the student (Tr. p. 247; Parent Ex. BB). At the end of August, 2010, the student attended CCC for two weeks (Tr. pp. 310-11).<sup>4</sup>

An impartial hearing commenced on August 4, 2010, during which the parties discussed the student's pendency placement (Tr. pp. 1, 4-17). The impartial hearing continued on August 9, 2010, during which the parties again discussed the student's pendency placement and set a schedule to submit briefs to the IHO on the issue (Tr. pp. 20, 22-35).

In September 2010, the student's educational program included attending CTC in a 10:1+6 special class two days per week (Tr. p. 313; Parent Ex. E at p. 2). On two other days each week, the student received 6 1/2 hours of home-based speech-language therapy and nine hours of home and community-based "support" services (Tr. pp. 313-14). One day per week, the student attended CCC and received four hours of speech-language therapy, two hours of instruction using the Relationship Development Intervention (RDI) approach, and one hour of services provided by a private psychologist (Tr. pp. 251, 314).<sup>5</sup> The student also attended a once weekly 1 1/2 hour social skills group affiliated with a different private school (Tr. pp. 623, 632-33).

#### **A. Amended Due Process Complaint Notice**

On October 13, 2010, the parents filed an amended due process complaint notice that was similar to their initial due process complaint notice dated July 2010 (compare Dist. Ex. 1, with Dist. Ex. 3). The amended due process complaint notice withdrew the parents' request for pendency services and added claims that the health and physical, social/emotional, and academic management needs in the May 2010 IEP were not appropriate and that the IEP offered insufficient related services (compare Dist. Ex. 1 at pp. 1-3, with Dist. Ex. 3 pp. 1-3; see Tr. p. 45).

Both the July and October 2010 due process complaint notices also included claims, among others, that the district failed to adequately evaluate the student and relied on teacher estimates that were insufficient resulting in inaccurate present levels of performance on the IEP (Dist. Exs. 1 at pp. 2-4; 3 at pp. 1-4). The parents also alleged that the CSE process was deficient because the district violated the parents' right to participate in the formulation of the student's IEP as the CSE failed to consider the student's current private program as a potential placement, and that the

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<sup>4</sup> CCC has not been approved by the Commissioner of Education as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

<sup>5</sup> In November 2010, the director of CCC conducted an observation of the student at CTC and reached the conclusion that CTC was not an appropriate placement for the student (Tr. p. 315). From January 2011 through June 2011, the student attended CCC three days per week and continued to receive home and community-based services two days per week (Tr. p. 317).

district predetermined the student's program by selecting the 6:1+1 special class placement outside of the CSE meeting (Dist. Exs. 1 at pp. 2-4; 3 at pp. 1-4). Additionally, the parents alleged that the goals and objectives in the May 2010 IEP were not reviewed during the CSE meeting and, further, that the goals were inappropriate to meet the student's needs and were too "sparse, vague, and ambiguous" to be objectively measured (*id.*). The parents contended that although the May 2010 IEP stated that a behavioral intervention plan (BIP) was prepared, no copy of the BIP was provided to the parents (*id.*). Next, the parents asserted that the district's recommended 6:1+1 special class placement on the IEP was inappropriate to meet student's needs because it would not provide sufficient intensive educational and behavioral supports to avoid regression and for the student to make educational and behavioral gains, and that the CSE failed to consider full continuum of placement options (*id.*). The parents also claimed that the particular public school to which the student had been assigned would have been inappropriate because it could not offer intensive 1:1 instruction, an adequately trained staff, a lunch setting that would not be overwhelming, and an adequate sensory gym or suitable functional grouping of the student with peers (*id.*). Lastly, the parents asserted that their unilateral program, including CTC, was appropriate for the student and that no equitable considerations limited their request for tuition reimbursement (Dist. Exs. 1 at pp. 2, 6; 3 at pp. 1, 5).

### **B. Impartial Hearing Officer Decision**

The impartial hearing continued on March 24, 2011 and concluded on November 2, 2011, after a total of eight hearing dates (Tr. pp. 1, 20, 37, 51, 203, 243, 420, 541). The hearing record reflects that during the impartial hearing, the parents withdrew the student from CTC following the 2010-11 winter school vacation, and in January 2011, increased his attendance at CCC to approximately 35 hours per week (Tr. pp. 315-18). Thereafter, upon consent of both parties, the parents withdrew their request for tuition reimbursement at CTC and instead requested that the district pay the cost of the student's unilateral, center-based program at CCC, together with the other services obtained by the parents (Tr. pp. 45-47).

In a decision dated January 10, 2012, the IHO noted that the parents had withdrawn their request for pendency, had "made it clear at the close of the hearing that they [were] not seeking reimbursement for the cost of [OT] and [PT]," and that they had altered their demand from seeking the cost of tuition at CTC to the cost of tuition at CCC (IHO Decision at pp. 1-2, 5). The IHO found that the district failed to offer the student a FAPE during the 2010-11 school year because the May 2010 CSE had insufficient evaluative information in that the district's most recent evaluation was conducted in 2007 and the CSE relied upon teacher estimates which, without more, were an insufficient basis for developing an IEP (*id.* at p. 3). The IHO also found that the description of the student's present levels of performance and learning characteristics in the May 2010 IEP were inaccurate (*id.*). The IHO also found that the goals and objectives in the student's IEP were not appropriate in that they were too challenging for the student and would have lead to frustration and "possibly resulted in increased rates of aggressive and inappropriate behavior" (*id.* at pp. 3-4). The IHO also found that the district had failed to show that the recommended 6:1+1 special class placement would have provided sufficient 1:1 instruction because although the 1:1 paraprofessional provided for in the IEP would have been sufficient to address the student's behavior needs, it would not have provided sufficient instructional support (*id.* at p. 4).

