



The University of the State of New York

The State Education Department State Review Officer

No. 07-049

Application of a CHILD 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:

Law Offices of Steven L. Goldstein, attorney for petitioners, Steven L. Goldstein, Esq., of counsel

Hon. Michael A. Cardozo, Corporation Counsel, attorney for respondent, Daniel J. Schneider, Esq., of counsel

DECISION

Petitioners appeal from the decision of an impartial hearing officer which denied their request to be reimbursed for their son's tuition costs at the Rebecca School for the 2006-07 school year. Respondent, the New York City Department of Education, cross-appeals from the impartial hearing officer's determination that it failed to demonstrate that it had offered an appropriate educational program to the student for that year. The appeal must be dismissed. The cross-appeal must be sustained.

Preliminarily, I will address a procedural issue. Petitioners attach to their petition an occupational therapy (OT) update dated April 23, 2007 and a summary of the child's performance at the Rebecca School dated April 24, 2007. Petitioners explain that these exhibits were unavailable at the time of the impartial hearing (Pet. ¶ 23). Generally, documentary evidence not presented at a hearing may be considered in an appeal from an impartial hearing officer's decision if such additional evidence could not have been offered at the time of the hearing and the evidence is necessary to enable the State Review Officer to render a decision (Application of a Child Suspected of Having a Disability, Appeal No. 07-042; Application of a Child with a Disability, Appeal No. 06-058; Application of a Child with a Disability, Appeal No. 05-020). The April 2007 exhibits could not have been offered at the time of the impartial hearing; however, they are not necessary for my review and I decline to accept them.

Petitioners' son was five years old and attending the Rebecca School when the impartial hearing began in September 2007. The Rebecca School has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7). The child's eligibility for special education programs as a student with autism is not in dispute (Dist. Ex. 11 at p. 1; see 8 NYCRR 200.1[zz][1]). At the recommendation of Respondent's Committee on Preschool Special Education (CPSE), the child began attending the Hebrew Academy for Special Children (HASC) in September 2004 (Tr. p. 425; Parent Ex. B; Dist. Exs. 3; 13 at p.1).

A November 21, 2005 education progress report from HASC, completed by the child's classroom teacher, noted that the child had made progress in all areas and that applied behavioral analysis (ABA) therapy, Treatment and Education of Autistic and Communication Handicapped Children (TEACCH) and sensory integration techniques had been used in his instruction (Dist. Ex. 13 at p. 1). The teacher reported that, cognitively, petitioners' son was able to find a hidden toy, rotate an object to find its functional side and play with cause and effect toys (id.). He was able to identify some action pictures and follow one-step and some two-step commands, but did not demonstrate understanding of concepts of quantity, attributes or prepositions and did not identify objects by their use or category (id.). The child was able to make eye contact in response to his name in a one-to-one setting, could receptively identify most body parts and many pictures of common objects as well as some verb pictures. Expressively, the child was reported to make sounds throughout the day, was able to imitate "ah" and "m" and had been heard to say some words, but he did not initiate any verbal or nonverbal communication (Dist. Ex. 13 at p. 2).

The November 2005 education progress report also summarized the child's present performance in gross and fine motor skills (id.). Petitioners' son was reportedly able to walk and run independently, climb on playground equipment and jump in place, but was unable to catch, throw or kick a ball, jump forward or stand on one foot (id.). He was able to complete inset puzzles and string beads with verbal prompting (id.). He required prompting to snip with scissors and hold a crayon correctly, and would imitate horizontal and vertical lines and a cross (id.). He was unable to imitate folding paper in half and did not build three dimensional constructions with blocks (id.). The child could eat independently with a spoon and fork and drink from a cup; he did not serve himself, but would return empty dishes to a counter with prompting (id.). He was able to use the toilet when taken, but did not independently indicate need (id.). He was able to take off his jacket and hat, unzip a zipper and zip a zipper when the catch was in place, but he required assistance with all other aspects of dressing (Dist. Ex. 13 at p. 3). Socially, the report noted that the child recognized boys and girls that appear alone in a picture, but not those that appear in a book (id.). The child engaged in parallel play and was beginning to watch other children, but he made no attempts to interact with them and did not share or take turns (id.). In January 2006, the HASC classroom teacher completed a screening form as part of an observation of the child (Dist. Ex. 28). On the form, the teacher indicated that the child was cooperative but easily frustrated and remained withdrawn and did not interact with other children (Dist. Ex. 28 at p. 2).

A November 2005 speech-language evaluation report from a speech-language pathologist at HASC noted that the child had mastered two-step gross motor imitations and could imitate the fine motor gestures for "point" and "thumbs up," had mastered 17 one-step commands and had mastered ten two-step non-related commands with 90 percent to 100 percent accuracy (Dist. Ex.

19 at p. 1). When presented in groups of three, he was able to recognize common nouns depicted in black and white pictures and he could recognize objects in colored pictures presented in groups of four (*id.*). Expressively, the child was able to imitate three sounds consistently and two sounds inconsistently when in therapy sessions, and was able to produce one consonant-vowel combination and one vowel-consonant combination when the sounds were presented slowly (Dist. Ex. 19 at p. 2). The evaluator noted that the child had recently demonstrated the ability to nod his head "yes" when asked "Do you want ____?" (Dist. Ex. 19 at p. 2). Continued speech-language therapy was recommended and the evaluator recommended goals for increased eye contact, increased two-step gross motor imitations and commands, increased noun and verb recognition and increased consonant and vowel production (Dist. Ex. 19 at p. 1).

