



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 09-039

**Application of a STUDENT WITH A DISABILITY, by her 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 & Associates, attorneys for petitioners, Gary S. Mayerson, Esq., of counsel

Michael Best, Special Assistant Corporation Counsel, attorney for respondent, Karyn R. Thompson, Esq., of counsel

### **DECISION**

Petitioners (the parents) appeal from the decision of an impartial hearing officer which awarded only partial tuition reimbursement for their daughter's tuition costs at the Brooklyn Autism Center Academy (BAC) for the 2008-09 school year. Respondent (the district) cross-appeals from the impartial hearing officer's determination that it had failed to offer an appropriate educational program to the student for that year. The appeal must be dismissed. The cross-appeal must be sustained.

At the time of the impartial hearing the student attended BAC, a private school that has not been approved by the Commissioner of Education as a school with which districts may contract to provide special education services for students with disabilities (see 8 NYCRR 200.1[d], 200.7). In addition, a private agency was providing the student with related services, which included speech-language therapy and occupational therapy (OT) (Tr. pp. 274, 279). The hearing record indicates that the student has delays in cognition, speech-language development, fine motor development, sensory processing, adaptive behavior, and socialization (Dist. Exs. 1; 3-10). The student is described as highly distractible and is reported to engage in stereotypic behavior which interferes with her ability to socialize and to learn new skills (Dist. Exs. 7 at pp. 2, 5; 8 at p. 1). The student has received a diagnosis of an autistic disorder (Dist. Ex. 5 at p. 6). As measured by standardized testing, the student's intellectual functioning falls in the "very low" range (id. at p. 2).

The student's eligibility for special education services as a student with autism is not in dispute in this proceeding (see 34 C.F.R. § 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

At age two, the student was reportedly diagnosed as having an autism spectrum disorder (Parent Ex. AA at p. 1). She received early intervention services which included home-based OT, speech-language therapy, and applied behavioral analysis (ABA) special instruction (Parent Ex. N at p. 1). As a preschooler, the student attended an 8:1+3 special class where she received related services of speech-language therapy and OT (Dist. Exs. 8; 9; 10). In addition, the student received 10 hours per week of home-based ABA services (Dist. Ex. 7 at p. 1).

In December 2007, the district attempted to conduct a psychoeducational evaluation of the student as part of a reevaluation and for the purpose of determining an appropriate school placement for the 2008-09 school year (Dist. Ex. 3 at p. 1). Citing the student's attending difficulties and inability to relate to the examiner in a meaningful way, the school psychologist deemed the student "untestable at this time" (id. at p. 4). The psychologist noted that based on the student's weaknesses, the student would require a highly structured environment with related services (id.). A social history update, conducted at the same time, indicated that the student would be "aging out" of her 8:1+3 preschool program (Tr. pp. 189-90; Dist. Ex. 4 at pp. 1-2). The social history noted that the parents felt that the student had made "significant progress" in her preschool program, noting that the student exhibited a larger vocabulary, had learned the alphabet, and counted from 1-20 (Dist. Ex. 4 at p. 1). The social history report noted that the student responded well to the program and to the discrete trial method or ABA (id. at pp. 2, 4). The social history also stated that the parents had participated in training to learn about ABA and considered it a good learning experience (id.).

Following the district's December 2007 evaluation, the parents sought a private evaluation to determine the student's educational needs (Tr. p. 198; Dist. Ex. 5 at p. 1). This private evaluation took place in January 2008 and included a neurodevelopmental evaluation of the student, conducted by a physician and a school psychologist (Dist. Ex. 5 at p. 1). According to the evaluators, the parents reported that the student's progress in her then current program was erratic (id.). With respect to the student's test behavior, the psychologist noted that the student transitioned easily to the testing room (id. at p. 2). She further noted that the student's use of expressive language was limited and that the student had difficulty understanding the evaluator's comments and instructions (id.). The psychologist described the student as "highly distractible and impulsive" and noted that the student "drifted easily into self-stimulatory behaviors" (id.). Administration of the Stanford-Binet Intelligence Scales, Fifth Edition (SB5) yielded the following standard (and percentile) scores: verbal IQ 51 (<1st percentile), non-verbal IQ 55 (<1st percentile), and full scale IQ 50 (< 1st percentile) (id. at p. 7). The psychologist cited the student's non-verbal ability to solve novel problems as a relative area of strength for the student (id. at p. 5). Based on supplemental assessments of the student's language skills, the psychologist reported that the student's single-word receptive vocabulary was "very low" (id. at pp. 3, 8). Likewise, the student's expressive language skills, with respect to naming single objects, groups of objects, or actions were "very low" (id.). The psychologist assessed the student's visual-motor ability using the Beery-Buktenica Developmental Test of Visual-Motor Integration, 5th Edition (VMI-V) (id. at p. 3). The psychologist described the student's visual-spatial skills (standard score 55), graphomotor integration skills, and fine motor speed (standard score <45) as being "very low" (id. at pp. 3, 8). The student's adaptive behavior skills were assessed using the Vineland Adaptive Behavior Scales-

Second Edition (Vineland-II), with the student's parents serving as reporters (*id.* at p. 3). The psychologist reported that the student's overall adaptive behavior skills were in the low range for her age (*id.*). She further indicated that the student's copying skills and written communication skills were age appropriate (*id.* at pp. 5, 9). The psychologist reported that the Childhood Autism Rating Scale (CARS) was completed based on observations made during the evaluation and by parent report (*id.* at p. 4). According to the psychologist, the student's overall score of 36 placed her "above the cutoff" for an autism spectrum disorder (*id.*). The psychologist noted that "behaviors of at least mild abnormality were reported in all areas with relating to people, imitation, visual response and verbal communication being the areas of most pronounced impairment" (*id.*). The evaluators offered the following diagnoses of the student: autistic disorder, auditory processing disorder, expressive language disorder, graphomotor deficits, and sensory integration disorder (*id.* at p. 6). The evaluators recommended, among other things, that the student continue a 12-month program of intervention, that the student be enrolled in an ABA-based program and receive 1:1 discrete trial therapy for 40 hours weekly, that the student's ABA program be based on the Assessment of Basic Language and Learning Skills (ABLLS) and supervised weekly by a board certified behavior analyst (BCBA), that "manding" sessions should be incorporated into each ABA teaching session, that the BCBA develop a toileting program for the student to be used consistently between home and school, that the student receive speech-language therapy and OT five times per week for 60 minutes, and that the parents receive two hours per week of parent training with the ABA supervisor (*id.* at pp. 5-6).

In January 2008, a series of progress reports were completed by the student's preschool service providers (Dist. Exs. 7-10). The student's special education itinerant teacher (SEIT) generated an "age-out report" based on parent and teacher observation, as well as administration of the Developmental Assessment of Young Children (DAYC) (Dist. Ex. 7). According to the SEIT, the student had demonstrated tremendous gains with respect to following instructions and attending to tasks for longer periods of time at home (*id.* at p. 1). However, the SEIT noted that the student continued to require assistance throughout activities in order to complete tasks (*id.*). The SEIT described the student as "a happy, friendly child who enjoys adult interaction" (*id.*). She noted that during 1:1 sessions the student was willing to work on an activity but was easily distracted (*id.*). According to the SEIT, in order to stay engaged for longer periods of time the student required redirection and adult proximity (*id.*). The SEIT reported that she used a timer to help increase the student's attending time and a token economy board to increase and reward the student's positive behaviors (*id.*). According to the SEIT, the student attempted to avoid teacher directed activities by physically getting up and leaving the area, during which time the student would engage in jumping and hand-flapping (*id.* at p. 2). The student was observed to attend for 1-5 minutes when presented with teacher directed tasks (*id.*). Use of a picture schedule, which contained both preferred and non-preferred activities, was implemented to help the student understand which activity came next and which activities had been completed (*id.*). The SEIT reported that the student often used her language in a non-functional manner and produced non-contingent utterances (*id.*). However, the SEIT indicated that the student was beginning to use her language more appropriately and to independently request items (*id.*). The SEIT reported that as measured by the DAYC, the student demonstrated a 41 percent delay in cognitive development, a 57 percent delay in communication, a 47 percent delay in social-emotional development, a 43 percent delay in physical development, and a 29 percent delay in adaptive behavior (*id.* at pp. 2-4, 5). According to the SEIT, the student was able to complete a variety of cognitive tasks such as stacking 6-7 blocks; matching identical objects by color, shape and size; demonstrating