The IHO also found that the parents' unilateral program was appropriate, including CCC, and was "tailor-made" to meet the student's unique needs (IHO Decision at p. 5). Lastly, the IHO found that the parents had cooperated with the CSE and provided appropriate notices such that equitable considerations did not weigh against reimbursement (*id.*). The IHO ordered the district to reimburse the parents for the cost of the student's 2010-11 educational program including services provided by CCC, as well as speech-language therapy, psychotherapy, "educational services," and transportation expenses (*id.* at pp. 5-6).

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

The district appeals. Regarding the provision of a FAPE to the student, the district maintains that the CSE used recent, relevant, and sufficient documentation to develop the May 2010 IEP; it argues that the present levels of performance in the IEP were accurate and sufficient to describe the student's needs and abilities and that the use of teacher estimates did not violate the IDEA or State regulations. The district also argues that the IHO erred in determining that the goals and objectives in the IEP were inappropriate because the hearing record shows that "many" of the goals were not too challenging, that goals were added during the CSE meeting at the parents' request, and that the goals, as a whole, addressed all of the student's needs. The district argues that the BIP developed by the May 2010 CSE was appropriate and was included as a part of the IEP. The district also argues that the IHO erred in finding that the 6:1+1 special class placement recommended in the IEP was inappropriate because the 6:1+1 special class placement with a 1:1 paraprofessional and related services would have provided sufficient support for the student. The district also argues that the special class placement would have provided the student with needed socialization opportunities. Moreover, the district argues that the assigned school was appropriate because the staff at the school was adequately trained, there was an appropriate sensory room, and the student would have been appropriately grouped with other students in the class.

With regard to the parents' unilateral program, the district argues that the IHO erred in finding it was appropriate because the academic services at CCC were insufficient, CCC did not provide all needed related services, it lacked sufficient opportunities for interaction with other students, and some of the services the IHO ordered reimbursement for were not "educational services." Lastly, the district argues that equitable considerations do not favor reimbursement for the parents because they did not provide notice of their decision to move the student from CTC to CCC, their stated reasons for rejecting the district's recommended program were disingenuous, and they never seriously considered the public school placement. The district requests that the IHO's decision be overturned.

The parents submitted an answer in which they request that the IHO's decision be upheld in its entirety and also request that the petition be dismissed because it failed to contain "allegations in this appeal related to the amended hearing request." With respect to the district's claim that it offered the student a FAPE during the 2010-11 school year, the parents maintain, in part, that the IHO correctly determined that the CSE failed to timely evaluate the student and relied on teacher estimates to determine the present levels of performance in the IEP, rendering them inaccurate, and the annual goals were inappropriate. They argue that the district failed to document the student's academic management needs and that those identified were inappropriate. Specific to the goals in the IEP, the parents allege that the goals were too challenging and would frustrate the student, the mastery criteria were incorrect and did not aim for independent skills, and that the

goals missed some of the student's needs in "thinking objectives," activities of daily living (ADL) skills, and language skills. The parents argue that the BIP was inappropriate because it was developed without first conducting a functional behavioral assessment (FBA), it failed to describe the student's behaviors, and it failed to include strategies for addressing those behaviors. The parents also argue that the IHO properly found that the student's needs for individualized instruction could not have been met in a 6:1+1 special class, that the 1:1 behavioral paraprofessional would not have been sufficient, and that the proposed program was not reasonably calculated to confer educational benefits to the student. Regarding the assigned school, the parents argue that it was inappropriate.

The parents next argue that the IHO properly determined that the parents' unilateral program was appropriate because CCC, in combination with the other services obtained by the parents, was appropriate and met all of the student's needs. Lastly, the parents argue that equitable considerations favor the parents' claim for reimbursement.

The district submitted a reply contending that it had properly appealed from the IHO's decision.

## **V. Applicable Standards**

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally *Forest Grove v. T.A.*, 129 S. Ct. 2484, 2491 [2009]; *Bd. of Educ. v. Rowley*, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (*Rowley*, 458 U.S. at 206-07; *Cerra v. Pawling Cent. Sch. Dist.*, 427 F.3d 186, 192 [2d Cir. 2005]). While school districts are required to comply with all IDEA procedures, not all procedural errors render an IEP legally inadequate under the IDEA (*A.C. v. Bd. of Educ.*, 553 F.3d 165, 172 [2d Cir. 2009]; *Grim v. Rhinebeck Cent. Sch. Dist.*, 346 F.3d 377, 381 [2d Cir. 2003]; *Perricelli v. Carmel Cent. Sch. Dist.*, 2007 WL 465211, at \*10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if a procedural violation is alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 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 IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]).

A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 130 [2d Cir. 1998]; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at \*15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 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 CFR 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 CFR 300.320[a][2]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (34 CFR 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).

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

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding



the appropriateness of such placement (Educ. Law § 4404[1][c]; see M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at \*7 [S.D.N.Y. Aug. 27, 2010]).

## **VI. Discussion**

### **A. Scope of Review**

I will initially address two threshold issues regarding the scope of the appeal. First, although the parents set out substantive and procedural arguments in their answer regarding the provision of a FAPE that were not ruled on by the IHO, the parents do not cross-appeal the IHO's failure to rule on any of these claims. State regulations provide that "[a] respondent who wishes to seek review of an IHO's decision may cross-appeal from all or a portion of the decision by setting forth the cross-appeal in respondent's answer" (8 NYCRR 279.4[b]). Although the parents assert in their answer reasons, in addition to those delineated in the IHO's January 10, 2012 decision, to support their claim that the student was denied a FAPE, a review of the parents' verified answer indicates that the parents did not cross-appeal from the IHO's decision (see Answer). Raising additional issues in a respondent's answer without cross-appeal is not authorized by State Regulations and, in effect, deprives the petitioner of the opportunity to file responsive papers on the merits because State Regulations do not permit pleadings other than a petition and an answer except for a reply to "any procedural defenses interposed by respondent or to any additional documentary evidence served with the answer" (8 NYCRR 279.6). In essence, a party who fails to obtain a favorable ruling with respect to an issue submitted to an IHO is bound by that ruling unless the party either asserts an appeal or interposes a cross-appeal. Accordingly, regarding the first prong of the Burlington/Carter test, the only issues to be considered on appeal in this case concern whether the IHO erred in finding that the student was denied a FAPE based upon her findings regarding whether the student was properly evaluated, the adequacy of the present levels of performance on the IEP, the adequacy of the goals and objectives on the IEP, and the adequacy of the May 2010 CSE's recommendation to place the student in a 6:1+1 special class with a 1:1 paraprofessional (see Application of the Dep't of Educ., Appeal No. 11-156; Application of the Dep't of Educ., Appeal No. 11-127).<sup>6</sup>