A December 2005 OT progress report from HASC indicated that the child's immature grasping and manipulation patterns affected his fine motor skills (Dist. Ex. 20 at p. 1). The child could snip with scissors with cueing, but he required assistance to cut a straight or curved line, and he could string beads with an awkward grasp and frequent dropping (*id.*). He was unable to open or close buttons (Dist. Ex. 20 at p. 2). Describing the child's sensory processing levels, the evaluator noted that he did not demonstrate sensations when touching different textured materials (Dist. Ex. 20 at p. 1). He would mount most sensory equipment but was described as appearing fearful and tolerant of movement on the equipment for only brief periods of time (*id.*). The occupational therapist also reported that the child appeared to enjoy deep pressure activities, which seemed to have a calming effect on him (Dist. Ex. 20 at p. 1).

A December 2005 physical therapy (PT) progress report from HASC noted normal muscle tone and joint flexibility but muscle weakness in both legs as well as poor coordination, balance and endurance (Dist. Ex. 21 at p. 2). The physical therapist reported that the child's lack of understanding contributed to his delays, and that he required demonstration and guidance (*id.*).

On May 18, 2006, petitioners' son was privately evaluated by a clinical psychologist (private psychologist) (Dist. Ex. 12). The private psychologist reported that the child exhibited difficulties complying with requests, hyperactive and impulsive behaviors, poor eye contact, poor attention and concentration, poor motivation, and severe communication deficits during the evaluation, but that he was able to respond to some questions with refocusing and prompting (Dist. Ex. 12 at p. 2). Attempted administration of the Wechsler Preschool and Primary Scale of Intelligence – III (WPPSI-III), yielded a performance IQ score of 55, placing the child's cognitive abilities in the mild to moderate range of mental retardation (Dist. Ex. 12 at p. 4). The child was unable to perform on other measures in the WIPPSI-III, so no verbal IQ score, processing speed IQ score or full scale IQ score could be calculated; the clinical psychologist noted that this aspect of the child's performance was consistent with a previous diagnosis of autism (*id.*). Assessment of the child using the Vineland-II Adaptive Behavior Scales with the child's mother as informant suggested performance within a 1.3 to 2.2 year age equivalent in the communication domain, a 2.3 to 2.8 year age equivalent in the daily living skills domain and a 0.7 to 1.10 year age equivalent in the socialization domain, yielding an adaptive behavior composite below the first percentile (Dist. Ex. 12 at pp. 5-6). The child's score of 44 on the Childhood Autism Rating Scale (CARS) placed him in the "severe" range of autism (Dist. Ex. 12 at p. 7). Results of the Conners' Parent Rating Scale – Revised did not identify the presence of an attention deficit hyperactivity disorder (ADHD); the private psychologist suggested that the child's occasional hyperactive and impulsive behaviors were an integral part of his disability and did not warrant an ADHD diagnosis (Dist. Ex. 12 at p. 9).

The private psychologist offered diagnoses of an autistic disorder and also mental retardation with severity unspecified (Dist. Ex. 12 at p. 10). He recommended that the child be placed in a "small, self-contained special education school that uses [ABA] techniques" and opined that, because of the severity of the child's delays, he needed to acquire initial interpersonal skills rather than group skills (Dist. Ex. 12 at p. 11).

Respondent's Committee on Special Education (CSE) convened on June 6, 2006 to review the student's records and develop an individualized education plan (IEP) for the 2006-07 school year (Dist. Ex. 11). The meeting was attended by respondent's district representative, an additional parent member, respondent's psychologist, the child's special education teacher from HASC, the child's mother and a parent advocate; the child's mother received a procedural safeguards notice at the CSE meeting (Tr. pp. 1144-45, 1233, 1280-1281, 1284; Parent Ex. AA; Dist. Ex. 11 at p. 2). The CSE recommended that the child receive extended school year services and be placed in a special class in a specialized school with a 6:1+1 student to staff ratio (Dist. Ex. 11 at p. 1). The CSE also recommended that the child receive one-to-one speech-language therapy for five 30-minute sessions per week, OT for four 30-minute sessions per week, and PT for two 30-minute sessions per week (Tr. p. 314; Dist. Ex. 11 at pp. 17, 19). The CSE also recommended door-to-door transportation on a limited run in a climate-controlled mini-bus as well as adaptive physical education (Dist. Ex. 11 at p. 1).

At the conclusion of the June 2006 CSE meeting, the district representative produced a non-exhaustive, handwritten list of schools that operated 6:1+1 specialized classes, and she asked the child's mother to visit and familiarize herself with the programs (Tr. pp. 312, 314, 1234, 1251; Dist. Ex. L). Over the course of the summer, the child's mother visited several of the schools on the handwritten list (Tr. pp. 1251-52; Dist. Ex. L) and she also visited several approved and non-approved private schools (Tr. pp. 1246-49). The child's father testified that it was his belief that petitioners were to choose from among the schools on the handwritten list (Tr. pp. 1110-11; Dist. Ex. L).

