The University of the State of New York

The State Education Department
State Review Officer
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No. 16-039

Application of a STUDENT WITH A DISABILITY, by his parents, for review of a determination of a hearing officer relating to the provision of educational services by the New York City Department of Education

Appearances:
Mayerson and Associates, attorneys for petitioners, Gary S. Mayerson, Esq. and Maria C. McGinley, Esq., of counsel

Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, Alexander M. Fong, Esq., of counsel

DECISION

I. Introduction

This State-level administrative review is being conducted pursuant to an order of remand issued by the United States District Court for the Southern District of New York (see F.L. v. New York City Dep't of Educ., 2016 WL 3211969 [S.D.N.Y. Jun. 8, 2016]). 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. Petitioners (the parents) previously appealed from the decision of an impartial hearing officer (IHO) which denied their request to be reimbursed for their son's tuition costs at the McCarton School for the 2013-14 school year. The appeal must be dismissed.[1]

[1] The SRO had previously sustained district's cross-appeal from the IHO's determination that it was required to fund the student's after-school services of six hours per week of applied behavior analysis (ABA) and two 45-minute sessions per week of occupational therapy (OT) (Application of a Student with a Disability, Appeal No. 14-125). This issue is not the subject of the court's remand and will not be addressed in this decision.

II. Overview—Administrative Procedures

In a due process proceeding conducted pursuant to the IDEA, the decision of an IHO is binding upon both parties unless appealed (Educ. Law § 4404[1]). A party aggrieved by the decision of an IHO may 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]).

III. Facts and Procedural History

As indicated above, this State-level administrative review is being conducted pursuant to an order of remand issued by the United States District Court for the Southern District of New York (see F.L., 2016 WL 3211969 at *11). The factual and procedural background as it relates to the appeal is discussed below.

At the time of the impartial hearing, the student was enrolled in the upper school at McCarton and had been attending McCarton since 2002 (Tr. pp. 29, 190-91, 326, 328; Dist. Ex. 5 at p. 1). On March 6, 2013, the student's mother entered into an enrollment contract with McCarton for the 2013-14 school year (Parent Ex. CC).[2]

On April 24, 2013, a CSE met for the student's annual review and to develop his IEP for the 2013-14 school year (Dist. Ex. 6 at pp. 1, 23). The April 2013 CSE recommended a 12-month placement in a 6:1+1 special class for academic subjects in a specialized school with related services comprised of four 40-minute sessions of individual speech-language therapy per week, two 40-minute sessions of individual OT per week, two weekly 40-minute group sessions of OT, as well as one 60-minute group session of parent counseling and training per week (id. at p. 20).[3] In addition, the April 2013 CSE developed postsecondary goals, approximately 40 annual goals, and over 100 corresponding short-term objectives to address the student's areas of deficit (id. at pp. 4-19). Further, the April 2013 CSE recommended environmental and human or material resources to address the student's management and transition needs, as well as a coordinated set of transition activities (id. at pp. 3-4, 21-22). The April 2013 CSE also recommended that the student receive a full-time 1:1 crisis management paraprofessional and a functional behavioral assessment (FBA) and a behavior intervention plan (BIP) were developed for the student (Dist. Exs. 5 at pp. 1; 6 at pp. 3, 20, 24; 7; 8). The April 2013 IEP also indicated that the student would participate in

[2] The Commissioner of Education has not approved McCarton as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

[3] The April 2013 CSE meeting minutes indicate a recommendation of two sessions per week of individual and two sessions per week of group speech-language therapy, while the April 2013 IEP does not include the related service of speech-language in a group and repeats two 40-minute sessions per week of individual speech-language therapy twice (compare Dist. Ex. 5 at p. 1, with Dist. Ex. 6 at p. 20).

the New York State alternate assessments due to his severe cognitive and academic delays that precluded his participation in standardized assessments (Dist. Ex. 6 at p. 22). By prior written notice dated June 11, 2013, the April 2013 CSE summarized their recommendations to the parents and advised them of their due process rights (Dist. Ex. 19 at pp. 1-3).