Next, the parents contend that the district's petition should be dismissed because "both the initial and amended hearing requests sought reimbursement for services provided [by CCC]" and the district "has not issued any allegations in this appeal related to the amended hearing request" (Answer ¶ 2). However, neither of the parents' due process complaint notices requested reimbursement for CCC (see Dist. Exs. 1 at p. 6; 3 at p. 5). Furthermore, the petition contains numerous allegations regarding CCC (see Pet. ¶¶ 47-50). In any event, I find that the district's petition complies with the requirements of 8 NYCRR 279.4 in that it clearly indicates reasons for challenging the IHO's decision, identifies the findings, conclusions and orders to which exceptions are taken, and indicates what relief should be granted by an SRO (8 NYCRR 279.4[a]). Therefore, I decline to dismiss the petition on this basis.

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<sup>6</sup> Among the issues included in the parents' answer that were not ruled upon by the IHO and have not been cross-appealed, are arguments concerning the academic management needs on the May 2010 IEP, arguments concerning the BIP, and arguments concerning the assigned school.

## **B. May 2010 IEP**

### **1. Sufficiency of Evaluative Data and Present Levels of Performance**

A district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 CFR 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree but at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; see 34 CFR 300.303[b][1]-[2]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). Any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1][ii]; see S.F. v. New York City Dep't of Educ., 2011 WL 5419847, at \*12 [S.D.N.Y. Nov. 9, 2011]; Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]; see Application of the Dep't of Educ., Appeal No. 07-018).

The hearing record shows that the most recent evaluation of the student prior to the May 2010 CSE meeting occurred in February 2007 (Dist. Ex. 6). Here, the district's failure to conduct a reevaluations after three years had elapsed or to obtain the parents' agreement to dispense with a reevaluation constitutes a violation of federal and State regulations. Such a violation constitutes a denial of a FAPE if the 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 (see Luo v Baldwin Union Free Sch. Dist., 2012 WL 728173, at \*4-\*5 [E.D.N.Y. Mar. 6, 2012]; Application of the Bd. of Educ., Appeal No. 11-129).

. As a threshold matter, I note that although State regulations require that an IEP report the student's present levels of academic achievement and functional performance, State regulations do not mandate precisely where that information must come from (see 8 NYCRR 200.4[d][2][i]; Application of a Student with a Disability, Appeal No. 11-043). Nor is there any support for the proposition that "teacher estimates" or "teacher observations" cannot, as the IHO suggests, be relied upon as a source of information for developing a student's IEP or determining the student's skill levels (S.F., 2011 WL 5419847, at \*10). Moreover, having considered the arguments asserted by both parties and upon an independent review of the hearing record, I find that the evidence does not support the IHO's conclusion that the student was denied a FAPE due to

noncompliance with the reevaluation procedures or inaccurate present levels of performance in the IEP. Rather, as described below, the CSE had sufficient information to formulate the student's present levels of performance in the May 2010 IEP, which contrary to the IHO's finding, consisted of more than merely "teacher estimates" (*id.*).

Attendees present at the May 2010 CSE meeting included staff from CTC who participated in the meeting by telephone including the executive director of CTC, the student's 1:1 paraprofessional, a speech therapist, a physical therapist, and an occupational therapist (Tr. p. 69; Dist. Ex. 4 at p. 2). The district's school psychologist testified that the attendees had the opportunity to participate in the student's review during the entire meeting (Tr. pp. 65, 67-70). According to the hearing record, the May 2010 CSE reviewed a February 2007 psychological evaluation report, a March 2010 OT report, a May 2010 counseling progress report, and a May 2010 private school progress report (Tr. pp. 70-72; Dist. Exs. 6-9).<sup>7</sup>

The February 2007 psychological report indicated that the student had from a young age exhibited global developmental delays and "symptoms associated with [an] [a]utism [s]pectrum [d]isorder" (Dist. Ex. 6 at p. 1). During the February 2007 evaluation, the student exhibited "fidgety and easily distractible" behaviors and required redirection and encouragement to focus on presented tasks (*id.* at p. 2). The student's verbal responses to the evaluator were "off-topic, perseverative, and representative of his preferred subjects of interest," and his spontaneous verbalizations were "often scripted and unintelligible" (*id.*). Although an administration of the Wechsler Intelligence Scale for Children, Fourth Edition (WISC-IV) was attempted, completion of enough subtests to generate a scorable record was not achieved (*id.* at p. 3). The evaluator opined that the student's inability to complete many of the WISC-IV subtests was a reflection of his limited auditory processing skills and lack of understanding of the task (*id.*). Qualitatively, the evaluator described many of the student's responses to test items as "scripted and unrelated to the question," and although he attempted to cooperate with the evaluator's requests, the student's ability to perform in the manner the WISC-IV required was limited (*id.* at pp. 3, 5).

The student's mother provided responses to the Vineland Adaptive Behavior Scales-Second Edition (Vineland-II), which yielded scores within the low range of adaptive functioning in the areas of communication, daily living, socialization, and motor skills (Dist. Ex. 6 at pp. 3-4). The student's mother also completed the Temperamental and Atypical Behavior Scale (TABS) to provide the evaluator with a qualitative assessment of the student's behaviors, results of which indicated that the student was "often on the go," and could become easily frustrated, and over stimulated by too much noise, light, or touch (*id.* at pp. 5-6). The evaluator indicated that conducting an alternate test of cognitive ability that relied on visual or non-verbal tasks may be more instructive to assess the student's "true" cognitive functioning (*id.* at p. 5). The evaluator further indicated that the student would benefit from educational services that provided opportunities for creativity, symbolic thinking, and pretend play, while building upon the student's interests and motivations (*id.* at p. 6). Continuation of the student's OT and speech-language therapy services was recommended (*id.*).