understanding of the concept of "one;" and labeling and pointing to body parts (id. at p. 2). The student had difficulty counting five objects, distinguishing between same and different, and understanding size concepts, positional concepts, and opposites (id.). The teacher reported that expressively the student could label many objects and actions; however, she had difficulty generalizing the knowledge to the natural environment (id. at p. 4). The student was able to use at least 50 different words in spontaneous speech (id.). According to the SEIT, the student's spontaneous speech was limited to expressing her needs in short phrases or sentences (id.). With respect to social-emotional development, the SEIT reported that the student was able to transition between activities when she received simple verbal instructions (id.). The student's eye contact was described as inconsistent and the teacher reported that the student required frequent verbal and physical prompts to maintain eye contact with adults (id.). The student was unable to carry on a reciprocal conversation with an adult (id. at p. 3). With respect to motor development, the SEIT reported that the student demonstrated difficulty catching, throwing and kicking a large ball (id. at p. 5). With respect to adaptive skills, the student required some assistance with dressing and was not yet "potty trained" (id.). The SEIT concluded that the student had made "significant progress since the beginning of intervention, but require[d] 1:1 teacher support to effectively function in a classroom setting" (id. at p. 1).

In addition to the SEIT, the student's center based classroom teacher described the student's current levels of performance with respect to cognitive, social-emotional, and adaptive functioning (Dist. Ex. 8 at p. 1). The classroom teacher reported that the student "present[ed] with significant deficits in her overall development characterized by impairments in communication skills, reciprocal social interactions, decreased attention span, fleeting eye contact and repetitive non-functional behavior that interferes with her ability to learn, play and interact effectively" (id.). The teacher detailed the cognitive skills mastered by the student and her observations were generally consistent with reports of skill mastery provided by the student's SEIT (compare Dist. Ex. 7 at p. 2, with Dist. Ex. 8 at p. 1). With respect to social-emotional development, the teacher reported that although the student knew the names of peers and teachers, she did not interact with them (Dist. Ex. 8 at p. 1). She further noted that the student's interaction with adults consisted of requesting foods, drinks, toys, and to end an activity (id.). The teacher reported that once the student was "set up" with play materials she would engage in simple functional play using toys appropriately with "some emerging symbolic/pretend play observed" (id.). According to the teacher, the student had made progress toward achieving her individualized educational program (IEP) goals and objectives (id. at p. 2). Specifically, the teacher reported that the student's ability to follow simple directions with minimal prompting had improved significantly, the student was more aware of classroom routines and becoming more independent, and the student's ability to engage and participate in small and large group activities in the classroom had improved (id.). The teacher reported that the student was able to engage in small group bingo games with her peers and with guidance she could wait her turn and match pictures of colors and objects (id.). The teacher noted improvement in the student's language skills and reported that the student requested foods, drinks and to end an activity by establishing brief eye contact accompanied by her request (id.). The teacher reported improvement in the student's ability to listen, follow directions, and follow through with sequenced motor activities during group movement games in class, given adult support and prompting (id.). She also reported that the student was responding to verbal redirection more consistently (id.). In the teacher's opinion, the student continued to require maximum support and a small group learning environment in order to facilitate the acquisition of new skills, encourage interactions, decrease non-functional behavior, and participate

independently within the classroom (id.). The teacher recommended that the student would benefit from participation in a small highly structured classroom environment (id. at p. 3).

In a progress report dated January 15, 2008, the student's speech-language therapist confirmed the classroom teacher's observations of the student's social skills and provided additional information regarding the student's speech-language development (Dist. Ex. 9). The therapist stated that the student would engage in simple verbal turn taking, but not in conversational turn taking (id. at p. 1). With respect to receptive language, the therapist reported that the student was able to identify items from a variety of semantic categories and respond to "what" and "who" interrogatives (id. at p. 2). The therapist reported that the student had demonstrated improvement in her ability to follow routine, single-step verbal directives, and also demonstrated knowledge of object function (id.). With respect to expressive language, the therapist reported that the student was able to produce 2-5 word utterances to request, label, and protest (id.). The therapist reported that although the student had demonstrated progress, she was self-directed and continued to demonstrate self-stimulatory behaviors which interfered with her ability to attend to therapy activities and to interact in a socially appropriate manner (id.). The therapist concluded that the student continued to demonstrate significant impairments in her pragmatic, receptive, and expressive language skills (id.). She concluded that the student would continue to benefit from individual speech-language therapy three times per week and suggested that therapy should focus on improving the student's social relatedness including eye contact, turn taking, joint attention, and peer interaction (id.).

A January 15, 2008 progress report prepared by the student's occupational therapist indicated that the student continued to make progress with respect to her fine/visual motor skills (Dist. Ex. 10 at p. 1). The therapist noted that the student's grasp patterns continued to improve and that the student exhibited in-hand manipulation skills (id.). The therapist reported that the student was able to stack 8-9 cubes, but was unable to copy any block designs (id.). In addition, the therapist noted that the student was able to assemble simple inset puzzles and had shown improvement in her awareness to turn pieces to make them fit (id.). With respect to gross motor function, the therapist reported that the student presented with low muscle tone and weakness throughout her upper body and trunk (id.). She further noted that the student demonstrated poor body awareness and that her gross motor movements lacked proximal stability and graded muscle control (id. at p. 2). According to the therapist, the student presented with inefficient processing of movement and body sense, as well as delayed motor planning and bilateral integration skills (id.). The therapist indicated that although the student had demonstrated gradual progress in these areas, her deficits continued to affect the graded execution, sequence, and motor control needed for fine and gross motor skills (id.). With respect to self-care skills, the therapist reported that the student was able to follow through with most self-care tasks with prompting and assistance as needed (id. at p. 3). She noted that the student was not toilet trained (id.). The therapist recommended that the student continue to receive OT three times per week (id.).

On January 28, 2008, the Committee on Preschool Special Education (CPSE) met to conduct the student's annual review (Parent Ex. C at p. 1). The resultant IEP reflected the information provided by the student's teachers and therapists in their progress reports regarding the student's present levels of performance (compare Dist. Exs. 5; 7-10, with Parent Ex. C at pp. 3-9). The IEP indicated that the student benefited from multiple learning opportunities to repeatedly practice skills and detailed the student's academic management needs as follows: adult

models, visual cues, verbal prompts, verbal repetition, and a small structured learning environment (Parent Ex. C at p. 4). With respect to social-emotional development, the IEP stated that the student required guidance and modeling to engage in interactions with peers and adults (*id.* at p. 5). The IEP also indicated that the student's behavior did not seriously interfere with instruction and could be addressed by the special education classroom teacher (*id.*). The IEP noted that the student did not require a behavior plan (*id.*). With respect to health and physical management needs, the IEP indicated that the student was not yet toilet trained and needed assistance to use the bathroom (*id.* at p. 6). The IEP further indicated that the student required OT to address sensory modulation, integration issues, and delayed motor skills (*id.*). The IEP included goals and objectives related to the student's deficits in pragmatic language, receptive language, expressive language, play skills, classification skills, perceptual motor and fine motor skills, postural stability and body awareness, sensory processing and sensory integration skills, following simple directions, independent daily living skills, and attending (*id.* at p. 15). The CPSE recommended that the student continue to be classified as a preschool student with a disability and continue placement in an 8:1+3 special class (*id.* at p. 1). The CPSE further recommended that the student continue to receive 10 hours per week of SEIT services, as well as individual speech-language therapy three times per week and individual OT three times per week (*id.* at pp. 1, 18). The IEP indicated that the recommended programs and services would begin on January 28, 2008 and that the student would receive services on a 12-month basis (*id.* at pp. 1, 2).