Respondent sent petitioners a Final Notice of Recommendation (FNR) dated June 15, 2006, which offered the child a space in its public school located at P396 (Tr. p. 1111; Dist. Ex. 8). The district representative stated that petitioners objected to respondent's proposed location of P396 when the child's father telephoned her in June 2006 and adamantly indicated that the child would not attend school in "East New York" (Tr. pp. 317-20). However, the child's father did not explain to the district representative at the time of the June 2006 telephone conversation that in 1985 he had been the victim of a violent crime approximately one mile from P396 (Tr. pp. 1111-13; 1153-54). Petitioners visited P396 on August 7, 2006, but were unsuccessful observing a class that day (Tr. pp. 1125-28, 1300-02; Dist. Ex. 45). Petitioners also applied to the Rebecca School on August 7, 2006 (Dist. Ex. 37).

Respondent sent petitioner a second FNR, dated August 15, 2006, which recommended that the child attend P231 at 215 (P231) (Dist. Ex. 24). Petitioners did not visit P231, and the child's mother indicated that she telephoned P231 and the program was not in session (Tr. pp. 1138-39, 1255).

On August 24, 2006, petitioners notified respondent via facsimile that they planned to enroll the child at the Rebecca School for the 2006-07 school year and planned to request an

impartial hearing and seek tuition reimbursement from respondent (Dist. Ex. G). By due process complaint notice dated August 28, 2006, petitioners alleged, among other things, procedural deficiencies with respect to the development of the child's IEP and substantive deficiencies with regard to the CSE's recommended placement for the child (Parent Ex. A at pp. 3-8). Petitioners also alleged that the August 2006 FNR failed to indicate that an appropriate class for the child was offered at the proposed school location (Parent Ex. A at p. 6).

The impartial hearing commenced on September 7, 2006 and concluded on January 17, 2007 after seven days of testimony. At the impartial hearing, petitioners asserted, among other things, that the goals and objectives in the IEP were not appropriate, that the child had sensory integration needs that were not addressed, and that discrete trial settings were not appropriate for the child (Tr. pp. 938, 968, 970-973). Petitioners indicated that the IEP did not include parent training or transition goals (Tr. pp. 198, 655, 729-30, 724-26), and a behavior intervention plan (BIP) was listed on the IEP which did not follow a functional behavioral assessment (FBA) (Tr. pp. 206-207, 574, 645, 647, 972-73).¹ Petitioners also contended that they were not told that HASC was available as a pendency placement and that the Rebecca School should be the student's pendency placement (Tr. pp. 90, 114, 1199, 1316).

At the impartial hearing, respondent asserted that transition goals were not required for the child and that it was unnecessary to place parent training in the June 2006 IEP because parent training was incorporated into the program (Tr. pp. 198, 314-15, 655). Respondent also elicited testimony regarding the ability of its schools to implement the proposed June 2006 IEP (Tr. pp. 789-792, 900).

By decision dated April 3, 2007, the impartial hearing officer determined that the educational program offered by respondent was not appropriate because, among other things, it significantly reduced the student-to-staff ratio and did not appropriately consider the recommendations contained in petitioners' May 2006 psychological evaluation report (IHO Decision at pp. 9-12). She also determined that the Rebecca school was not an appropriate placement for the child and that petitioners submitted almost no objective evidence of the child's progress at the Rebecca School (*id.*).

Petitioners appeal that portion of the impartial hearing officer's decision which determined that the Rebecca School was not an appropriate placement for the child and her decision not to address the equities of petitioners' claim. Petitioners contend that the Rebecca School was appropriate because it provided the child with an appropriate student-to-staff ratio and related services. Petitioners argue that the student was making educational progress at the

¹ An FBA is "the process of determining why a student engages in behaviors that impede learning and how the student's behavior relates to the environment. The functional behavioral assessment shall be developed consistent with the requirements in section 200.22(a) of this Part and shall include, but is not limited to, the identification of the problem behavior, the definition of the behavior in concrete terms, the identification of the contextual factors that contribute to the behavior (including cognitive and affective factors) and the formulation of a hypothesis regarding the general conditions under which a behavior usually occurs and probably consequences that serve to maintain it" (8 NYCRR 200.1[r]). A BIP is "a plan that is based on the results of the [FBA] 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 201.2[a]).

Rebecca School and that the appropriateness of the Rebecca school was "undisputed by the parties." Petitioners also argue that equitable considerations supported their claim for tuition reimbursement.

In its answer, respondent denies that the Rebecca School offered an appropriate educational program to the student. Respondent also cross-appeals, asserting that the CSE members had the private psychological evaluation report at the meeting and that neither the child's mother nor petitioners' advocate voiced any dissatisfaction with the conduct of the CSE meeting or the June 2006 IEP. Respondent contends that the June 2006 IEP appropriately addressed the child's needs and that it offered an appropriate program for the child.

Petitioners argue in their answer to the cross-appeal that the impartial hearing officer properly determined that the CSE failed to consider the child's unique needs when developing the IEP and making its recommendations for the child. Petitioners argue that respondent's cross-appeal should be dismissed because the CSE was not properly constituted; petitioners were not permitted to meaningfully participate in the June 2006 CSE; the annual goals in the June 2006 IEP did not contain objectively measurable criteria and did not address the child's needs; an FBA was not conducted by respondent; the BIP was inappropriate; and respondent failed to provide a transition program for the child.