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<sup>7</sup> The school psychologist testified that the CSE also considered the 2009-10 IEP, which is not included in the hearing record (Tr. p. 72).

The March 2010 clinic-based OT report indicated that the student exhibited deficits in fine and gross motor skills, bilateral motor coordination, and self-care skills (Dist. Ex. 7). According to the occupational therapist, the student did not exhibit hand preference and frequently switched hands when performing fine motor tasks (id.). The student exhibited difficulty crossing midline, which was a skill required for activities such as handwriting and ADLs (id.). Regarding the student's fine motor skills, the occupational therapist reported that the student was able to write the capital letter of his first name, identify most of the letters in his name by sight, write a vertical, horizontal and diagonal line, and draw a square and circle approximation (id.). According to the occupational therapist, the student demonstrated very little isolated finger movement, did not hold a pencil with an appropriate grasp, and fatigued quickly when using his hands and arms for most activities (id.). The student's gross motor deficits were most often related to decreased strength and endurance, and difficulty crossing midline (id.). The occupational therapist indicated in a report that was incorporated into the student's IEP that the student was "semi-independent" in ADLs and required assistance with dressing activities (Dist. Ex. 4 at p. 19). The report provided goals and objectives developed to improve the student's fine motor skills, upper body movement and strength, and bilateral coordination skills, which were used to develop the student's IEP (id.).

The May 2010 counseling report indicated that the student received one 30-minute session of group counseling, focusing on improving motor and social skills by using teams to complete physical tasks (Dist. Ex. 8). The psychologist reported that the student often hesitated to join the group, but participated with physical and verbal prompting (id.). At times, the student was observed to become frustrated due to multistep tasks that overwhelmed him, and he exhibited agitation by high levels of auditory and visual stimulation (id.). The psychologist indicated that the student was often provided an alternate activity to complete in a quiet area of the room, but that the student preferred a "break" away from peers (id.). The report described the student's participation in the "Peer Relationship Cycle," which was a group that discussed social relationships, entering a group, and social rules (id.). The psychologist indicated that the student demonstrated difficulty participating, due to the complexity of the topic, or due to becoming overwhelmed by auditory and visual stimulation (id.). According to the psychologist, the student benefited from sensory regulating activities both in and outside the classroom (id.).

The May 2010 progress report from CTC indicated that the student attended his class with a 1:1 aide and nine other students (Dist. Ex. 9 at p. 1). At the school, the student participated in both group and individualized lessons, OT, PT, speech-language therapy, counseling, and Floortime sessions (id.). Regarding sensory skills, the report indicated that the student enjoyed movement and spinning activities such as the swing and trampoline, which assisted the student in regulating and feeling his body (id. at p. 2). The report reflected that movement activities resulted in increased regulation and ability to engage in academic activities when followed up with heavy work, as well as deep pressure experiences which he "craved" (id.). The student reportedly exhibited a poor sense of where his body is in space, and how to move it to perform certain tasks (id.). The report also noted that the student exhibited both under and over reactions to auditory stimuli, and his limited diet may have been due to his difficulty processing various tastes and textures (id. at pp. 2-3). With challenging activities, the student required sensory supports to keep him engaged, and he often took short breaks before returning to the activity (id. at p. 9). The report indicated that the student became dysregulated throughout the school day, due to his need for increased sensory input, his decreased ability to filter insignificant auditory information, or when he avoided specific tasks (id. at p. 3). When dysregulated, the student typically sought out sensory

activities, and he responded well to regular sensory diet breaks consisting of movement, heavy work and deep pressure (id.).

In the motor skills area, the progress report indicated that the student exhibited difficulty spontaneously crossing midline, coordinating body movements for simple gross motor tasks, executing novel motor activities, and with body awareness and motor planning (Dist. Ex. 9 at pp. 3-4, 6). The student demonstrated poor posture, weak upper body and core strength, and overall decreased endurance and range of motion (id. at p. 6). He also displayed difficulty disassociating his eye and head movements, and consistently sorting objects by one attribute (id. at p. 4). The student spontaneously built block towers, but did not exhibit the ability to copy a tower built in front of him (id.). He did not exhibit a consistently dominant hand for handwriting purposes, did not use a consistent grip on writing utensils, and was "extremely resistant to handwriting," due to his level of motor skills and visual spatial skills (id. at pp. 4-5). Although the student independently navigated throughout the school environment and classroom, he required assistance for many ADL tasks throughout the day, such as opening containers, zipping his coat, and retrieving items for class (id. at pp. 5-6). The report indicated that the student's OT services, provided individually and in a group, incorporated into the classroom oculo-motor, visual thinking, motor planning, and sensory-based regulation exercises (id. at p. 5). The physical therapist reported that the student exhibited some skills during PT sessions such as dribbling a basketball, playing catch with the physical therapist, and jumping forward (id. at p. 6).

In the May 2010 progress report, the student's speech-language therapy provider indicated that addressing the student's regulatory and sensory needs was essential to accessing his higher-level communicative abilities, and that therapy focused on improving his receptive and expressive language skills and increasing the use of language for pragmatic functions (Dist. Ex. 9 at p. 6). Regarding the student's language skills, the progress report indicated that when he was regulated, the student demonstrated the ability to follow simple two step unrelated directions with moderate verbal prompting; understanding of simple yes/no, what, where and who questions; and inconsistently responded accurately to those same questions with minimal scaffolding (id.). The student exhibited the ability to use language to protest, label, request, call attention to, comment and respond, in phrases up to six words in length (id.). The report described the student's language as "fragmented" in that he struggled with exchanging turns, maintaining a topic, accepting others ideas, and repairing communication breakdowns (id.). When the student was dysregulated, his language skills reduced to "scripts" and single word utterances, and he exhibited a limited ability to maintain interpersonal engagement and generate ideas (id.).