Following the CPSE meeting, the parents visited BAC and subsequently submitted an application to the school in February or March 2008 (Tr. pp. 268-69; Parent Ex. FF).

On April 29, 2008, the Committee on Special Education (CSE) convened in order to develop a kindergarten placement for the student and to transition her to the CSE (Tr. pp. 192-93; Dist. Ex. 1 at p. 1). Meeting participants included a school psychologist, who also functioned as the district representative; the student's parents; a regular education teacher; a school social worker; the student's preschool center-based teacher who participated by telephone; and an additional parent member (Tr. pp. 141-42; Dist. Ex. 1 at p. 1). The school psychologist reported that the CSE reviewed teacher and therapists' reports, a neurologist's report, and a private assessment provided by the student's parents (Tr. pp. 142-43). The present levels of performance and goals and objectives from the student's January 28, 2008 CPSE IEP were adopted by the April 29, 2008 CSE (compare Parent Ex. C, with Dist. Ex. 1). The CSE recommended that the student be found eligible for special education services as a student with autism and that she be placed in a 6:1+1 special class in a specialized school (Dist. Ex. 1 at p. 1). In addition, the CSE recommended that the student be provided with individual speech-language therapy three times per week and individual OT three times per week (*id.* at p. 18). The parents were provided with a completed copy of the IEP at the end of the CSE meeting (Tr. pp. 165, 194; Dist. Ex. 1 at p. 2). The student's mother stated that at the time of the CSE meeting, the district indicated that it could not provide the parents with the specific location of the student's recommended placement and that they would receive a placement letter within two weeks after the meeting (Tr. p. 204). According to the student's mother, the parents expressed concern about the level of progress the student was making (Tr. p. 197). The student's mother further reported that the parents requested that the CSE consider placing the student at BAC and that the district "dutifully noted that" (Tr. p. 205).

On May 7, 2008, the parents signed an enrollment contract with BAC for the 2008-09 school year (Parent Ex. EE). By final notice of recommendation (FNR) dated June 12, 2008, the

district summarized the April 29, 2008 CSE's recommendations and provided the parents with the name of the specific district school where the recommended program would be implemented (Dist. Ex. 2).

By letter to the district dated June 26, 2008, the parents indicated that based on their private evaluation, as well as assessments from the student's teachers and therapists, the school and services recommended by the CSE were inadequate and inappropriate (Parent Ex. D at p. 1). The parents further indicated that they had visited the district's proposed school on June 24, 2008 and determined that it was not an appropriate placement because, among other things, the placement was inconsistent with the recommendations made by the parents' private evaluator (*id.*). Specifically, the parents asserted that the recommended placement did not include "home therapy," did not provide the level of 1:1 instruction recommended by their private evaluator, that the teachers in the recommended program did not collect data consistently or keep a program book for their students, that there was no systematic training and certification required of the teachers in the recommended program, that the recommended program did not offer parent training that was specific and individualized, that the staff had little control over placement of students in classes and could not insure grouping with appropriate peers, and that the recommended placement did not provide the student with opportunities to interact with typically developing peers (*id.* at pp. 1-2). The parents also noted that the FNR did not include therapy frequencies (*id.*). They requested the district's assistance in placing the student in an appropriate program that came as close to meeting the recommendations from their private evaluator as possible (*id.*). The parents stated that, absent an appropriate program and placement for the 2008-09 school year, they would seek to implement the recommendations of their private evaluator and request the district to reimburse and fund the evaluator's recommendations (*id.*).

The following day, on June 27, 2008, the parents, through their attorney, submitted a due process complaint notice to the district requesting an impartial hearing pertaining to the programs and services being offered to the student for the 2008-09, 12-month school year (Parent Ex. A at p. 1). The parents stated that the student's pendency program was pursuant to the student's last agreed upon IEP dated January 28, 2008 (*id.* at p. 2). The parents asserted that the district failed both procedurally and substantively to offer the student a free appropriate public education (FAPE) for the 2008-09 school year (*id.*). Specifically, the parents asserted: (1) that the district failed to address and develop a specific placement at the student's April 2008 CSE meeting with the participation of all CSE members; (2) that the district denied the parents meaningful participation in the development of the IEP, specifically with regard to placement and the development of goals and objectives; (3) that the district failed to ensure the attendance of an "Education Evaluator;" (4) that the IEP failed to give a specific date in September for the initiation of services; (5) that the district failed to initiate services beginning July 1, 2008, despite the fact that the student's IEP called for a 12-month program; (6) that the CSE failed to develop goals and objectives that were clear, unambiguous, and sufficiently challenging; (7) that the IEP failed to provide any methods of measurement for the proposed goals and objectives; (8) that despite the student's classification of autism, the IEP failed to provide for individual parent training and counseling; and (9) although the student was classified as having autism, her IEP stated that she had been diagnosed as having a pervasive developmental disorder (PDD) (*id.* at p. 3).

In the due process complaint notice, the parents also indicated that the student would be attending BAC for the 2008-09 school year (Parent Ex. A at p. 4). The parents requested

reimbursement covering a 12-month program of intervention, including summer, tuition for BAC, 1:1 ABA teaching for 40 hours per week; 15 hours of 1:1 ABA teaching in the home and community; four hours of weekly supervision and parent training by a BCBA; individual speech-language therapy five times per week for 60 minutes; individual OT five times per week for 60 minutes; parent training two hours per week; and monthly interdisciplinary meetings between home and school providers and the parents (id.).

The student entered BAC in September 2008 (Tr. pp. 262-64; see Parent Ex. BB3 at p. 1). On September 30, 2008, by way of a "supplemental amended demand," the parents, through their attorney, requested that the impartial hearing officer accept an amendment to their initial June 27, 2008 due process complaint notice (Parent Ex. T at p. 1). The stated purpose of the amendment was "to respond with particularity to the district's April 28, 2008 IEP" (id. at p. 6). In addition to the parents' initial assertions, the supplemental amended demand listed additional claims with regard to the program/placement recommended by the April 2008 CSE (id. at pp. 3-4). Specifically, the parents claimed that the proposed 6:1+1 class failed to properly address the student's need for 1:1 teaching; that the district impermissibly abdicated a placement decision to an administrator who was not present at the CSE meeting; that the CSE failed to offer adequate levels of related services; that the CSE failed to "meaningfully consider private evaluations;" that despite the student exhibiting interfering behaviors, the district failed to develop a functional behavioral assessment (FBA) or behavioral intervention plan (BIP); that the CSE failed to properly develop, assess, and rely upon present levels; and that the CSE failed to meet the State regulations minimum mandates for speech-language services for students who have been diagnosed on the autism spectrum (id. at p. 4).

On October 1, 2008, the parents amended their due process complaint notice a second time to include a request for reimbursement for transportation costs to and from BAC (Parent Ex. U at p. 4).