The central purpose of the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482)² is to ensure that students with disabilities have available to them a free appropriate public education (FAPE) (20 U.S.C. § 1400[d][1][A]; see Schaffer v. Weast, 126 S. Ct. 528, 531 [2005]; Bd. of Educ. v. Rowley, 458 U.S. 176, 179-81, 200-01 [1982]; Frank G. v. Bd. of Educ., 459 F.3d 356, 371 [2d Cir. 2006]).³ A FAPE includes special education and related services designed to meet the student's unique needs, provided in conformity with a written IEP (20 U.S.C. § 1401[9][D]; 34 C.F.R. § 300.17[d];⁴ see 20 U.S.C. § 1414[d]; 34 C.F.R. § 300.320).

² On December 3, 2004, Congress amended the IDEA; however, the amendments did not take effect until July 1, 2005 (see Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647). As the relevant events in the instant appeal took place after the effective date of the 2004 amendments, the provisions of the IDEA 2004 apply and the citations contained in this decision are to the newly amended statute.

³ 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]).

⁴ The Code of Federal Regulations (34 C.F.R. Parts 300 and 301) has been amended to implement changes made to the IDEA, as amended by the Individuals with Disabilities Education Improvement Act of 2004. The amended regulations became effective October 13, 2006. While some of the relevant events in the instant case took place prior to the effective date of the 2006 amendments, none of the new provisions contained in the amended regulations are applicable to the issues raised in this appeal. For convenience, citations in this decision refer to the regulations as amended because the regulations have been reorganized and renumbered.

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). While school districts are required to comply with all IDEA procedures, not all procedural errors render an IEP legally inadequate under the IDEA (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 child, 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]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, at 419 [S.D.N.Y. 2007]).

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 child 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 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).

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs, establishes annual goals related to those needs, and provides for the use of appropriate special education services (Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

The burden of persuasion in an administrative hearing challenging an IEP is on the party seeking relief (see Schaffer, 126 S. Ct. at 531, 536-37 [finding it improper under the IDEA to assume that every IEP is invalid until the school district demonstrates that it is not]).⁵

Turning first to the parties' arguments in the cross-appeal regarding the impartial hearing officer's decision that respondent failed to offer the student a FAPE, petitioners' contention that the June 2006 CSE was not properly composed is not supported by the record. In their due process complaint notice, petitioners alleged, among other things, that no regular education teacher was included at the June 2006 CSE meeting (Parent Ex. A at p. 5). The June 2006 IEP listing the participants at the CSE meeting shows that no regular education teacher attended the meeting (Dist. Ex. 11 at p. 2). However, at the impartial hearing, petitioners offered no evidence that the child may have participated in the regular education environment, and I find respondent was not required to include a regular education teacher at the June 2006 CSE (34 C.F.R. § 300.321[a][2]; 8 NYCRR 200.3[a][1][ii]). I have searched the record and find no other evidence suggesting that the CSE was improperly constituted.

Among the June 2006 CSE attendees were the child's mother and her lay advocate (Dist. Ex. 11 at p. 2). The child's mother testified that she was asked questions regarding the child, and respondent's psychologist testified that he summarized the goals and descriptions out loud (Tr. pp. 199, 208, 1277-78). The child's mother also explained that she received and had read copies of the reports and evaluations considered at the June 2006 CSE meeting, and that copies were at the meeting in the child's educational files (Tr. pp. 1266-71). Although she stated that she had been curious about what respondent's psychologist was writing on the IEP at the time of the CSE meeting, the child's mother testified that she "just didn't ask" (Tr. pp. 1273-75). Under these circumstances, I find that petitioners did not sustain their burden to establish that the child's mother was denied the opportunity to meaningfully participate at the June 2006 CSE meeting.

With regard to the impartial hearing officer's conclusion that the June 2006 CSE did not appropriately consider the recommendations contained in petitioners' May 2006 psychological evaluation report, the child's mother testified that she provided the evaluation report to the CSE and the meeting did not commence until the CSE member who was participating by telephone had received a copy via facsimile (Tr. pp. 374-75, 1264-65). Other CSE members also stated that they received, read and considered the evaluation report (Tr. pp. 188-89, 374-75). I disagree with the impartial hearing officer's conclusion that the CSE failed to consider the May 2006 psychological evaluation report. Although a CSE must consider the results of privately obtained evaluations and relevant information provided by the parent (Educ. Law § 4402[3][a]; 8 NYCRR 200.5[g][1][v][a]; see 34 C.F.R. § 300.502[c][1]), it is not obligated to adopt every recommendation. Rather, it is the responsibility of the CSE to make recommendations regarding the student's needs and the services to be provided (Educ. Law § 4402[1][b][3]; Application of the Bd. of Educ., Appeal No. 06-080; Application of a Child with a Disability, Appeal No. 05-126).

⁵ At the impartial hearing, the burden of production was placed upon respondent because of its failure to comply with the requirements in its response to petitioners' due process complaint notice (Tr. pp. 141-42; see 34 C.F.R. § 300.508[e]; 8 NYCRR 200.5[i][4]).