Pertinent to the issue presented on remand, in an amended due process complaint notice dated August 1, 2013, the parents asserted that the district failed to address and accommodate the student's need for intensive 1:1 and dyad teaching throughout the school day (Parent Ex. B at p. 7). The parent further asserted that the recommended use of a 1:1 paraprofessional was inappropriate and would not provide the student with the necessary dyad teaching or provide him a reasonably calculated program (id.).

The parties convened for an impartial hearing commencing on September 12, 2013 and concluding on May 27, 2014 after five days of proceedings (see Tr. pp. 1-391). By findings of fact and decision dated June 30, 2014, the IHO found that the district provided the student a FAPE (IHO Decision at pp. 14-15). Relevant to the matter on remand, the IHO found that although 1:1 attention from a teacher may be desirable, the recommended 6:1+1 special class placement plus the support of a full-time 1:1 paraprofessional was appropriate (id. at p. 13).

The parents appealed and an SRO upheld the IHO's determination that the district provided the student a FAPE for the 2013-14 school year (Application of a Student with a Disability, Appeal No. 14-125). With respect to the issue of 1:1 instruction, the SRO found that the April 2013 IEP reflected the student's unique needs and included the support of a 1:1 paraprofessional (id. at p. 17). The SRO found that although some testimony indicated a need for 1:1 instruction, it was not clear from the hearing record that the activities for which the witnesses indicated the student required 1:1 "instruction" could not be performed by a paraprofessional (id.). The SRO found that the services described by McCarton staff as 1:1 instruction were similar to services supplementary school personnel are permitted to provide under the supervision of a teacher (id. at pp. 17-18).

The parents sought judicial review of the SRO's decision in the United States District Court for the Southern District of New York (F.L., 2016 WL 3211969). The District Court remanded the case to the state administrative process for clarification as to the relevant burdens of proof and whether 1:1 instruction was necessary to provide the student with a FAPE (F.L., 2016 WL 3211969 *8). The Court found that the SRO's finding that "it is not clear from the hearing record that the activities constituting such instruction cannot be provided by a paraprofessional" was ambiguous and obscured the placement of the burden of persuasion preventing the SRO from reaching a clear determination on a central issue in the case (id.).

The SRO who issued the decision in Application of a Student with a Disability, Appeal No. 14-125 became unavailable to serve while the matter was pending in District Court. Upon remand, I was appointed to hear the matter and reviewed the record of the impartial hearing proceedings, prior State-level submissions and administrative decisions,[4] as well as the District

[4] The student has also been the subject of prior administrative appeals related to the 2009-10, 2010-11 and 2012-13 school years (see Application of Dep't of Educ., Appeal No. 13-198; Application of Dep't of Educ., Appeal No. 12-103; Application of a Student with a Disability, Appeal No. 11-032). The issue of 1:1 support and/or instruction for the student has featured prominently in several of the parties' disputes.

Court's order of remand. As part of the review process, the parties were directed in a letter dated June 17, 2016 to notify the Office of State Review in writing of their respective positions regarding the adequacy of the hearing record to address the remanded issue and their respective positions on the remanded issue.[5] Both the district and the parents submitted memoranda presenting arguments related to the remaining issue as remanded by the Court.

IV. Arguments on Remand

In their submission, the parents argue that the district was fully aware of its burden to prove it offered a FAPE and made an inadequate record in support of its case. The parents contend that an unclear record and the absence of any evidence that the district offered a FAPE should be held against the district. In support of their argument, the parents assert that the district failed to elicit any testimonial evidence that the recommended 6:1+1 program with the support of a 1:1 paraprofessional was appropriate for the student or an appropriate substitute for 1:1 instruction. The parents also contend that the district failed to produce evidence demonstrating how the recommended program would have enabled the student to make meaningful progress or establish that the student did not need significant 1:1 instruction. In turn, the parents argue that the hearing record supports their contention that the student required 1:1 instruction and that the district offered an inadequate program.