In October 2008, the student was evaluated at Columbia University as part of a research study (Parent Ex. AA at p. 1). The student's mother completed the Autism Diagnostic Interview-Revised (ADI-R), which revealed deficits in the student's communication skills and ability to engage in reciprocal social interactions (id. at p. 2). In addition, results of the interview revealed that the student engaged in some restrictive and repetitive patterns of behavior (id. at pp. 2-3). The evaluators reported that overall, the ratings on the ADI-R met the criteria for a classification of autism (id. at p. 3). Based on parent report, the student attained an adaptive behavior composite of 65 on the Vineland Adaptive Behavior Scales, Second Edition (Vineland-II), which was in the "[l]ow" range of functioning (id.). The evaluators noted that the student "had considerable delays in her ability to use words to communicate," "notable difficulty with her self care skills and with activities in the community," and that the student's "socialization skills [were] significantly impaired" (id.). The evaluators noted that during testing, the student exhibited a brief attention span and required frequent prompting to remain on task (id.). They also noted that the student was "very cooperative and worked nicely" (id.). Administration of the Differential Ability Scales, Second Edition (DAS II) yielded the following standard (and percentile) scores: verbal cluster 63 (1st percentile), nonverbal reasoning cluster 78 (7th percentile), spatial reasoning cluster 53 (< 1st percentile), and general cognitive ability 58 (< 1st percentile) (id. at p. 4). According to the evaluators, the student's test performance suggested a relative strength in some of the student's nonverbal reasoning abilities (id.). As measured by the Peabody Picture Vocabulary Test-Third



Edition (PPVT-III), the evaluators suggested that the student's receptive word knowledge was significantly below age expectation (id.). Administration of the Autism Diagnostic Observation Schedule-Module 2 yielded ratings that met "cutoffs" for classification with autism (id. at p. 5). The evaluators stated that the student's level of aloofness was concerning and noted that the student was not initiating or responding to social overtures to the degree that she was capable (id.). They further noted that the student's ability to self-regulate, frequent self-stimulatory and stereotypic behaviors, and restrictive and repetitive interests impacted the student's ability to engage in meaningful interactions (id.). According to the evaluators, the student's cognitive and adaptive functioning deficits met the criteria for mild intellectual disability or mental retardation (id.). The evaluators concluded that the student had more capability than she was demonstrating and that she required more intensive intervention, including home-based services and parent training (id.). The evaluators offered numerous recommendations with respect to the student's educational program and the provision of related services (id. at pp. 6-7).

In a document created November 3, 2008, the educational director at BAC outlined proposed goals and objectives for the student for the 2008-09 school year (Parent Ex. X). The proposed goals and objectives covered the following domains: attending, community, expressive language, fine motor, gross motor, handwriting, imitation, leisure, mathematics, reading, receptive language, self-care, and socialization (id. at pp. 1-3). The document listed the following "instructional, personal and social strategies:" forward and backward chaining; contrived establishing operations/motivational operations; discrete trial teaching; generalization; incidental teaching; maintenance; modeled instruction; observational learning; 1:1 instruction; parent support, education and training; peer modeling; prompt fading; reinforcement schedules; shaping; small group instruction; task analysis; textual cues, and video modeling (id. at pp. 3-4).

An impartial hearing convened for two days on January 7 and 8, 2009 (Tr. pp. 1, 317). At the impartial hearing, the district called three witnesses and entered 12 exhibits into the hearing record (Tr. pp. 26, 138, 216; Dist. Exs. 1-12). The parents called three witnesses and entered 50 exhibits into the hearing record (Tr. pp. 188, 258, 324, 396; Parent Exs. A-J, N, T, U, X; AA-FF; BB1-BB30).

The impartial hearing officer issued a decision dated February 25, 2009 (IHO Decision at p. 6). In her decision, titled "amended findings of fact and decision," the impartial hearing officer set out background information and then summarized the positions of the parties (id. at pp. 1-3).<sup>1</sup> Addressing the parents' argument that the district violated 20 U.S.C. § 1414(d)(1)(A), which in their view requires a district to specify a location for a placement, the impartial hearing officer determined that the statute applied only to the location where related services would be provided and not to the location of an educational placement (id. at p. 3). Next, the impartial hearing officer determined that based upon the parents' testimony, and contrary to the contentions of the parents, the parents were able to meaningfully participate in the CSE meeting (id.).

Next, the impartial hearing officer set out the applicable law and described the findings in the student's assessments, evaluations, and other evidence in the hearing record (IHO Decision at pp. 3-5). The impartial hearing officer found that the record contained varied evidence on whether

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<sup>1</sup> The hearing record contains only the "amended findings of fact and decision," no other decision was made part of the hearing record.

the student needed 1:1 therapy or just a highly structured environment (id. at p. 5). The impartial hearing officer found that there was consensus that the student needed an ABA program, speech-language therapy, and OT and that one report indicated the need for additional ABA at home or after school (id.). The impartial hearing officer found that the district's recommended placement offered only 25 minutes of 1:1 therapy per day, which she determined was inappropriate and therefore, found that the district failed to offer the student a FAPE (id.). The impartial hearing officer then addressed the parents' unilateral placement at BAC and found that because the placement was 1:1 all day, despite the recommendation from a former teacher that the student required a small, structured environment, the unilateral placement met only part of the student's needs, and that the evidence supported only a partial tuition award (id.). The impartial hearing officer also noted that the parties were in agreement regarding reimbursement for speech-language therapy and OT (id. at pp. 5-6).

This appeal ensued. In their petition, the parents argue that the impartial hearing officer properly found that the district failed to offer the student a FAPE because the district's failure to determine "the school location and placement issue" at the April 2008 CSE meeting deprived the student a FAPE and deprived the parents of meaningful participation in the IEP development process. They further argue that the impartial hearing officer properly found that the district failed to offer the student a FAPE because the IEP failed to provide for parent training and counseling. However, they contend that the impartial hearing officer erred by applying an erroneous and elevated standard in her determination regarding the appropriateness of the parents' placement and that their unilateral placement is appropriate warranting full tuition reimbursement. They further argue that the impartial hearing officer's reimbursement calculations contained errors, were arbitrary, and relied upon erroneous information about the costs of services. Finally, they argue that the equities favor the parents and do not preclude full tuition reimbursement. The parents request that the impartial hearing officer's decision be amended to include full tuition reimbursement for BAC.

In their answer and cross-appeal, the district agrees with the parents that the impartial hearing officer's determination that the unilateral placement was partially appropriate was an error as a matter of law, but the district also asserts that the unilateral placement was entirely inappropriate for the student because it was overly restrictive and did not provide any of the student's needed related services. The district also asserts that the parents' arguments that the IEP ought to have identified the location of a placement and ought to have included parent training and counseling are without merit, but in any event should not be addressed because such arguments are set forth in the parents' memorandum of law only, and are not found in the petition. Pleading as a "statement of opposition and cross-appeal," the district argues that the impartial hearing officer erred in finding that the district failed to offer the student a FAPE because the student did not require full-time 1:1 instruction in order to make meaningful educational progress and benefit from instruction. The district contends that the recommended program was appropriate and that the district is not required to maximize the student's potential. Lastly, the district argues that the equities favor the district because the parents failed to give the district sufficient notice of their intention to unilaterally place the student and seek reimbursement.

The parents answered the district's cross-appeal. The parents argue that the impartial hearing officer correctly found that the district failed to offer the student a FAPE for the following reasons: (1) the CSE approved the student for a 12-month school year, but the proposed placement

was set to begin in September 2008, two months after the start of the 2008-09 school year; (2) the district failed to discuss or recommend a specific placement location at the April 2008 CSE meeting; (3) the goals and objectives were not drafted by the CSE, but were brought to the meeting in completed form and the CSE failed to discuss or individualize the proposed goals and objectives at the April 2008 CSE meeting, depriving the parents of an opportunity to object to the goals and objectives; (4) the proposed placement failed to provide the student with sufficient 1:1 instruction that her present levels of performance and behavior required; (5) the proposed program failed to meet the statutory requirements for students classified as autistic including required speech-language services and provision of parent training and counseling; (6) the district failed to develop an FBA or a BIP, failed to assess the student's present levels of behavioral performance, and failed to account for the student's interfering behaviors; and (7) the district failed to develop a transition plan for the student's move from preschool to the recommended program.

The parents further argue that they met their burden to show that the unilateral placement was reasonably calculated to provide the student with meaningful educational benefits. They also argue that the impartial hearing officer's finding that BAC was partially appropriate was contrary to the weight of evidence because the bulk of the evaluations showed that the student needed a small, structured environment that provided 1:1 teaching. The parents also argue that BAC was not overly restrictive because student needed that level of supervision and even the district offered its most restrictive available class. The parents additionally argue that, contrary to the district's claim, they provided sufficient notice to the district that the student would be attending BAC by orally advising the CSE chair at the April 2008 CSE meeting and giving notice in their first due process complaint notice. The parents also argue that in the alternative, oral notice is allowed under 20 U.S.C. § 1412(a)(10)(C)(iii)(I) and that in any event, insufficient notice to the district ought not result in a denial of tuition reimbursement, but may be resolved by a pro-rata reduction in reimbursement to conform with the required notice.