Academically, the progress report indicated that in mathematics the student was working on improving 1:1 correspondence skills using manipulatives and that with support, he worked on identifying "more" and "less" with manipulatives, extended simple patterns, crossed midline on a grid, and identified written numbers up to 20 (Dist. Ex. 9 at p. 6). With "full support," the student demonstrated the ability to match shapes and coins; correctly identifying a penny, and working on quarters, dimes and nickels (id.). In language arts, with support the student imitated letter sounds, listened to stories and answered questions, and was beginning to recognize words and sounds that rhyme (id.). The progress report indicated that in science the student was exploring concepts such as living and nonliving things, using his five senses, and grouping objects by shape and size (id.). According to the progress report, in the classroom the student "works on an independent schedule," although he joined the class throughout the day when appropriate (id. at p. 9). The progress report

noted that the student had developed relationships with a few peers that he often chose to play with and with support, would ask them to join him (id.). He exhibited the ability to maintain engagement with his peers during motivating activities (id.).

The progress report also contained descriptions of the student's progress and skills within each of the six the "Functional Developmental Levels" of the Floortime program (Dist. Ex. 9 at pp. 7-8). The report indicated that the student received daily Floortime sessions focusing on maintaining his focus and interactions and facilitated by his 1:1 aide both in small group and individual settings (id. at p. 7). Skills identified within the various levels included the ability to maintain regulation in a variety of settings, maintain longer periods of regulation, exhibit strong engagement with adults, remember faces and interactions, initiate interactions with familiar staff, maintain back and forth interactions for up to 10 "circles," demonstrate intentional and purposeful interactions, use prior knowledge and thought processes to solve problems with support, and exhibit symbolic play (id.). When at his "lowest capacity," the student exhibited crying, hitting, shouting, pacing, and running back and forth behaviors; interacted with staff rather than peers; failed to sustain attention and interactions; and exhibited difficulty communicating intent (id.).

The district's school psychologist who participated at the CSE meeting testified that the present levels of performance contained in the May 2010 IEP were derived from a variety of sources including the documents described above, the student's then-current providers who participated at the meeting, and the student's mother (Tr. pp. 68, 70-72, 88-89, 105-06; see Dist. Ex. 4 at p. 2). The school psychologist stated that she drafted the present levels of academic performance prior to the meeting and then read the draft page aloud during the meeting, at which time "all members participated in modifying the draft" to reflect the student's current level of functioning (Tr. p. 106). The school psychologist testified that the student's present levels of performance appeared to be correct, based upon the information the CSE obtained from CTC (Tr. pp. 85-86). The student's mother testified that she had a full opportunity to participate at the CSE meeting, and that CTC contributed information about what the student's skills were at school (Tr. pp. 688-89). She further testified that she agreed with the descriptions of the student's academic skills provided by his private school teachers and therapists at the time of the CSE meeting (Tr. pp. 688-90).

According to the description of the student's present levels of performance contained in the May 2010 IEP, the student's then-current teachers from CTC reported that with supports including teacher assistance, visual aides, and manipulatives, the student imitated letter sounds; answered who, what, and where questions; described pictures using "structure words;" extended simple patterns; crossed midline on a grid; matched shapes and coins; identified written numbers up to 20; and worked on the concepts of "more" and "less," and 1:1 correspondence (Dist. Ex. 4 at p. 3). The IEP indicated that the student listened to stories and answered questions, and was beginning to recognize words and sounds that rhyme (id.). According to the IEP, the student was "extremely resistant" to completing handwriting tasks, had not established hand dominance, and did not exhibit a consistent pencil grip (id.). Teacher estimates of the student's reading and mathematics skills were at a kindergarten level (id.). The IEP indicated the student needed the use of positive language, classroom breaks, positive reinforcement to improve self-esteem, and modeling (id.). The IEP further indicated that the student benefited from engaging in visual/spatial tasks including visual tracking, sequencing,

and body awareness activities to help the student "remain organized and available" for academics (id. at p. 8).

In the area of social/emotional performance, the May 2010 IEP indicated that based on the student's then-current counselor's report, the student often hesitated before joining group activities, but with verbal and physical prompting would participate (Dist. Ex. 4 at p. 8). The IEP noted that at times the student became frustrated when feeling overwhelmed and agitated by high levels of auditory and visual stimulation; in these situations preferring "a break away" from peers (id.). The IEP reflected that within group settings, the student exhibited social awareness and "a love of people;" strengths used to promote peer engagement (id.). The student required encouragement to remain focused and connected during play and at times, appeared engaged and connected to others (id.). Further, according to the IEP, at times the student exhibited behaviors such as becoming visibly upset, crying, hitting himself and others, shouting, pacing, and running back and forth (id.). The student demonstrated strong engagement with adults, initiated interactions with familiar adults, and often spoke to adults rather than attempting to interact with peers (id.). His interactions with staff often included scripted phrases to "open circles of communication" and at times, he demonstrated the ability to maintain up to 10 circles of intentional, purposeful interactions (id.). The IEP indicated that at other times, the student exhibited difficulty communicating his intent, and in challenging situations, lost attention and did not sustain interactions (id.). The May 2010 CSE determined that the student's behavior seriously interfered with instruction and that he required a 1:1 paraprofessional (id.). In addition to the 1:1 paraprofessional, the IEP identified the special education teacher, the speech-language therapist, the physical therapist, the occupational therapist, and the counselor as personnel responsible for providing the student with behavioral support (id.).<sup>8</sup> The IEP also indicated that the student required access to sensory motor breaks to help him maintain a regulated state (id.).