The district contends it met its burden of production and persuasion in proving that the recommendation of a 6:1+1 special class placement with the support of a 1:1 paraprofessional was reasonably calculated to provide the student with educational benefits and offered the student a FAPE for the 2013-14 school year. The district argues that the evidence in the hearing record demonstrated that the student required 1:1 support primarily for prompting, redirection, and to address behaviors that impeded learning. The district asserts that a 6:1+1 special class with a 1:1 paraprofessional would have provided sufficient individualization of instruction and attention for the student as there would have been three adults with the student in the classroom, one of which was specifically assigned to him. Further, the district argues that a 1:1 paraprofessional, under the supervision of a special education teacher, would have provided sufficient individualized attention for the student. The district claims that teaching assistants are paraprofessionals and may be used to deliver instruction to the student under the supervision of a special education teacher. The district also asserts that the student was capable of learning in a group setting with individualized support. With respect to recommendations in the McCarton reports, the district contends that the reports indicate that the student learns best in a 1:1 setting but does not establish that the student can only learn in a 1:1 instructional setting. The district argues that the recommended educational placement is appropriate for the student as a 6:1+1 special class is intended for students who have highly intensive management needs and who require a high degree of individualized attention and intervention. The district contends that the student was capable of working in groups but required frequent prompting and redirection and had highly intensive management needs and interfering behaviors. It argues that a 1:1 paraprofessional not only would have provided redirection and prompting but would also have provided 1:1 instructional services under the direction of a classroom teacher.

[5] The parties represent that the hearing record is complete for the issue on remand and do not seek to submit any additional evidence.

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 Sch. Dist. v. T.A., 557 U.S. 230, 239 [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; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; 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 procedural violations are 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]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245; A.H. v. Dep't of Educ., 394 Fed. App'x 718, 720, 2010 WL 3242234 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008], aff'd, 361 Fed. App'x 156, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007], aff'd, 293 Fed. App'x 20, 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, 142 F.3d at 130; 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 T.P., 554 F.3d at 254; 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; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], aff'd, 486 Fed. App'x 954, 2012 WL 4946429 [2d Cir. Oct. 18, 2012]; 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 includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. New York City Bd. of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008] [noting that a CSE must consider, among other things, the "results of the initial evaluation or most recent evaluation" of the student, as well as the "'academic, developmental, and functional needs'" of the student]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see also 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]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). 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; see 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 R.E., 694 F.3d at 184-85; 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. April 2013 IEP: 1:1 Instruction

The issue on remand is to determine whether the district carried its burden in proving that the 1:1 support the student required could be provided in a 6:1+1 special class with the support of a 1:1 paraprofessional or whether the student required 1:1 support beyond the purview or capability of a paraprofessional. The district argues that the student's need for 1:1 support could have been addressed within a 6:1+1 special class placement by providing an additional 1:1 paraprofessional assigned specifically to the student rather than by assigning a 1:1 teacher, whereas the parents argue that the district has not proven that the student would have benefited from the support of a 1:1 paraprofessional. Based upon a review of the hearing record, the school district met its burden in demonstrating that the recommended 6:1+1 special class placement with the support of a 1:1 paraprofessional was reasonably calculated to provide the student with educational benefits. The district presented testimonial and documentary evidence to support the April 2013 CSE recommendation as discussed below (Tr. pp. 65, 70; Dist. Exs. 6; 15; 17; 18).

Under the IDEA, the burden of persuasion in an administrative hearing challenging an IEP is on the party seeking relief (see Schaffer v. Weast, 546 U.S. 49, 59-62 [2005]). However, New York State has placed the burden of proof 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]). With respect to the question presented on remand, rather than establishing which pedagogical approach was most appropriate for providing instruction to the student—McCarton's or the district's—the district had the burden of proving that the recommended 6:1+1 special class placement with the support of a 1:1 paraprofessional was reasonably calculated to provide the student with educational benefits in accordance with the standard established by the Supreme Court in Rowely (see Rowley, 458 U.S. at 206-07; C.F. v. New York City Dep't of Educ., 746 F.3d 68, 76 [2d Cir. 2014]["the Department bears the burden of establishing the validity of the IEP"]).