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

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

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<sup>2</sup> The term "free appropriate public education" means special education and related services that--

- (A) have been provided at public expense, under public supervision and direction, and without charge;
  - (B) meet the standards of the State educational agency;
  - (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and
  - (D) are provided in conformity with the individualized education program required under section 1414(d) of this title.
- (20 U.S.C. § 1401[9]).

IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). While school districts are required to comply with all IDEA procedures, not all procedural errors render an IEP legally inadequate under the IDEA (A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at \*10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if a procedural violation is alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; E.H. v. Bd. of Educ., 2008 WL 3930028, at \*7 [N.D.N.Y. Aug. 21, 2008]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] *aff'd*, 2008 WL 3852180 [2d Cir. Aug. 19, 2008] see also T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 252-53 (2d Cir. 2009).

The IDEA directs that, in general, an impartial hearing officer's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 130 [2d Cir. 1998]; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at \*15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

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

Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9). Subsequent to its development, an IEP must be properly implemented (8 NYCRR 200.4[e][7]; Application of a Child with a Disability, Appeal No. 08-087).

The New York State Legislature amended the Education Law to place the burden of production and persuasion upon the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of production and persuasion regarding the appropriateness of such placement (Educ. Law § 4404[1][c], as amended by Ch. 583 of the Laws of 2007). The amended law took effect for impartial hearings commenced on or after October 14, 2007; therefore, it applies to the instant case (see Application of the Bd. of Educ., Appeal No. 08-016).

The parents argue that the CSE approved the student for a 12-month school year, but the proposed placement was set to begin in September 2008, two months after start of the 2008-09 school year. I find that the parents' argument is without merit. According to Education Law § 4410(1)(i) a child is a "preschool child", and thus the responsibility of the CPSE for programming purposes, "through the month of August of the school year in which the child first becomes eligible to attend school pursuant to section thirty-two hundred two of this chapter," which for this student, was the 2008-09 school year. The student's January 28, 2008 CPSE IEP provided for a 12-month school year and had a projected date of initiation of January 28, 2008 (Parent Ex. C at pp. 1-2). Thus, under the January 28, 2008 CPSE IEP, the student had been recommended for special education and related services during July and August 2008, the time period the parent contends that the student was being denied a FAPE. Furthermore, the hearing record suggests that the student received the educational programs and services set out in the January 2008 IEP during summer 2008 (Tr. pp. 13-14).

Next, the parents argue that the CSE failed to recommend a specific placement location at the April 2008 CSE meeting which significantly impeded the parents' participation in the IEP process, I find that this argument is also without merit. The IDEA requires that a valid IEP be in effect "at the beginning of each school year" and a school district's delay does not violate the IDEA so long as the school district "still has time to find an appropriate placement ... for the beginning of the school year in September" (20 U.S.C. § 1414[d][2]; Tarlowe v. New York City Bd. of Educ., 2008 WL 2736027, at \*6 [S.D.N.Y. July 3, 2008] quoting Bettinger v. New York City Bd. of Educ., 2007 WL 428560, at \*8 n.26 [S.D.N.Y. Nov. 20, 2007]). The assignment of a particular school is an administrative decision, provided it is made in conformance with the CSE's educational placement recommendation (White v. Ascension Parish Sch. Bd., 343 F.3d 373, 379 [5th Cir. 2003]; see Veazey v. Ascension Parish Sch. Bd., 2005 WL 19496 [5th Cir. Jan. 5, 2005]; A.W. v. Fairfax Co. Sch. Bd., 372 F.3d 674, 682 [4th Cir. 2004]; Concerned Parents & Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751, 756 [2d Cir. 1980]; K.Y. v. New York City Dep't of Educ., 51 IDELR 78 [E.D.N.Y. July 2, 2008]; Application of a Student with a Disability, Appeal No. 08-103; Application of a Child with a Disability, Appeal No. 07-049; Application of the Bd. of Educ., Appeal No. 99-90; Application of a Child with a Disability, Appeal No. 96-51; Application of a Child with a Disability, Appeal No. 93-5; but see A.K. v. Alexandria City Sch. Bd., 484 F.3d 672 [4th Cir. 2007]). The United States Department of Education (USDOE) recently noted that it "referred to 'placement' as points along the continuum of placement options available for a child with a disability, and 'location' as the physical surrounding, such as the classroom, in which a child with a disability receives special

education and related services" (Placements, 71 Fed. Reg. 46588 [August 14, 2006]).<sup>3</sup> This view is consistent with the opinion of the USDOE's Office of Special Education Programs (OSEP), which indicates that the assignment of a particular school is an administrative decision provided it is made in conformance with the CSE's educational placement recommendation (Letter to Veazey, 37 IDELR 10 [OSEP 2001]; Application of a Child with a Disability, Appeal No. 07-049).

In the present case, the April 29, 2008 CSE recommended that the student be placed in a program along the continuum, a 6:1+1 special class in a specialized school (Dist. Ex. 1 at p. 1; see 8 NYCRR 200.6[h][4][ii][a]). The hearing record indicates that by FNR dated June 12, 2008, the district provided the parents with the name of a specific school that offered a 6:1+1 special class in a specialized school, in conformance with the CSE's recommendation (Dist. Ex. 2). The hearing record indicates that the parents submitted a private evaluation to the CSE and that they initiated and participated in discussion regarding the report and its recommendations (Tr. pp. 197-98, 202-03). The parents also indicated that they asked the CSE to consider placing the student at BAC and that their request was "dutifully noted" (Tr. p. 205). The parents had an opportunity to visit a 6:1+1 class in a district school and, after they received the June 12, 2008 FNR, they visited and toured the school containing the proposed class and spoke to an administrator, several teachers, and a speech-language therapist (Tr. pp. 205-09). Both of these visits occurred more than two months before the expected start of the recommended program (id.; Parent Ex. B at p. 2). There is no evidence in the hearing record that the student's special education and related service needs could only be met in a specific classroom or school building. To the contrary, as discussed below, the hearing record shows that the student's special education and related service needs would have been met in the LRE in the district's recommended program. Under the facts in this case, I find that the district did not deny the student a FAPE by not determining at the April 2008 CSE meeting the specific district school that the student was recommended to attend and at which her IEP would be implemented. Furthermore, I find that the failure to identify a specific school at the time of the CSE meeting did not impede the parents' meaningful participation in the CSE process.

The district argues that it offered the student a FAPE for the 2008-09 school year. Based on a review of the hearing record, I find that the recommendations in the student's April 2008 IEP offered the student a FAPE. The hearing record indicates that the student has delays in cognition, speech-language development, fine motor development, sensory processing, adaptive behavior, and socialization (Dist. Exs. 1; 3-10). At the time that the student's April 2008 IEP was developed, the student was described as highly distractible and she reportedly attempted to leave her seat during structured tasks (Dist. Ex. 7 at pp. 2, 5). The student's teachers reported that the student required prompting and cueing to complete tasks (id. at pp. 4, 5; Dist. Ex. 8 at p. 1). The student's preschool providers noted that the student engaged in stereotypic behavior which interfered with her ability to socialize and to learn new skills (Dist. Ex. 8 at p. 1). However, the providers also indicated that the student's ability to follow simple directions throughout the day had improved,

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<sup>3</sup> The USDOE previously discussed "location" regarding the 1997 amendments to the IDEA, which for the first time required an IEP to identify the "location" of services. In discussing this provision of the 1997 amendments, the USDOE noted that "[t]he 'location' of services in the context of an IEP generally refers to the type of environments that is the appropriate place for provision of the service. For example, is the related service to be provided in the child's regular classroom or in a resource room?" (Content of IEP, 64 Fed. Reg. 12594 [March 12, 1999]). Current provisions requiring that the location of services be identified on an IEP are found at 20 U.S.C. § 1414(d)(1)(A)(i)(VII); 34 C.F.R. § 300.320(a)(7); 8 NYCRR 200.4(d)(2)(v)(b)(7).

that she was more aware of classroom routines, and that she had demonstrated improvement in her ability to engage and participate in small and large group activities (id. at p. 2).