The description of the student's present level of physical development in the May 2010 IEP indicated that the student was "medically healthy" and that he had received a diagnosis of autism (Dist. Ex. 4 at p. 9). At the time of the IEP, the student was administered medication to, among other things, help him "focus his attention, attend to tasks, and organize himself" (id.). The student exhibited both under and over reactions to various sensory stimuli, he avoided unpredictable noises, and his food repertoire was limited (id.). Additionally, the student exhibited difficulty spontaneously crossing midline, disassociating his eye and head movements, and showing consistent hand dominance (id.). The IEP indicated that continued OT and PT was warranted and also provided the student with adapted physical education (id.).

Insofar as the director of CCC (director) provided extensive testimony about the evaluation of the student she conducted in summer 2010 and the content of the student's subsequent program CCC provided to the student, as explained below, I do not find that information renders the information before the May 2010 CSE invalid or inaccurate (see Tr. pp. 271-412, 424-69).<sup>9</sup> The

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<sup>8</sup> The hearing record reflects that the May 2010 CSE also developed the student's BIP (Tr. pp. 73, 93; Dist. Exs. 4 at pp. 8, 23; 5 at p. 2).

<sup>9</sup> I note that the director's evaluation of the student occurred subsequent to the development of the May 2010 IEP, and there is no indication in the hearing record that the parents provided the evaluation report to the district outside of the context of the impartial hearing (compare Dist. Ex. 4, with Parent Ex. BB).

director reviewed the student's May 2010 IEP at the time she evaluated the student in July 2010 (Tr. pp. 275, 277, 363-65; Parent Ex. BB at p. 1). In describing the basis for her opinion that the May 2010 IEP inaccurately described the student, the director testified that based in part on information contained in the IEP, she initially planned "for testing that was much more complicated, much more complex," and began her assessment at an eight year old level; however, when she attempted those tasks, the student exhibited aggressive and inappropriate behaviors (Tr. pp. 276-78). According to the director, the student's behaviors de-escalated when she reduced the difficulty level of tasks, the student exhibited good focus skills, and he responded within an appropriate amount of time (Tr. p. 279). The hearing record does not support, upon review of the present levels of academic performance in the IEP described above, any indication that at the time of the CSE meeting the student's skills were above a pre-kindergarten to kindergarten level, which is where the May 2010 CSE placed the student's reading decoding and math computations skills (Tr. pp. 115-17; Dist. Ex. 4 at p. 3).

Similarly, the annual goals in the IEP indicated that the student, in one year's time, would acquire skills such as identifying same and different shapes, primary colors, letters, and three letter sight words; understanding the concepts of more and less, 1:1 correspondence, and sound-symbol relationships; and recognizing letter-sound relationships for consonants, which CTC participants at the May 2010 CSE meeting considered to be kindergarten level skills (Tr. pp. 688-91; Dist. Ex. 4 at p. 3; see Tr. pp. 90-91, 113-14, 700; Dist. Ex. 5 at p. 1). Therefore, it is unclear why the director began her assessment of the student at an eight year old level, and not surprising that the student responded by demonstrating inappropriate behaviors (Tr. pp. 276-78; see Dist. Ex. 4 at p. 8). Although the director stated that in May 2010, the student's decoding and mathematics skills were not at a kindergarten level, at the time of her summer 2010 evaluation, she estimated the student's academic skills to be at a pre-kindergarten level (Tr. pp. 368-69). Given the allowance for teacher support for the skills described in the IEP, and the student's age, and the severity of his disability, I do not find the difference between estimating the student's skills at a pre-kindergarten level versus a kindergarten level to result in inaccurate academic present levels of performance on the IEP to the extent that it would fail to provide information sufficient to guide the student's instruction or deny the student of a FAPE. Additionally, a comparison of the director's testimony and the academic present levels of performance show that the director evaluated and subsequently addressed needs similar to those identified by the student's private school providers at the CSE meeting and reflected in the IEP (compare Tr. pp. 365-68, and Parent Ex. BB at pp. 5-7, with Dist. Exs. 4 at p. 3; 7; 9 at p. 4-7).

I note that the director also expressed her view that the academic performance levels contained in the May 2010 IEP did not accurately reflect the student's abilities at the time of the meeting, based upon her review of the IEP and her evaluation and subsequent work with the student (Tr. pp. 364-65).<sup>10</sup> However, based upon the foregoing, I find that her viewpoints represented what may be described as a genuine difference of opinion regarding the best way to instruct this student and address his complex needs, but her views were rendered after the CSE meeting and do not overcome the fact that the district had sufficient information relative to the

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<sup>10</sup> I note that the director did not testify that she disagreed with the descriptions of the student contained in the social/emotional and physical development present levels of performance contained in the May 2010 IEP (Tr. pp. 370-72, 375-76).



student's present levels of academic achievement and functional performance—including the teacher estimates of the student's current skills levels—at the time of the CSE meeting to develop an IEP that reflects the student's special education needs with sufficient accuracy to formulate a program designed to help the student progress (see Tr. pp. 365-68; 34 CFR 300.306[c][2]; 8 NYCRR 200.4[d][2]; see also Application of a Student with a Disability, Appeal No. 11-043; Application of the Dept. of Educ., Appeal No. 11-025; Application of the Dept. of Educ., Appeal No. 10-099; Application of the Dept. of Educ., Appeal No. 08-045).

## **2. Annual Goals and Short-Term Objectives**

Turning next to the IHO's determination that the goals in the May 2010 IEP were not appropriate because many of them were above the student's then-current skill level, an IEP must include a written statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum; and meet each of the student's other educational needs that result from the student's disability (see 20 U.S.C. § 1414[d][1][A][i][II]; 34 CFR 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). Each annual goal shall include the evaluative criteria, evaluation procedures and schedules to be used to measure progress toward meeting the annual goal during the period beginning with placement and ending with the next scheduled review by the committee (8 NYCRR 200.4[d][2][iii][b]; see 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][3]).