Before addressing the program and services offered by the district during the 2013-14 school year, some review of the background information related to the student's needs is in order. The district school psychologist, who was present at the April 2013 CSE meeting, testified that the April 2013 CSE reviewed a number of documents provided by McCarton including a 2012-13 OT annual goals report, a December 2012 speech-language progress report, a January 2013 positive behavior support plan, a January 2013 OT progress report, and a February 2013 McCarton progress report (Tr. pp. 40, 43-45, 80-81; Dist. Ex. 5 at p. 2; see Dist. Exs. 14-18). The hearing record also indicated that in developing the April 2013 IEP, the April 2013 CSE relied on the input of the student's parents and McCarton staff who had worked with the student during the 2012-13 school year (Tr. pp. 76, 350; Dist. Ex. 6 at pp. 1-3). The referenced progress reports revealed that at McCarton during the 2012-13 school year the student received 1:1 support in a classroom with four peers; individual and co-treated instruction in speech-language therapy; OT on an individual

and group basis; and group instruction for science, health, cooking, and yoga (with faded 1:1 support) (Dist. Exs. 15 at p. 1; 17 at p. 1; 18 at p. 1).[6]

The present levels of performance included in the April 2013 IEP reflected the vast majority of the student's needs as identified in the above referenced evaluative information (compare Dist. Ex. 6 at pp. 1-3, with Dist. Exs. 14-18). Regarding the student's learning style and his need for 1:1 support, the April 2013 IEP's present levels of performance stated that one of the student's strengths was his ability to generalize learned information and skills, that he was able to grasp various concepts when provided with direct instruction, and that his retention was "great" (Dist. Ex. 6 at p. 1). The April 2013 IEP further indicated that once the student learned a sight word he was able to maintain it and that he had "moved through" the words at a moderate pace, typically taking 10 sessions to master a group of five new words (id.). In the area of mathematics, the April 2013 IEP noted that one of the student's strengths was his ability to pick up new concepts quickly, yet it was also noted that unlike in reading, the student had challenges with retention in math (id.). The April 2013 IEP stated that the student tended to drift in and out during direct instruction lessons and independent work time, that he struggled to remain on task consistently when he was working on an assignment at his desk, and that he required prompting and teacher redirection (id.). Within the April 2013 IEP the student's teacher reported that one of the main focuses of the student's educational program was developing the student's independence and that his "desire to succeed" was one of the his greatest strengths (id.).

In regard to the student's speech-language needs the April 2013 IEP indicated that the student had identified challenges with his language processing abilities and that he benefited from having additional processing time to answer questions and expand his utterances and from the use of a timer to self-monitor his engagement (Dist. Ex. 6 at p. 1). The April 2013 IEP also noted that the student required verbal and/or gestural prompts from the teacher to support his ability to focus (id.).

With respect to social development, the April 2013 IEP stated that the student worked well within the classroom environment, was able to follow a self-generated schedule, followed set rules in a variety of contexts, and was currently able to work for up to 20 minutes within a small group setting (Dist. Ex. 6 at p. 2). The April 2013 IEP also stated that the student "benefits from being provided with visuals of what attending looks like vs. not attending to a task" (id.). The student was reported to benefit from self-monitoring checklists as they promoted his self-advocacy skills and his ability to take more initiative with his behaviors (id.). For example, with the assistance of a timer, the student self-monitored and self-assessed his behavior—specifically his attention to task—in three minute intervals (Dist. Exs. 6 at p. 2; 8). The April 2013 IEP also noted that the student had a stronger ability to advocate for himself with familiar adults than compared to his ability to advocate with peers and more unfamiliar people (Dist. Ex. 6 at p. 2). The April 2013 IEP further indicated that the student had become less prompt dependent and that the use of a token economy system had been very successful in helping the student self-manage his challenging

[6] While the McCarton personnel describe the student's program at McCarton as consisting primarily of 1:1 instruction, the hearing record reveals that during the 2012-13 school year the McCarton staff member identified as the student's ABA "teacher" and as someone who provided 1:1 "instruction" to the student, was not a certified teacher and held a bachelor's degree in a field other than special education, autism or "behavior for kids with autism" (Tr. pp. 139-40, 212, 266-68, 312-13; Dist. Ex. 5 at p. 1; 6 at p. 28).

behaviors, remain on task for longer periods of time, and drastically decrease his targeted behaviors (id.).