I have carefully reviewed the IEP prepared by respondent's CSE on June 6, 2006, and I find that it accurately reflects the child's present performance levels as articulated by the reports available to the CSE at the time the IEP was developed, that it includes goals and objectives consistent with the child's needs as identified in these reports, and that it recommends a program both consistent with those needs and consistent with recommendations made by those who provided services to the child and those who evaluated him (Dist. Ex. 11).

The IEP contains brief descriptions of the child's present performance levels in the academic, social/emotional and physical development domains which directly correspond to progress reports provided by HASC staff in November and December 2005 as well as to conclusions in the report of the May 18, 2006 psychological evaluation of the child (Dist. Exs. 11 at pp. 3-5; 12; 13). Consistent with information provided by the child's classroom teacher and speech-language therapist, the IEP contains goals and corresponding objectives for identifying pictures, identifying functions of objects in pictures, identifying verbs in pictures, identifying the gender of boys and girls in pictures in a book, and following commands (Dist. Exs. 11 at pp. 6-7, 13; 13; 19). Consistent with the speech-language therapist's report that the child had recently demonstrated the ability to nod his head to communicate "yes," the IEP includes a goal with objectives to expand that skill as well as objectives for communicating the word "no" by shaking his head (Dist. Exs. 11 at p. 8; 19). Additional speech-language goals address other areas of need identified by both the classroom teacher and the speech-language therapist, including goals for eye contact and increasing receptive language and goals for expressive language with objectives for increased imitation of speech sounds and increased spontaneous verbalizations (Dist. Exs. 11 at pp. 6, 13, 14; 13; 19). OT goals and objectives address fine motor skills for grasping, cutting and folding as articulated in the December 2005 OT evaluation report and in the classroom teacher's progress report (Dist. Exs. 11 at pp. 8, 9; 13; 20). Goals for self care include objectives for buttoning and for independent toileting which are also consistent with reports of both the occupational therapist and the classroom teacher (Dist. Exs. 11 at pp. 10, 12; 13; 20). Goals and objectives for improving visual perceptual motor skills and for tolerance of movement on sensory equipment are consistent with needs identified in the occupational therapist's report (Dist. Exs. 11 at pp. 9, 10; 20). PT goals address the child's identified difficulty with balance and his inability to throw and catch a ball (Dist. Exs. 11 at p. 15; 21). The goals and corresponding objectives include information regarding methods of measurement for each quarter of the 2006-07 school year as well as criteria for determining mastery of goals and objectives (Dist. Ex. 11 at pp. 6-16).

Petitioners also assert that the CSE failed to provide appropriate transitional support services on the child's IEP. In this case, nothing in the record suggests that the child requires transitional support services, and as more fully described below, the child would have been placed in classes in which all of the students were autistic and he would receive assistance with acclimating to his new environment. Thus, transitional support services were not required for the child (8 NYCRR 200.13[a][6]).

Next, petitioners' contention that respondent did not offer the student appropriate classroom placements because the classes were not in session when petitioners visited in August 2006 also lacks merit. Respondent's staff suggested that petitioners visit several particular schools and observe 6:1+1 classes therein (Parent Ex. L). Petitioners testified regarding their opposition to the classroom sites recommended by respondent, stating that there was little to show them at the particular classes they wished to observe (Tr. pp. 1126-27, 1139, 1157, 1254-

55; 1299). The CSE was required to indicate a recommended placement on the child's IEP (8 NYCRR 200.4[d][2][xii]). Although the IDEA requires parental participation in determining the educational placement of a child (see 34 C.F.R. §§ 300.116, 300.327, 300.501[c]), the assignment of a particular school is an administrative decision provided it is made in conformance with the IEP team'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]; 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. ex rel. J.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]).^{6, 7} 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 IEP team's educational placement recommendation (Letter to Veasey, 37 IDELR 10 [OSEP 2001]).⁸ While encouraging school districts to work with parents and offer opportunities to observe classroom and placement options, OSEP has opined that the IDEA does not entitle parents of children with disabilities to observe their children in any current classroom or proposed educational placement (Letter to Mamas, 42 IDELR 10 [OSEP 2004]; see Application of a Child with a Disability, Appeal No. 07-013). The USDOE has clarified that a school district "may have two or more equally appropriate locations that meet the child's special education and related services needs and school administrators should have the flexibility to assign the child to a particular school or classroom, provided that determination is consistent with the decision of the group determining placement" (Placements, 71 Fed. Reg. 46588 [August 14, 2006]). In this case, there is no evidence in the record that the child's special education or related services needs could only be addressed in a specific classroom or a specific school. Consequently, petitioners' unsuccessful attempts during summer 2006 to observe particular classrooms identified in the FNRs do not rise to the level of supporting a finding that respondent failed to offer the student a FAPE.

Contrary to petitioners' contentions, the evidence in the record shows that either P396 or P231 could have implemented the child's IEP had he attended one of those schools. With regard

⁶ The federal and state continuums of alternative placement options are identified in 34 C.F.R. § 300.115 and 8 NYCRR 200.6.

⁷ 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]).