In this case, I note that the IHO did not identify which goals in the IEP she believed were too challenging for the student (see IHO Decision at pp. 3-4). The May 2010 IEP included approximately 26 annual goals and 84 short-term objectives to improve the student's skills in the areas of academic readiness and basic reading, mathematics, and writing; comprehension; self-regulation; engagement/relatedness; visual-spatial; self-help; handwriting; gross motor; motor planning; postural control; pragmatic, receptive, and expressive language; and sensory processing—areas of need commensurate with the information reviewed and considered by the May 2010 CSE as discussed above (Dist. Exs. 4 at pp. 4-7, 10-19; 6-9). Specifically, the IEP provided academic annual goals and short-term objectives designed to improve the student's 1:1 correspondence, identifying "more and less," extending simple patterns, crossing midline using a grid, matching shapes and coins, identifying coins, answering "wh" questions, showing understanding of sound symbol relationships, and identifying rhyming words (Dist. Ex. 4 at pp. 4, 7, 10; see Dist. Ex. 9 at p. 7).

The hearing record reflects that some of the annual goals and short-term objectives contained in the May 2010 IEP were prepared in advance of the meeting by the student's then-current teachers and related service providers from CTC, some of the goals were developed during the meeting, and all of the goals were reviewed at the CSE meeting (Tr. pp. 90-91, 113-14, 700; Dist. Ex. 5 at p. 1). The district's school psychologist testified that during the meeting CSE participants were asked if there were any additions or changes to the goals to be made, noting that the student's mother requested the addition of a self-help annual goal, which was added to the IEP (Tr. pp. 90-92; Dist. Ex. 4 at p. 13). The student's mother testified that at the time of the May 2010 CSE meeting, she believed that the annual goals were appropriate for the student (Tr. p. 701; see Dist. Ex. 5 at p. 1).

As stated previously, the student's academic readiness and basic academic skill annual goals and short-term objectives read as a whole, are concepts closely aligned with pre-kindergarten and kindergarten level skills (compare Dist. Ex. 4 at p. 3, with Dist. Ex. 4 at pp. 4, 6-7, 10, 12). While the director testified that some of the student's annual goals may have been too challenging for the student, she did agree with the focus of many of the goals including improving the student's handwriting skills, ADLs and functional skills, ability to match coins, and identify letters and sight words (Tr. pp. 378-81, 393). Although the director testified that upon reading the May 2010 IEP annual goals she would have thought the student's skills to be much "higher," the director acknowledged that the student at times correctly showed 1:1 correspondence, counted to ten, and that he was at a "reading readiness" level—skills targeted in the annual goals and short-term objectives in the IEP (Tr. pp. 327-28; Dist. Ex. 4 at pp. 7, 10, 12). As the May 2010 progress report from CTC indicated that the student's skills in some academic areas were "emerging" and that he required support to exhibit new skills, it was not inappropriate for the May 2010 CSE to include supports within the annual goals and short-term objectives (Dist. Exs. 4 at pp. 4, 6-7, 10, 12; 9 at pp. 5, 7). The director's concern with the student's annual goals was based on the amount of support provided within the goals, and she disagreed with the focus of some of the annual goals given the student's age and her belief that he should be working on what she considered to be more functional skills (see Tr. pp. 376-405). However, the hearing record reflects that the focus of the CTC school-based program—which, in conjunction with other information, the CSE appropriately relied upon at the time of the meeting—was to improve academic and social skills, whereas the focus of the student's CCC program was to improve functional living skills through speech-language therapy, counseling, and instruction using the RDI method in a clinic setting (Tr. p. 314; see Tr. pp. 320-24). That the focus of intervention at CCC differed from that employed by CTC and appropriately utilized by the May 2010 CSE does not result in a denial of a FAPE.

The district asserts that the annual goals and short-term objectives met the student's needs. The IEP included annual goals and short-term objectives to improve the student's ability to problem solve within his environment, imitate a daily functional task without support, improve his ability to make decisions when given a choice of two, answer "why" questions, develop appropriate coping strategies, sort objects by one attribute, locate objects in a "scavenger hunt," and improve his ability to "filter out disorganizing stimuli" to attend to teachers (Dist. Ex. 4 at pp. 13, 17-18). To increase ADL skills, the IEP provided annual goals and short-term objectives including opening packages and containers, pouring liquids, cutting with scissors, zipping zippers, crossing midline to complete tasks, and performing fine motor activities and developing hand dominance to complete ADL tasks (id. at pp. 4, 13, 19). In the area of language, the IEP included annual goals and short-term objectives to increase the student's ability to describe a picture by answering "wh" questions; recall two details from a story heard aloud; use language to call attention, protest, request, and comment; follow one step directions that include three linguistic concepts; follow two step unrelated directions; and respond accurately to yes/no, "what," "where," and "who" questions (id. at pp. 10, 15).

In consideration of the information before the May 2010 CSE and the participation of the attendees at the meeting, the hearing record supports a finding that the IEP included annual goals and short-term objectives appropriate to meet the student's needs. Consequently, I disagree with the IHO's determination that the district denied the student a FAPE on this basis.

### 3. 6:1+1 Special Class Placement

Turning next to a review of the parties' claims regarding the May 2010 CSE's recommended 6:1+1 special class placement, as detailed below, an independent review of the hearing record supports a finding that the May 2010 CSE recommended an appropriate placement for the student for the 2010-11 school year designed to address his academic, language, physical, and social/emotional needs.

The hearing record reflects that during the school years immediately prior to this dispute, the student received instruction—at private schools the parents had selected—in classes with ratios of 8:1+4 or 10:1+6 (Tr. p. 103; Parent Exs. C at pp. 4, 7-8; E at p. 2). At the time of the May 2010 CSE meeting, the student received instruction at CTC in a 10:1+6 special class with the assistance of a 1:1 aide (Dist. Ex. 9 at p. 1; Parent Ex. E at p. 2).