To address the student's special education needs, the April 2008 CSE recommended that the student be placed in a 6:1+1 special class in a specialized school (Dist. Ex. 1 at p. 1). The April 2008 IEP reflected the student's present levels of academic performance as described by her preschool providers and included a list of academic management needs that were consistent with provider recommendations and reports (compare Dist. Ex. 1 at pp. 3, 4, with Dist. Exs. 7-9). In addition, the IEP included goals and objectives that targeted the student's identified cognitive deficits, as well as her difficulty attending and following directions (Dist. Ex. 1 at pp. 9, 10, 13).

To address the student's speech-language deficits, the CSE recommended that the student receive individual speech-language therapy three times per week for 30 minutes (Dist. Ex. 1 at p. 18). The April 2008 IEP included goals and objectives that reflected the deficit areas identified by the student's speech-language therapist (Dist. Ex. 1 at pp. 9, 11). Specifically, the goals and objectives targeted the student's weaknesses in pragmatic language, including maintaining eye contact and engaging in turn taking with peers; receptive language, including following directions and responding to interrogatives; and expressive language, including decreasing the use of non-contingent utterances and producing 1-3 word utterances (id. at pp. 11, 12).

To address the student's motor and sensory deficits, the CSE recommended that the student receive individual OT three times per week for 30 minutes, in accordance with the recommendations on the January 2008 OT report (compare Dist. Ex. 1 at p. 14, with Dist. Ex. 10 at p. 3). The April 2008 IEP included goals and objectives related to improving the student's perceptual and fine motor skills, postural stability and motor awareness, and sensory processing and sensory integration (Dist. Ex. 1 at pp. 14-15). The goals and objectives reflected the weaknesses identified by the occupational therapist who evaluated the student in January 2008 (Dist. Ex. 10). The IEP also contained goals and objectives related to improving independent daily living skills and increasing play skills (Dist. Ex. 1 at pp. 9, 12, 13).

Turning to the appropriateness of the district's recommended class, the teacher of the proposed district class testified she used the Treatment and Education of Autistic and Related Communication Handicapped Children (TEACCH) program and some elements of ABA in her classroom (Tr. p. 28). She reported that she used TEACCH throughout the day and to develop different tasks for individual students, which she referred to as "work stations" (Tr. p. 33). According to the teacher, work stations provided the students with the opportunity to do individual work on their own (id.). The teacher indicated that she had a schedule for each student and that the schedule was used to transition between classrooms (id.). In addition, she provided each student with a symbol, made of a designated shape and color (Tr. pp. 33-34). The teacher reported that the students would carry their schedules and symbols with them when they went to different locations (Tr. p. 34). When the students arrived at a location there would be a receptacle matching their symbols (id.). According to the teacher, if it was a work station there would be a symbol also for the work station (id.). The teacher described ABA as a method of instruction that she used to teach students different tasks and how to do things on their own (Tr. pp. 35, 47-48). She indicated that she used ABA during 1:1 instruction (Tr. p. 35). According to the teacher, during ABA sessions she would work on "manding," which she described as teaching a student to express himself and his wants and needs (id.). The teacher indicated that she would spend at least 25

minutes daily with each student engaged in 1:1 instruction, but that the actual amount of 1:1 time provided in a 6:1+1 class depended on the teacher and the students' needs (Tr. pp. 47, 98). The teacher reported that all of the students received approximately the same amount of 1:1 instruction because they were "more or less" on the same level (Tr. p. 79). As reported by the teacher, there was an autism coach in the recommended school and the district offered continuing education to staff with regard to TEACCH (Tr. pp. 75, 81, 82).

To assess the functional levels of her students, the teacher reported that she used the ABLLS (Tr. p. 30). The teacher testified that she conducted the assessments during the first and second weeks of school (Tr. p. 31). She stated that the ABLLS would give her an idea of what level to put the students in and noted that she also used the student's IEP goals as a guide (Tr. pp. 30-31). The teacher indicated that she usually took notes and collected data to know what a student was capable of doing in different settings and that she would use her observations to develop tasks and programs (Tr. pp. 30-33).

According to the teacher, the students in her class were four and five years old and all functioned at the pre-kindergarten level (Tr. pp. 29, 67, 105). The teacher reported that she followed a pre-kindergarten curriculum given to her by the school (Tr. p. 100), but that she did not believe that it was specifically designed for students with autism (Tr. p. 102). The teacher indicated that she modified the curriculum based on the level of the students and that she grouped the students according to their functioning levels (Tr. pp. 30, 136). The teacher stated that she used repetition in her classroom because students with autism benefited from repetition (Tr. pp. 42-43). In addition, the teacher reported that she addressed generalization by using "the symbols," Picture Exchange Communication System (PECS) symbols, and teaching students the same thing in different settings (Tr. pp. 44, 129-30).<sup>4</sup>

The teacher reviewed the student's April 2008 IEP and testified that the goals on the student's IEP were goals that she tried to implement in the classroom (Tr. pp. 62-66). She stated that she believed the student would have been functionally grouped with the other students in her class because she was functioning more or less at the same level as the other students (Tr. p. 46). The teacher testified that based on the student's IEP, the student needed to learn how to socialize with peers and also to increase her language (Tr. pp. 40-41). The teacher indicated that she would address the student's social deficits by doing different social activities such as "circle time," where a student learns the names of peers and how to take turns (Tr. p. 41). She further indicated that classroom activities such as cooking, art, music, dance, ceramics, health, and gym taught students how to socialize with peers, to take turns, and to wait (*id.*). The teacher noted that the student's IEP indicated that the student was slowly becoming independent in classroom activities, which was what she did with her students (Tr. p. 46). She noted that the student would require prompting and cueing, which is something she used with her students (*id.*). The teacher indicated that there were other students in the classroom who were not yet toilet trained and that she would develop a schedule to toilet train the student (*id.*). The teacher indicated that she had experience working with students who exhibited stereotypic behaviors and tantrums and that she would work with the occupational therapist to address these behaviors if they occurred in her classroom (Tr. pp. 48-49). The teacher reported that she coordinated with the occupational therapist to incorporate sensory

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<sup>4</sup> The teacher described PECS as a "picture communication exchange" system (Tr. p. 44).



activities into the classroom (Tr. p. 52). For students who had difficulty transitioning, the teacher reported that she would provide the student with a cue so that the student could anticipate what was going to happen thereby reducing the student's anxiety and minimizing behaviors (Tr. pp. 49-50). The teacher indicated that as part of the daily schedule, she worked on activities of daily living (Tr. pp. 55-56).

The teacher reported that there were both verbal and nonverbal students in her class (Tr. p. 45). She indicated that language instruction took place throughout the day and that the speech-language therapist did activities with the students in the classroom, in addition to student's mandated therapies (Tr. pp. 50-51, 54). According to the teacher, all of the students in the class received speech-language and OT services (Tr. pp. 51-52).

The teacher also reported that all of the students in her class had BIPs (Tr. p. 570). She indicated that based on a review of the student's IEP, she would have developed a BIP for the student, probably during the first two or three weeks of school, to address the student's peer interaction, toilet training, and self-stimulatory behaviors (Tr. pp. 59-60). The teacher further testified that she conducted an FBA when developing a BIP for the students in her class (Tr. pp. 91-92).