Regarding physical development, the April 2013 IEP stated that the student presented with decreased skill in the areas of sensory processing, fine motor, visual perceptual, and motor planning (Dist. Ex. 6 at pp. 2-3). The April 2013 IEP also stated that when engaged, the student was an active participant in his OT sessions and that he was better able to acquire new skills when the material was presented to him in a structured manner and with enough time to process the information (id. at p. 3). Tactile and proprioceptive input was reported to have a calming effect on the student and assisted in increasing his engagement (id.). The April 2013 IEP stated that the integration of sensory supports throughout the day had been beneficial for the student (id.).

To meet the student's identified needs, the April 2013 CSE recommended for the student 12 month services in a 6:1+1 special class with related services of four 40-minute sessions per week of individual speech-language therapy, two 40-minute sessions per week of speech-language therapy in a group of six, two 40-minute sessions per week of individual OT, and two 40-minute sessions per week of OT in a group of six (Tr. p. 64; Dist. Exs. 5 at p. 1; 6 at p. 20).[7] The April 2013 IEP also included the provision of a full time 1:1 crisis management paraprofessional (Dist. Ex. 6 at pp. 3, 20, 24; see Dist. Ex. 5 at pp. 1, 5). The district school psychologist testified that the full-time paraprofessional would help to address the student's behavioral concerns and provide assistance in redirection, refocusing and helping the student to stay engaged and regulated (Tr. pp. 65-66). The April 2013 IEP also included a number of environmental and human or material resources (i.e. cues and prompts, redirection, modeling, sensory input, 1:1 support, small group instruction) to address the students management needs, a large number of annual goals and corresponding short-term objectives to address the student's academic, social and physical needs, and a coordinated set of transition activities (Dist. Ex. 6 at pp. 3-19, 21-22).

The April 2013 IEP indicated that the CSE considered for the student a special class placement in a community school, yet determined that it would not be appropriate because to prevent regression the student required a 12-month program (Dist. Ex. 6 at p. 24).[8] The April 2013 CSE also considered special class placements in specialized schools and determined that a 6:1+1 placement would be the most appropriate setting to address the student's cognitive, academic, and social/emotional needs, in addition to providing him with the most appropriate peer group (id.). Regarding the student's need for 1:1 support, the district school psychologist acknowledged that during the CSE meeting, McCarton staff indicated the student "would benefit from a lot of individualization of instruction and attention" and the psychologist opined that the April 2013 CSE's recommendation of a 6:1+1 special class with related services and the support of a 1:1 paraprofessional was appropriate for the student (Tr. p. 70).

[7] In contrast to the April 2013 CSE meeting minutes, the April 2013 IEP does not include the related service of speech-language in a group, yet repeats the two 40-minute sessions per week of individual speech-language therapy twice (compare Dist. Ex. 5 at p. 1, with Dist. Ex. 6 at p. 20).

[8] I note that according to State regulations it does not automatically follow that a student eligible for an extended school year program would also require a special school (see 8 NYCRR 200.6[k][1]).

As noted by the District Court, "[t]he record is clear that [the student] requires some form of one-to-one support"; however, the question remains as to whether this support "can be fully provided by a paraprofessional" (F.L., 2016 WL 3211969 at *8).

In assessing whether a 1:1 paraprofessional would have provided the student with sufficient support, the role of the paraprofessional in the classroom must first be addressed. The district asserts that the student's 1:1 crisis management paraprofessional would have been a teaching assistant, and references the State Education Department's website indicating that teaching assistants are called paraprofessionals in New York City. While the State Education Department's website does indicate that teaching assistants are called paraprofessionals in New York City, it does not indicate that paraprofessionals must be teaching assistants, and State regulations do not define the term "paraprofessional" as the term "paraprofessional" was replaced with the term "supplementary school personnel" (see "'Supplementary School Personnel' Replaces the Term 'Paraprofessional' in Part 200 of the Regulations of the Commissioner of Education," VESID [Aug. 2004], available at http://www.p12.nysed.gov/specialed/publications/policy/suppschpersonnel.pdf).[9] Additionally, "supplementary school personnel" can be either a teacher aide or a teaching assistant (8 NYCRR 200.1[hh]). While a teacher aide may assist teachers in nonteaching duties such as "attending to the physical needs" of students or "supervising students," teaching assistants may provide "direct instructional services to students" while under the supervision of a certified teacher (see 8 NYCRR 80-5.6[b], [c]).