⁸ Educational placement decisions must also be made consistent with least restrictive environment principles (see 34 C.F.R. § 300.116[a][2], [b][3]).

to P396, the psychologist from P396 (P396 psychologist) reviewed the June 2006 IEP and observed that the child had language deficits that interfered with formal testing and also had difficulties with generalization (Tr. p. 638). She indicated that she would have requested a psychological evaluation to obtain more information, but noted that the speech-language evaluation report provided by HASC was "excellent" and provided useful information about the child's current communication skills which could have been used to encourage further communication and to facilitate parent training (Tr. pp. 667-68). She explained that the child's IEP would have been given to the classroom teacher and to relevant related service providers who were responsible for reviewing the IEP and implementing the goals (Tr. p. 639). After entry into the program at P396, each child was formally evaluated using Brigance scales to identify baseline skills and to determine if the IEP goals were still appropriate (Tr. pp. 640-41, 658). According to the P396 psychologist, the Brigance is performed in October of each school year, after allowing the new students a month to become acclimated to their new classroom environment and is administered again in April to assess progress (Tr. pp. 640, 642). She described strategies used to facilitate each child's acclimation into the classroom and building, and explained how the structure and consistency inherent within the classroom assisted with transitions (Tr. pp. 654, 683, 722-27, 738-39). The P396 psychologist testified that she also used the ABAS Adaptive Behavior Scale to assess the child's functioning in the home and in the community (Tr. p. 660).

The P396 psychologist reviewed the goals and objectives on the June 2006 IEP and testified in detail regarding strategies in the proposed classroom which would have been used to address the goals, noting how related services would have addressed some of the goals and how she would have contacted the child's parents to gain more specific information regarding the child's current performance at home in relation to the goals (Tr. pp. 697-707). She also offered suggestions as to how the child's sensory integration needs would have been assessed and addressed (Tr. pp. 708-10, 750).

The P396 psychologist testified that a modified form of ABA was used in the program at P396, and that the teacher in the recommended classroom implemented components of ABA with the picture exchange communication system (PECS) (Tr. pp. 626-27). She described the PECS and TEACCH programs used at the school and offered examples of how the classroom teacher individualized each child's program within PECS by creating visual cues that included photographs of each child and also how PECS was carried over into the TEACCH paradigm as each child mastered PECS and became developmentally ready for TEACCH (Tr. p. 617). She testified that PECS was also implemented with all related services, and described how pictures were used to teach each child to become independent by allowing for individual choices and to generalize skills within the school and ultimately in the community (Tr. pp. 618-19). The P396 psychologist noted that, within the TEACCH process, each child had an individualized schedule and individualized rewards (Tr. pp. 619-20, 628-29).

The special education teacher who would have been the child's teacher at P396 (P396 teacher) testified that she had reviewed the June 2006 IEP and would have been able to implement the goals (Tr. pp. 786, 816). She explained that she reviewed each child's IEP as soon as she received it and described how she assesses each student in order to determine how to implement their IEP goals (Tr. pp. 789-90, 820-21). She described strategies used to assist each child with transitions into the classroom, noting that schedules and routines were an important part of this process (Tr. pp. 791-92, 804-05). Her testimony supported the psychologist's

descriptions of use of modified ABA methods when appropriate, emphasis on the use of PECS, and implementation of the TEACCH program when students were ready to participate (Tr. pp. 796-97).

The P396 psychologist also testified that, in addition to speech-language therapists, occupational therapists and physical therapists, the program at P396 had crisis management paraprofessionals who were assigned to children on a one-to-one basis, if needed (Tr. p. 622). The proposed classroom had one child with a crisis management paraprofessional, which raised the student-to-child ratio in that class to 6:1+2 (Tr. p. 623). The school also offered the services of an "autism coach" to assist classroom teachers with developing individualized programs (Tr. pp. 635-36). The P396 psychologist noted that the IEP recommended that the child be placed in "an organized and structured full day, full year educational program that includes home, school and community and incorporates a predictable schedule and routine, curriculum modifications and the services of well-trained and experienced educational staff" and testified that this recommendation was consistent with the program at P396, providing examples of how the program addressed each aspect of that recommendation (Tr. pp. 752-53).

The P396 psychologist described the children in the proposed class, all of whom were classified as students with autism (Tr. p. 692). She noted that several children in the class had self-stimulatory behaviors and some had high levels of distractibility, and described their language abilities as varied (Tr. pp. 692-93). She testified that, based on Brigance scores, students in the class were functioning from the pre-readiness level to an emerging language level expressively and possibly "a little bit higher" receptively (Tr. p. 694). All of the children were able to follow one-step directions and all demonstrated understanding of PECS (Tr. pp. 694-95). The P396 special education teacher reviewed the child's June 2006 IEP and testified that petitioners' son would have been appropriately grouped in her classroom (Tr. p. 800).

The P396 psychologist indicated that she would have requested additional information regarding the statement on the IEP which noted that the child had a "fear of failure" (Tr. p. 666). She described how she completed an "individual workup" of each child, and would have used that opportunity to assess the conditions under which the child's reported fearfulness may have occurred (Tr. pp. 713-14). Noting that the child's teacher participated in the June 2006 CSE meeting via telephone, she speculated that this statement may have been the teacher's interpretation of the child's responses in an academic setting based upon that teacher's familiarity with the child (Tr. pp. 666, 741). In light of the forgoing evidence, I find that P396 would have been capable of appropriately implementing the child's IEP.