State regulations provide that a 6:1+1 special class placement is designed for students "whose management needs are determined to be highly intensive, and requiring a high degree of individualized attention and intervention" (8 NYCRR 200.6[h][4][ii][a]). The district's school psychologist testified that for the 2010-11 school year, the CSE recommended that the student be placed in a 6:1+1 special class with a full-time 1:1 crisis management paraprofessional and receive related services, due to his significant global delays (Tr. pp. 73-75; Dist. Ex. 4 at pp. 1, 22). The school psychologist testified that the CSE discussed the student's need for individual support in order to make progress, and in consideration of the student's then-current private school program, recommended that within the 6:1+1 special class, he also receive 1:1 paraprofessional support (Tr. p. 73). She further testified that the 6:1+1 special class placement would provide the student with "a very small classroom environment" that, in conjunction with the 1:1 paraprofessional, would address the academic and social/emotional needs identified by the CSE (Tr. pp. 74-77). The school psychologist testified and the student's mother confirmed that no one at the CSE meeting voiced disagreement with the recommendation for a 6:1+1 special class placement recommendation (Tr. pp. 117, 122-23, 705-06). The May 2010 CSE also discussed the student's need for special education services on a 12-month basis and recommended a 12-month program (Dist. Ex. 4 at p. 1). The IEP reflects that the CSE considered and rejected placement of the student in a 12:1+1, 8:1+1, or 6:1+1 special class without a 1:1 paraprofessional, stating that such programs were "insufficiently supportive" to meet the student's needs and that the student required a "smaller student-to-teacher ratio in order to make progress and achieve his IEP goals" (Tr. p. 100; Dist. Ex. 4 at p. 21).

To further support the instruction provided to the student in the 6:1+1 special class, the May 2010 CSE reviewed and discussed the frequency and ratio of the student's related services (Tr. pp. 86-87). The school psychologist testified that after "taking everyone's perspective into account," initiating group speech-language therapy, and modifying the student's counseling services, for the 2010-11 school year the CSE recommended that the student receive four individual and one group session of speech-language therapy per week, two individual sessions of PT per week, two individual sessions of counseling per week, and four individual sessions of OT per week (Dist. Ex. 4 at p. 22). She further testified that no one voiced any disagreement at the meeting regarding the related services recommendations (Tr. p. 87; see Tr. pp. 701-04). In conjunction with the 12 weekly individual related services sessions, the May 2010 IEP provided the student with classroom breaks, use of positive language and reinforcement, modeling, the use

of music and headphones, and access to sensory motor breaks; noting that the student benefitted from engaging in visual/spatial and body awareness activities to help him remain organized and available for academic instruction (Dist. Ex. 4 at pp. 3, 8, 23).

In addition to the supports incorporated into the May 2010 IEP, the hearing record reflects that the assigned school in which the district had intended to implement the IEP provided differentiated instruction according to the needs of a particular student, and that the paraprofessionals in the classroom collaborated with the special education teacher to assist in implementing lesson plans, collecting data on student progress, and promoting generalization (Tr. pp. 135-36, 140-48, 155-56, 160-64, 180-81).<sup>11</sup> Additionally, the hearing record shows that the assigned school implemented a daily positive reinforcement system focused on improving students' "emotional literacy" and social skills, and offered the program modifications and related services recommended in the student's IEP (Tr. pp. 148-49, 151, 160-61, 164-82).

Although in this dispute the parents are seeking reimbursement for a special education program consisting of primarily 1:1 services, at the time of the May 2010 CSE meeting, the student was exhibiting progress in a 10:1+6 classroom with a 1:1 aide—a program the parents initially sought tuition reimbursement for (Dist. Exs. 1; 9). The hearing record does not support a finding that the May 2010 CSE had information before it that the student required more 1:1 instruction than could have been provided in the district's recommended special education program and placement as described above in order to receive a FAPE. Accordingly, I find that the CSE's recommendation of a 6:1+1 special class with the added supports of a 1:1 paraprofessional and the recommended program accommodations and strategies described above was designed to provide the student with sufficient individualized support such that his IEP was reasonably calculated to enable the student to receive educational benefits for the 2010-11 school year (Rowley, 458 U.S. at 206-07; Cerra, 427 F.3d at 192).

## VII. Conclusion

Having determined that the IHO erred in determining that the district denied the student a FAPE for the 2010-11 school year, it is not necessary for me to consider the appropriateness of the parents' unilateral program, or whether the equities support the parents' claim for reimbursement (see MC v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; C.F. v. New York City Dep't of Educ., 2011 WL 5130101, at \*12 [S.D.N.Y. Oct. 28, 2011]; D.D.-S., 2011 WL 3919040, at \*13). I have also considered the parties' remaining contentions and find them unnecessary to address in light of my determinations herein.

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<sup>11</sup> In this case, the parents rejected the IEP and enrolled the student at the private school prior to the time that the district became obligated to implement the student's IEP. Thus, the district was not required to establish that the special education services were provided in conformity with the student's IEP in the proposed classroom. Even assuming for the sake of argument that the student had attended the district's recommended program, the evidence in the hearing record nevertheless shows that the 6:1+1 special class at the assigned district school was capable of providing the student with adequate supports and the evidence does not support the conclusion that the district would have deviated from the student's IEP in a material or substantial way (A.P. v. Woodstock Bd. of Educ., 2010 WL 1049297 [2d Cir. March 23, 2010]; Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 822 [9th Cir. 2007]; see D.D.-S. v. Southold U.F.S.D., 2011 WL 3919040, at \*13 [E.D.N.Y. Sept. 2, 2011]; A.L. 2011 WL 4001074, at \*9).

**THE APPEAL IS SUSTAINED**

**IT IS ORDERED** that the IHO's decision dated January 10, 2012 is modified by reversing those portions which determined that the district failed to offer the student a FAPE for the 2010-11 school year and awarded the parents reimbursement for the parents' program including CCC, related and home-based services, and transportation.

**Dated:**           **Albany, New York**  
                      **April 05, 2012**

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