In this instance, the district's school psychologist testified that he did not know the specific qualifications required to be a paraprofessional or if there was a discussion at the April 2013 CSE that the paraprofessional assigned to the student would provide instructional support (Tr. pp. 108-09; IHO Ex. II at p. 9). There is also no indication in the April 2013 IEP or elsewhere in the hearing record as to the specific qualifications of the recommended 1:1 crisis management paraprofessional. Accordingly, for the purposes of this decision, the appropriateness of the recommendation for 1:1 paraprofessional support will assume that the paraprofessional would have been qualified to serve in the role of a teacher's aide as defined by State regulations and could have performed nonteaching duties such as attending to the physical needs of children, supervising students, and performing such other services as support teaching duties when such services are determined and supervised by the teacher (8 NYCRR 80-5.6[b]).

Upon review of the hearing record, the activities which the parents argue the student received at McCarton and which would require 1:1 "instruction" (i.e. redirection, refocusing, keeping the student on task and focused, prompting) are consistent with the services which paraprofessionals are permitted to provide pursuant to State regulations, namely attending to the student's physical needs and supervising the student and performing such other services as support

[9] In its Official Analysis to Comments in the Federal Register, the United States Department of Education declined to include additional standards for paraprofessionals noting that qualifications for paraprofessionals must be consistent with the requirements that apply to the discipline in which they are providing special education and related services and further noting that the Elementary and Secondary Education Act (ESEA) provides specific requirements for paraprofessionals who provide instruction but not those who solely provide personal care services (Free Appropriate Public Education or FAPE, 71 Fed. Reg. 46554 [Aug. 14, 2006]).

teaching duties (see 8 NYCRR 80-5.6[b][2][3]). Accordingly, placement in a 6:1+1 special class with the support of a 1:1 paraprofessional was appropriate to address the student's needs.

The parents testified that at the April 2013 CSE meeting, they along with the McCarton staff expressed concerns regarding the CSE's recommended 6:1+1 placement and that all the McCarton staff recommended 1:1 instruction (Tr. pp. 346, 349-50). The district school psychologist testified that at the April 2013 CSE meeting "it was portrayed" that the student would benefit from a lot of individualization of instruction and attention (Tr. p. 70). The speech pathologist—the lone McCarton staff member who both testified at hearing and was in attendance at the April 2013 CSE meeting—testified that it was his opinion the student required the 1:1 "instruction" he was receiving at the time of the hearing, yet he did not testify that he advocated for such services during the April 2013 CSE meeting (Tr. p. 200; see Tr. pp. 189-229).

Generally, the reports provided by McCarton, which were available to and considered by the April 2013 CSE, did not include 1:1 instruction as a need or requirement for the student's learning (see Dist. Exs. 14 at pp. 1-13; 15 at pp. 1-10; 16 at pp. 1-5; 17 at pp. 1-9; 18 at pp. 1-17). One report—the February 2013 McCarton progress report—included the statement that the student "learned best" in a 1:1 setting with minimal outside noise and environmental distractions; however, the report did not indicate that 1:1 instruction was the only way in which the student could learn new material (see Dist. Ex. 18 at pp. 1-17). Indeed, the February 2013 progress report stated that along with the 1:1 support the student received in the classroom, he also received group instruction for science, health, cooking, and yoga (with faded 1:1 support) (id. at p. 1). The report further explained that the student demonstrated good acquisition across a variety of his programs, had shown an improvement in his ability to attend in a group lesson, and with the help of a token economy system had been very successful during the current year self-managing his challenging behaviors and remaining on task for longer periods of time (id.).