Turning to P231, a school-based autism coach (autism coach) assigned to P231 described the recommended classroom program (Tr. p. 841; Dist. Ex. 24). The autism coach described her job duties, which included supporting teachers in developing instructional programs (Tr. p. 849). The autism coach also testified that she trained all of the staff in the program at P231 and that she was familiar with all of the staff, including the teacher who would have been the child's classroom teacher (Tr. pp. 883, 904).

The autism coach described activities employed at P231 to assist each child in experiencing a positive transition to the program, including assigning them their own space and using photographs to identify their work stations (Tr. p. 862). As a child becomes acclimated, an assessment is conducted using a Brigance formal screening over a series of days (Tr. pp. 862-

63). Additional assessments are conducted at this time by an occupational therapist, who completes a "Coping Skills Inventory" and an FBA is conducted to determine how each child is performing in the classroom environment (Tr. p. 863). The autism coach testified that the IEP prepared for the child prior to placement is not always current when the school year begins, and the Brigance is used to ensure up-to-date information about the child's current performance (Tr. p. 863). She noted that the child's IEP was developed in June 2006 and would have been three months old had he started school in September (Tr. p. 895).

The autism coach reviewed the goals and objectives on the June 2006 IEP and described how the goals could have been implemented in the program at P231. For the goal regarding identification of pictures, she described picture schedules, communication devices and Mayer-Johnson symbols (Tr. p. 864). She described how the goal for increasing eye contact would have been addressed and generalized into other settings (Tr. pp. 867-68). The child's toilet training goal would have been addressed within the program, where students are gradually encouraged to become more independent as they become acclimated to the environment (Tr. p. 856). Additionally, she noted that staff would have access to evaluation reports conducted by previous service providers, which would include information helpful in determining a baseline (Tr. p. 903). Staff at P231 were trained in the TEACCH model, which provided a classroom structure to encourage independence (Tr. p. 871). She described the TEACCH work stations used in the classroom, how data would be obtained, and how mastered skills were used to assist the child in learning higher level skills (Tr. pp. 872-73, 907-909). The Handwriting Without Tears program was used by the occupational therapist at P231, and a beginning reading program was available for students who were at kindergarten level (Tr. p. 874). She described activities created to enable children to improve socialization and how individual and group activities and routines were incorporated into the day, and listed other activities, such as story telling, finger painting, manipulative materials and blocks (Tr. pp. 910-11). When appropriate, ABA discrete trials were used to address specific behaviors; these behaviors were tracked and a reinforcement system was established specific to the child (Tr. pp. 870, 874).

The autism coach opined that, based on the information in the child's IEP, petitioners' son would have been appropriately placed in the program at P231 and his related services could have been provided there (Tr. pp. 878-79). She observed that the IEP was a plan and not a day-to-day strategy, and that the plan would provide enough information for use within the classroom (Tr. p. 900). When asked about methods of measurement of progress on the student's IEP goals and objectives, the autism coach explained how ABA discrete trial data were used to monitor performance and indicated that IEP goals were addressed daily as part of the curriculum (Tr. pp. 917-18). Data collection reportedly occurred whenever an activity was conducted (Tr. p. 919).

At P231, a child's specific classroom assignment was determined collaboratively by administrative staff in consultation with classroom teachers and other clinical staff (Tr. pp. 860-61). After initial classroom assignments were made, each child was observed and assessed to confirm the appropriateness of the assignment (Tr. p. 861). The autism coach noted that most of the children remained in the classroom assignment for which they were initially designated, but that she preferred not to make this determination until she had an opportunity to observe the child in the classroom setting (Tr. p. 886). She described this determination as "a fairly quick process" (Tr. p. 887).

According to the autism coach, the recommended program at P231 has 36 children in six classes, each with a 6:1+1 student to teacher ratio (Tr. p. 851). The other students in the classroom recommended for the child were five and six years old, but were described as not having the social interactions typical of children that age, as they engaged in solitary or parallel play similar to petitioners' child (Tr. p. 857). Two of the children in the proposed class were assigned one-to-one paraprofessionals, who redirected them when they became distracted (Tr. p. 888).

The autism coach described her understanding of the child's present functioning and noted that the description of the child as having a fear of failure was typical of the type of anxiety experienced by autistic children, particularly during transitions (Tr. pp. 859-60). She noted that the program was "designed to eliminate as much as possible situations that would create that feeling" (Tr. p. 860). Based on the circumstances described above, I find that P231 would have been able to appropriately implement the child's IEP had he attended that school.

Next, with respect to petitioners' argument that the BIP in the June 2006 IEP was not supported by an FBA, I find that this did not rise to a denial of FAPE. The P396 psychologist testified that if a child's IEP includes a behavior plan, she is usually called upon by the teacher to assist with a review of the plan to determine if it is appropriate for the class (Tr. p. 639). The P396 psychologist noted that parents at P396 are involved in the creation of behavior plans for children in the program, but not all children in the program required behavior plans (Tr. pp. 606, 627). She reviewed the BIP on the June 2006 IEP and testified that, had the child been placed at P396, she would have initiated an FBA (Tr. p. 646). She provided a detailed description of how she would have conducted an FBA and noted that the BIP on the June 2006 IEP provided for use of positive reinforcement, which was consistent with the strategies used at P396 (Tr. pp. 646-47, 671). She noted, however, that the child's June 2006 IEP did not identify any behavior that would have interfered with the child's ability to learn to the extent that a BIP was required, and suggested that the behaviors identified in the child's BIP might be more appropriately addressed within the classroom program rather than with a BIP (Tr. pp. 672-73, 717).