The parents assert that the goals and objectives were created before the CSE meeting and that the CSE failed to discuss or individualize the student's proposed goals or objectives and therefore, failed to create goals and objectives that were clear, unambiguous, and sufficiently challenging. The school psychologist testified that she could not recall if the student's goals and objectives were specifically discussed at the April 29, 2008 CSE meeting (Tr. p. 168). However, she indicated that the student's preschool center based "teacher was on the phone and the parents were here and we went over the IEP" (*id.*; Dist. Ex. 1 at p. 2). The school psychologist testified that to the best of her recollection, the parents did not object at the CSE meeting to the goals that were on the student's IEP (Tr. p. 150). The student's mother acknowledged that in her June 26, 2008 letter to the district, in which she stated that the district's recommended placement was inappropriate and inadequate, she did not object to the goals on the student's April 2008 IEP (Tr. p. 30; Parent Ex. D). The parents fail to state specifically which goals are unclear, ambiguous, or insufficiently challenging or to detail why those specific goals are inadequate. A review of the student's IEP indicates that the goals and objectives targeted deficit areas identified by the student's preschool providers and evaluators. Furthermore, I note that the goals and objectives contained in the April 29, 2008 IEP are the same goals and objectives found in the student's January 28, 2008 IEP, and that the parents were in attendance at the January 2008 CSE meeting and did not object to the IEP that resulted from that meeting (compare Parent Ex. C at pp.9-15, with Parent Ex. B at pp. 9-15). Moreover, the parents contended in their due process complaint notice that the January 2008 IEP was the student's last agreed upon IEP and therefore, should serve as the student's pendency program (Parent Ex. A at p. 2). Under these circumstances, I find that the goals and objectives set forth in the April 29, 2008 IEP were consistent with recent assessments of the student and appropriately addressed the student's identified needs.

Regarding the method of measurement used to assess the student's progress toward goals and objectives, the April 29, 2008 IEP does not contain a specific method of measurement of the student's progress toward her IEP goals (Parent Ex. B at pp. 6-7). However, the teacher from the proposed placement stated that during the first and second weeks of school she assessed students'

functional levels using the ABLLS and observation (Tr. pp. 30-31). She reported that she took notes during classroom and group activities and collected data to determine what a student was capable of doing in different settings (Tr. p. 31). The teacher also indicated that she used the data to develop different tasks and programs (Tr. p. 32). In the instant case, the hearing record does not demonstrate that the district's failure to indicate the specific method of measurement that would have been used to show the student's progress toward her IEP goals impeded the student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE, or caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; see R.R. v. Scarsdale Union Free Sch. Dist., 2009 WL 1360980, at \*9 [S.D.N.Y. May 15, 2009]; M.C. v. Rye Neck Union Free Sch. Dist., 2008 WL 4449338, at \*11 [S.D.N.Y. Sept. 29, 2008]; E.H., 2008 WL 3930028, at \*7; see also Matrejek, 471 F. Supp. 2d at 419). However, the district is cautioned to ensure its compliance with 34 C.F.R. § 300.320(a)(3)(i-ii) and 8 NYCRR 200.4(d)(2)(iii)(b)(c).

The parents further assert that the CSE failed to make provision in the IEP for the 1:1 teaching program that the student needed. As identified by the impartial hearing officer, the professionals who worked with or evaluated the student offered varied program recommendations (IHO Decision at pp. 3-5). The neurologist who examined the student in December 2007 opined that the student should continue with an ABA-based therapeutic program (Dist. Ex. 6). The physician and school psychologist who evaluated the student in January 2008 recommended that the student receive 40 hours of 1:1 discrete trial therapy per week (Dist. Ex. 5 at p. 5). The student's SEIT reported that the student required 1:1 teacher support to effectively function in a classroom setting (Parent Ex. 7 at p. 1). Although the hearing record indicates that the SEIT provided the student with ten hours per week of ABA services, the SEIT did not specifically recommend ABA services for the student going forward (Dist. Ex. 7). The student's center-based special education teacher indicated that the student would benefit from a small, highly structured classroom environment (Dist. Ex. 8 at p. 3). Although the center-based classroom was described by the parents' professionals as an ABA-based program, the teacher of the center-based class did not identify it as such, nor did she specifically recommend ABA services for the student (Dist. Exs. 5 at p. 1; 6; 8). The school psychologist at the April 2008 CSE meeting stated that a 1:1 setting would not be the best setting for the student because she had begun to make gains and had started to work in small groups (Tr. p. 154). She further stated that it would be in the student's best interest to be in a setting where she could interact with peers (Tr. p. 155).

The school psychologist testified that the CSE members had extensive reports in front of them, and that the CSE read all of the reports and based a determination on "what the teacher was saying, what the parents were saying, what the reports said" (Tr. p. 151). The school psychologist acknowledged that the parents' private neuropsychological evaluation recommended 1:1 instruction for the student, but indicated "we never just follow one report or one recommendation, we look at the whole child, and we look at all the reports, we consider what the teacher is saying, we consider what all the related service providers are saying and we take everything together and make a recommendation" (id.).

While the CSE's recommendation did not incorporate all of the recommendations made by the parents' private evaluators, the hearing record shows that the CSE considered the private evaluations, and the IEP and recommended placement reflected some of the recommendations from each of the various professionals who had worked with or evaluated the student (see 8

NYCRR 200.5[g][1][vi]). The hearing record indicates that the recommended 6:1+1 class would have provided the student with a small, highly structured classroom environment along with the opportunity to interact with peers (Tr. pp. 33-34, 40-42). In addition, the student would have received individual instruction and that instruction would have been ABA-based (Tr. pp. 34-35). The parents' private neuropsychological evaluation recommended that the student's ABA program should be based on the ABLLS and that "manding" sessions should be incorporated into each ABA teaching session (Dist. Ex. 5 at p. 5). The teacher of the proposed class testified that she used the ABLLS to assess her students and determine their functioning levels and further indicated that she worked on manding during ABA instruction (Tr. pp. 30, 35). As discussed above, the student's related services goals and objectives addressed the areas recommended by the parents' private evaluators. Specifically, the student's IEP included speech-language goals related to improving the student's expressive, receptive, and pragmatic language skills and OT goals related to improving the student's sensory integration and fine motor skills (compare Dist. Ex. 1 at pp. 11, 12, 14, 15, with Dist. Ex. 5 at pp. 5-6). Furthermore, the hearing record shows that many of the IEP goals and objectives developed by the April 2008 CSE were similar to goals and objectives later developed by the staff at BAC (compare Dist. Ex. 1 at pp. 9-15, with Parent Ex. X at pp. 1-3). Based on the above, I find that the district's recommended program was reasonably calculated to confer educational benefits on the student and that the district's failure to adopt the frequency of individual instruction recommended by one of the parents' evaluators did not result in a denial of a FAPE to the student.

The parents also assert that the CSE failed to make provision to meet the statutory requirements for speech-language services and parent training and counseling. Pertaining to educational programs for student's with autism, State regulations require that provision shall be made for parent counseling and training for the purposes of enabling the parents to perform appropriate follow-up intervention activities at home (8 NYCRR 200.13[d]). Parent counseling and training is defined as:

"[A]ssisting parents in understanding the special needs of their child; providing parents with information about child development; and helping parents to acquire the necessary skills that will allow them to support the implementation of their child's individualized education program."

(8 NYCRR 200.1[kk]).

In this case, the parents are correct that the April 2008 IEP did not indicate that parent counseling and training would be provided; however, the hearing record shows that counseling and training would have been available at the district's recommended school. The parent coordinator at the recommended school testified that she served as a liaison between the school, the community, and the families of the students who attended the school (Tr. p. 217). She explained that when a parent came into the school they would be introduced to her (id.). The coordinator testified that she would provide the parents with an orientation to the school, answer their questions, and provide the parents with resources and outside referrals if needed (Tr. pp. 217, 218-20). The parent coordinator testified that she would also communicate with parents if a teacher needed to get in touch with them and schedule appointments if the parents wanted to meet with anyone at the school (Tr. pp. 218, 228). The parent coordinator testified that she conducted

monthly parent meetings designed to orient parents to the types of services that are available from agencies that provide services to parents of children with autism (Tr. p. 221). The coordinator reported that recent workshop topics included guardianship and an informational session on OT (Tr. pp. 223, 231, 233). She testified that she conducted outreach and created and sent out a calendar to parents every month (Tr. p. 224). She also followed up with phone calls (*id.*). According to the parent coordinator, in addition to training provided by the school, District 75 offered training that included ABA training for parents (Tr. p. 225). The coordinator noted that she had sent flyers home to parents informing them of District 75 training which included topics such as decreasing behaviors in the community and how to create visual supports in the community (Tr. pp. 225-26). In addition, there was an online positive behavior support conference (Tr. p. 225). The coordinator also reported that she was able to assist families with obtaining a Medicaid service coordinator (Tr. p. 227). I find that while parent training and counseling was not incorporated into the student's IEP, it would have been available at the recommended placement and the numerous trainings offered would have been relevant to the parents in this case; therefore, its absences on the IEP did not deny the student a FAPE.