The student's occupational therapist testified that in group therapy sessions each student had a 1:1 "instructor," yet she also stated that she was the one leading the group (Tr. pp. 142-43). The occupational therapist further explained that she was the one giving instruction during the OT sessions and that the 1:1 was there to collaborate and learn from what she was doing, and then take those skills into the classroom (Tr. p. 165). When asked if it was important for the student to have 1:1 "instruction" in the group setting, the occupational therapist replied that it was important for the student because he required redirection and needed attention and assistance "to complete whatever he was working on" (Tr. pp. 143-44). The occupational therapist further explained that the 1:1 "instructor" would help implement the student's routine, collect data to determine if the routine was benefiting the student, provide cues and assists as needed and ensure safety through redirection in community activities (Tr. pp. 145-46, 152).

The speech-language pathologist testified that the student required 1:1 instruction because of the complexity of his language delay, his delayed auditory processing, and his "lack of focus secondary to some of his behaviors" (Tr. pp. 200-01). When asked to further explain what the student's need for 1:1 instruction would look like the speech pathologist stated that it would look like "a lot of refocusing and a lot of gauging" how much time was needed for the student to respond to directions or questions, as well as gauging the appropriate prompt level (Tr. p. 201). The speech pathologist stated that he provided the 1:1 instructors with "really clear directions" including prompt levels and how to facilitate error correction and that he "really spelled out" to maintain

consistency amongst all staff (Tr. pp. 210-11). With respect to speech-language therapy, the April 2013 CSE meeting minutes indicate that the student required a "very high level" of attention during speech sessions and 1:1 prompting and that in the past the student had struggled within a group setting (Dist. Ex. 5 at p. 4).

The head of McCarton opined that a 6:1+1 special class with a 1:1 crisis management paraprofessional wouldn't be appropriate for the student because the paraprofessional would not be able to do the "instructional part to help him learn and to help him have less prompting" (Tr. pp. 311-12). However, when speaking about the specific role performed by the student's 1:1 instructor at McCarton, the head of McCarton only discussed prompting and fading to get the student back on task (Tr. pp. 309-10), which are duties that that can be performed by a 1:1 paraprofessional (see e.g., K.M. v. New York City Dep't of Educ., 2015 WL 1442415, at *20 [S.D.N.Y. Mar. 30, 2015][1:1 behavior management paraprofessional was sufficient to provide redirection to the student to keep the student engaged, active, and on task]). Additionally, in providing 1:1 support, school personnel must plan for reducing the support provided to the student and his or her dependence on an aide over time ("Guidelines for Determining a Student with Disabilities for a One to One Aide," Office of Special Educ. Special Educ. Field Advisory [January 2012] available at http://p1232.nysed.gov/specialed/publications/1-1aide-jan2012.pdf). And in this instance, the IEP contained annual goals, including goals related to expressive and receptive language, safety skills, attention, self-monitoring skills, transitioning, and self-advocacy skills, for increasing the student's independence and reducing the amount of assistance the student required to complete tasks, which all could have been worked on in a 6:1+1 classroom or during the student's related services sessions with the support of a 1:1 paraprofessional (Dist. Ex. 6 at pp. 6-13, 17-19).

The McCarton supervisor of the student's home team stated that he believed that the student needed a high level of 1:1 instruction—including a reinforcement system and the breaking down of steps—in order to keep the student on task and focused (Tr. p. 243). Although the breaking down of steps is not something that would be within the role of a teacher aide, the April 2013 IEP included other supports for the student's management needs, such as positive encouragement and reinforcement and chunking information, directions, and tasks (Dist. Ex. 6 at p. 3). Considering the other areas in which the McCarton staff described the student as requiring 1:1 support and the management needs included in the IEP, the hearing record indicates that the student's need for breaking down information, directions, and steps could have been planned by the teacher in the 6:1+1 special class with the aide supporting the teacher as determined and supervised by the teacher.

Based on the above, although the parent and McCarton staff believed the student would have been better served by the provision of fulltime 1:1 instruction, the district's recommendation for placement in a 6:1+1 special class with related services and the support of a fulltime 1:1 paraprofessional was reasonably calculated to provide the student with educational benefits.