The autism coach at P231 testified that she was not aware if any of the children in the proposed classroom had BIPs to address behavior, but she indicated that most of the children were not aggressive and episodes of aggression that did occur were "easily managed" (Tr. p. 889). She indicated that the BIP on the child's June 2006 IEP would have been used by the teacher as "a starting point" and that the teacher would have refined it to make it more specific to the child and more functional within the classroom by adding strategies and indicating scenarios in which the plan would be implemented (Tr. pp. 890-91).

When asked if the FBA conducted by the classroom teacher would amend the BIP in the June 2006 IEP, the autism coach explained that the teacher's FBA would enable the teacher to individualize the child's program as outlined in the IEP so it would be consistent with the child's present performance in the classroom (Tr. p. 869). She noted that the BIP outlined on the June 2006 IEP would have been used as a "starting point" but that more "child-specific" information would have been gathered to make the BIP more effective (Tr. p. 871).

I note that the record does not contain evidence that the child engaged in behaviors that required a BIP, but rather that the behaviors exhibited were typical of children with autism (Tr. pp. 404-05, 646-47, 672-73). Moreover, petitioners' witness, the program director at the Rebecca

School, agreed that the child does not require a BIP (Tr. pp. 972-73). While petitioner correctly asserts as a matter of procedure that a BIP should be developed after an FBA is conducted (8 NYCRR 201.2[a]), under the circumstances of this case, petitioner did not establish that an FBA was necessary, that the goal contained in the BIP was inappropriate for the child or that there has been any loss of educational opportunity from the failure to conduct an FBA.

Finally, with regard to petitioners' contention that the IEP did not state that they would receive parent counseling and training, I note that the Commissioner's regulations require that an IEP indicate the extent to which parent training will be provided to parents of students with autism (8 NYCRR 200.4[d][2][v][b][5], 200.13[d]). In this case, petitioners are correct that the June 2006 IEP does not indicate that parent training and counseling would be provided (Dist. Ex. 11); however, they did not establish that the training actually offered by both P396 and P231 was in any way inadequate or otherwise failed to address the specific needs of the child (Tr. pp. 197-98, 655, 729-30, 733, 778-79, 878, 914-15). The P396 psychologist explained that although parent training was not included on a child's June 2006 IEP because the IEP was "student driven," parent training was included as part of the program at P396 (Tr. p. 655). The classroom teacher communicated with parents on a daily basis through notes or a communication log, and training was based upon parent communication, which also included telephone calls and meetings (Tr. pp. 648, 655, 730). Training was conducted by the psychologist and by classroom teachers and was individualized to the needs of each child (Tr. pp. 655, 731). If ABA strategies were warranted for a child, parents would be taught how to implement them (Tr. p. 734). The P396 psychologist also noted that P396 had a new Parent Teacher Association (PTA), which she anticipated would also become involved in parent training (Tr. p. 655). She emphasized the importance of working with parents and stated that she would meet with parents to ensure their understanding of the child's goals (Tr. p. 661).

With regard to P231, the autism coach testified that parent training was provided in the school (Tr. p. 878). The school has a parent coordinator who conducts parent activities, there is an active PTA, and workshops for parents are arranged through affiliations with various organizations, such as the New York Families for Autistic Children, which have expertise with the autistic population (Tr. pp. 878, 914). Furthermore, the child's mother testified that she had attended a parent training session offered by respondent (Tr. pp. 1281-82).

Under the circumstances presented in this case, I find that respondent offered petitioners appropriate parent counseling and training in conjunction with the recommended educational placement and respondent's procedural violation did not render the IEP legally inadequate (20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; Grim, 346 F.3d at 381; Perricelli, 2007 WL 465211, at *10). However, respondent is reminded of its obligation to comply with the Commissioner's regulations by identifying on the child's IEP the extent of parent training to be provided (8 NYCRR 200.4[d][2][v][b][5]; Application of a Child with a Disability, Appeal No. 07-010).

In light of the forgoing, I disagree with the impartial hearing officer's conclusion with respect to the first Burlington criterion, and I find that respondent offered the child a FAPE for 2006-07 school year. With regard to the parties remaining contentions regarding whether the child was offered a FAPE for the 2006-07 school year, I have considered them and find them to be without merit.

Having determined that the child was not denied a FAPE for the 2006-07 school year, it is not necessary for me to consider the appropriateness of the program petitioners obtained for their son, or whether the equities support their claim for tuition reimbursement (see Mrs. C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; Application of a Child with a Disability, Appeal No. 07-030).

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the portion of the impartial hearing officer's decision dated April 3, 2007 determining that respondent failed to offer the student a FAPE for the 2006-07 school year is annulled.

Dated: **Albany, New York**
 July 12, 2007

PAUL F. KELLY
STATE REVIEW OFFICER