The parents also assert that the recommended speech-language services on the student's April 2008 IEP failed to meet the statutory requirements for speech-language services for students with autism. State regulations provide that "instructional services shall be provided to meet the individual language needs of a student with autism for a minimum of 30 minutes daily in groups not to exceed two, or sixty minutes daily in groups not to exceed six" (8 NYCRR 200.13[a][4]). The hearing record reflects that the April 2008 CSE recommended that the student receive individual speech-language therapy three times weekly for 30 minutes (Dist. Ex. 1 at p. 18). In addition to the student's individual speech-language therapy, the teacher of the proposed district class testified that language instruction was incorporated into the daily classroom routine through the use of different activities (Tr. pp. 50-51). The teacher reported that the speech-language therapist did activities with the students in the classroom and that such activities were in addition to students' mandated therapies (Tr. pp. 50-51, 54). The teacher also described a daily circle time in which the students sang, greeted each other, counted, and recited days of the week (Tr. p. 57). According to the teacher, circle time also provided the opportunity to work on social skills such as learning peers' names and turn taking (Tr. p. 41). The student's individual language needs, as identified by her preschool speech therapist, included improving the student's social relatedness, including eye contact, turn taking, joint attention, and peer interaction (Dist. Ex. 9 at p. 2). Under the circumstance, although not specifically delineated on the student's IEP, the hearing record reflects that the recommended program, including direct speech-language therapy services and in-class language-based activities were appropriate to meet the student's individual language needs (see Application of the Dep't of Educ., Appeal No. 08-140; Application of the Bd. of Educ., Appeal No. 08-091).

The parents also contend that the CSE failed to develop an FBA or BIP, failed to timely assess the then present levels of the student's behavioral performance, and generally failed to account for the student's interfering behaviors. If a student's behavior impedes his or her learning or the learning of others, the CSE must "consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior" when developing, reviewing and revising an IEP (20 U.S.C. § 1414[d][3][B][i]; see 34 C.F.R. § 300.324[a][2][i]; 8 NYCRR [d][3][i]; see also A.C., 553 F.3d 165; J.A. v. East Ramapo Cent. Sch. Dist., 2009 WL 773937, at \*4 [S.D.N.Y. Mar. 24, 2009]; M.M. v. New York City Dep't of Educ., 583 F. Supp. 2d 498, 510 [S.D.N.Y.

2008]; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 149-50 [S.D.N.Y. 2006]; Tarlowe, 2008 WL 2736027, at \*8; Application of a Student with a Disability, Appeal No. 08-028; Application of the Dep't of Educ., Appeal No. 07-120).<sup>5</sup> Additionally, under State regulations when considering more restrictive programs or placements as a result of the student's behavior, a CSE "shall consider the development of a behavioral intervention plan" (8 NYCRR 200.22[b]).<sup>6</sup>

The school psychologist reported that the April 2008 CSE discussed the student's need for a formal behavior plan with the student's preschool classroom teacher, but that the preschool teacher did not believe the student needed one (Tr. pp. 144-45, 161). The school psychologist testified that in her view, the student demonstrated behavior that was not unusual for a student with autism and that special education teachers "worked with students like this" (Tr. p. 162). When asked how the CSE had assessed the student's present levels of behavioral performance, the school psychologist stated that as part of their reports, the student's teacher and providers had provided descriptions of how the student was performing (Tr. p. 183). The student's mother testified that discussion at the CSE meeting focused on the fact that the student was not aggressive and was not disruptive to the other student's in the classroom (Tr. p. 200). She stated that the idea of an FBA was never directly discussed (*id.*).

Although the CSE did not conduct an FBA or develop a BIP for the student, the April 29, 2008 IEP identified the student's behavioral issues and included goals and objectives that targeted the student's interfering behavior. The April 29, 2008 IEP indicated that the student demonstrated self-stimulatory behaviors that interfered with her ability to attend to tasks and to socially interact with others (Dist. Ex. 1 at p. 3). The IEP also indicated that the student engaged in high rates of self-talk and needed a lot of prompting to remain engaged (*id.* at p. 4). To address the student's interfering behaviors, the CSE set objectives to "decrease the student's use of non contingent utterances when verbal prompts are provided" and to have the student "transition from one activity to another without running off or engaging in non-purposeful behavior" (*id.* at pp. 12, 15). The IEP indicated that the student required guidance and modeling to engage in interactions with adults and peers and the list of academic management needs contained in the IEP indicated the student's need for adult models, verbal cues, and verbal prompts (*id.* at pp. 1, 5).

The teacher of the proposed class testified that based on the student's IEP, she thought she would have created a BIP for the student (Tr. pp. 59, 94). The teacher suggested that she would have developed a plan that targeted the student's peer interaction, toilet training, and self-

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<sup>5</sup> In developing an IEP and considering "special factors" when a student's behavior impedes learning, federal regulations (34 C.F.R. § 300.324[a][2][i]) and State regulations (8 NYCRR 200.4[d][3]) require consideration of strategies to address that behavior as part of the development of the IEP. Federal regulations (34 C.F.R. §§ 300.530[d][1][ii], 300.530[f][1][i]) and State regulations (8 NYCRR 201.3) also address preparation of, or review of, an FBA and BIP in disciplinary situations. In addition, as presented in the instant case, State regulations (8 NYCRR 200.4[d][3][i], 200.22[a], [b]), but not federal regulations, require consideration of an FBA and BIP in certain non-disciplinary situations.

<sup>6</sup> In New York, a BIP is defined as "a plan that is based on the results of a functional behavioral assessment and, at a minimum, includes a description of the problem behavior, global and specific hypotheses as to why the problem behavior occurs and intervention strategies that include positive behavioral supports and services to address the behavior" (8 NYCRR 200.1[mmm]; 8 NYCRR 201.2[a]). An FBA is defined as "the process of determining why a student engages in behaviors that impede learning and how the student's behavior relates to the environment" (8 NYCRR 200.1[r]).

stimulatory behaviors (Tr. pp. 59-60). The teacher testified that sometimes after the first or second week of school, she would see that the student had a particular need and she would therefore develop a BIP (Tr. p. 91). The teacher reported that she conducted an FBA prior to developing a BIP (id.). The parents did not articulate how they believed the student would be harmed if the district did not conduct an FBA or develop a BIP until the student entered into the recommended classroom in September and I find that to the extent that failing to create an FBA and BIP at the April 2008 CSE meeting resulted in a procedural inadequacy, that inadequacy did not impede the student's right to a FAPE, significantly impede the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or cause a deprivation of educational benefits to the student (see Tarlowe, 2008 WL 2736027, at \*8; see generally A.G. v. Frieden, 2009 WL 806832, at \*9 [S.D.N.Y. Mar. 26, 2009]).

Lastly, the parents assert that the CSE failed to develop or recommend any transition plan to support the student's intended transfer to respondents proposed placement. The parents did not raise this issue in any of their due process complaint notices, nor was it raised during the impartial hearing. As such, I find that this issue was not properly raised and I will not address it on appeal (see 20 U.S.C. § 1415[c][2][E][i]; 34 C.F.R. § 300.508[d][3]; 8 NYCRR 200.5[i][7][i], [j][1][ii]).

I have considered the parties' remaining contentions and find that I need not address them in light of my determinations.

**THE APPEAL IS DISMISSED.**

**THE CROSS-APPEAL IS SUSTAINED.**

**IT IS ORDERED**, that the impartial hearing officer's decision is nulled in its entirety.

**Dated:** Albany, New York  
June 19, 2009

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**PAUL F. KELLY**  
**STATE REVIEW OFFICER**