The parents argue that this matter is similar to the facts presented in C.L. v. New York City Department of Education; however, this matter is distinguishable (C.L. v. New York City Dep't of Educ. 2013 WL 93361 [S.D.N.Y. Jan. 3, 2013]). In C.L, the district court found the SRO's reliance on district evidence that the student "worked well" in a group setting and that the student would have been able to receive educational benefits and learn new skills in the proposed 6:1+1 special

class was unexplained and misplaced (C.L., 2013 WL 93361 at *7). The court found that the record demonstrated that the student required 1:1 instruction to learn new skills (C.L., 2013 WL 93361 at *8).

In this matter, there are numerous instances in which the hearing record reveals that the student was able to receive educational benefits and learn without the inclusion of 1:1 instruction. Without mention of the need for 1:1 "instruction," the evaluative information considered by the April 2013 CSE noted the student's learning characteristics and needs with descriptions such as; retained learned skills without intensive maintenance practice, learned best in contexts, was better able to acquire new skills when material was presented in a structured manner and when given adequate time to process information, was able to grasp various concepts when provided with direct instruction, retention was "great", and that his ability to pick up new concepts quickly and generalize learned information and skills were some of his strengths (Dist. Exs. 6 at pp. 1-3; 14 at p. 1; 17 at p. 1). The reports also included the statements that the student demonstrated good acquisition across a variety of programs, had shown an improvement in his ability to attend in a group lesson, and was currently able to work for up to 20 minutes within a small group setting (Dist. Exs. 6 at p. 2; 18 at p. 1). Under the heading "small group instruction," the February 2013 progress report stated that the student learned to sit appropriately and attend in groups; that he participated in group activities such as cooking, yoga, health, science and leisure electives; and that with the support of an individual "teacher" the student had shown a significant increase in attending when in group instruction (Dist. Ex. 18 at p. 7).

Also regarding the student's need for 1:1 instruction in order to learn new material, in C.L. the Court found that the student's teachers and parents made it clear at the CSE meetings that the student required significant 1:1 instruction in order to make progress and that he would not receive educational benefits if placed in a small group class (C.L. 2013 WL 93361 at *7). An administrator from the private school testified that after working with the student over the course of a full school year, he had reached the "unequivocal conclusion" that to acquire new material, the student required a "one-to-one" (C.L. 2013 WL 93361 at *6). In addition the student's then-current teacher stated that the student would have a difficult time in a 6:1+1 because his behaviors were "very interfering to his learning," that he required a 1:1 person with him, and that she ensured that she taught new material to the student in a 1:1 setting (C.L. 2013 WL 93361 at *6).

In this case, the parent testified that during the April 2013 CSE meeting the McCarton staff recommended 1:1 instruction, the district psychologist acknowledged that during the CSE meeting the McCarton staff portrayed the student as benefitting from a lot of individualization of instruction and attention, and a February 2013 progress report indicated that the student "learned best" in a 1:1 setting (Tr. pp. 70, 350; Dist. Ex. 18 at p. 1). However as detailed above the hearing record also contains significant evidence indicating that the student could learn in a group setting, and unlike in C.L., the hearing record does not contain any testimony or evidence which would have

indicated to the April 2013 CSE that the student could only acquire new material with 1:1 instruction (see Tr. pp. 1-391; Dist. Exs. 5-20).[10]

VII. Conclusion

Having determined that the district provided the student with a FAPE for the 2013-14 school year and that the recommended 12-month 6:1+1 special class educational placement with the support of a 1:1 paraprofessional was reasonably calculated to provide the student with educational benefits, it is not necessary for me to consider the appropriateness of the parent's unilateral placement or to determine whether equitable factors favor an award of tuition reimbursement (see M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *13 [E.D.N.Y. Sept. 2, 2011], aff'd 2012 WL 6684585 [2d Cir. Dec. 26, 2012]).

THE APPEAL IS DISMISSED

Dated: **Albany, New York**
August 5, 2016

STEVEN KROLAK
STATE REVIEW OFFICER

[10] Although the hearing record included testimony from an occupational therapist, a speech pathologist, the home team supervisor and the head of McCarton indicating that 1:1 "instruction" was important for the student, this testimony was associated with the 2013-14 school year and was not available to the May 2013 CSE (Tr. pp. 135, 142-44, 151-52, 163-66, 176, 198, 200-01, 211-13, 227-28, 235, 237, 242-43, 259-60, 309, 311-13).