



# The University of the State of New York

## The State Education Department State Review Officer

No. 07-068

### **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:**

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. The appeal must be dismissed.

At the commencement of the impartial hearing on January 5, 2007 the student was attending the Rebecca School (Tr. p. 11). Petitioners unilaterally placed their son at the Rebecca School in September 2006 (Tr. pp. 11, 206). The Commissioner of Education has not approved the Rebecca School as a school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

The hearing record reflects that the student exhibits self-stimulatory behavior, demonstrates deficits in his expressive and receptive language skills, and has difficulty with transitions and changes in routine (Dist. Exs. 8; 9). The student reportedly meets the criteria for a diagnosis of a pervasive development disorder (Dist. Ex. 8 at p. 2). The student's eligibility for special education programs and services as a student with autism is not in dispute in this appeal (34 C.F.R. § 300.8[c][1];<sup>1</sup> 8 NYCRR 200.1[zz][1]).

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<sup>1</sup> 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. For convenience, citations in this decision refer to the regulations as amended because the regulations have been reorganized and renumbered.

For the 2003-04, 2004-05 and 2005-06 school years, the student attended the Hebrew Academy for Special Children (HASC), which is a state-approved private school for children with autism (see Tr. p. 272; Dist. Exs. 3; 9). During the 2005-06 school year, the student attended a class with five other children (Tr. pp. 253, 272, 295, 395; Dist. Ex. 12 at p. 1). He received related services of occupational therapy (OT), physical therapy (PT) and speech-language therapy (Tr. p. 297; Dist. Ex. 12 at p. 29). Applied behavioral analysis (ABA) and sensory integration techniques were also utilized in his instruction (Tr. pp. 281-83, 294-95).

A private psychoeducational evaluation of the student conducted in March 2005 at the student's home included the administration of the Stanford-Binet Intelligence Scale, Fifth Edition, which yielded a full scale IQ score within the mildly deficient range (Dist. Ex. 8 at pp. 1, 3). The evaluator noted that the student demonstrated weaknesses in the use of language (*id.* at p. 4). The evaluator further noted that sometimes the student responded to test items at an age appropriate level, and at other times, the student responded at an extremely low level (*id.* at p. 2). The student was quite active during the evaluation and was observed to have some difficulties with body balance (*id.*). He maintained eye contact for short periods of time and exhibited significant self-stimulatory behaviors (*id.*). He required ongoing prompts to complete self-care tasks (*id.* at p. 4).

In January and February 2006, the student's service providers and teachers at HASC completed progress reports. A January 2006 PT progress report from HASC indicates that the student demonstrated normal strength and balance, independent walking, good endurance, appropriate muscle tone, and was able to perform appropriate gross motor activities at an age-appropriate level safely and without difficulty both inside and outside the classroom (Dist. Ex. 7 at p. 2).

A January 2006 speech-language progress report from HASC indicates that, although the student demonstrated improvement in his language skills, he remained significantly delayed in both receptive and expressive language (Dist. Ex. 5). The speech pathologist noted that the student demonstrated improvement in his behavior, spontaneous use of language, and language comprehension skills (*id.*).

A January 2006 OT progress report from HASC indicates that the student had difficulty maintaining his attention during structured activities for task completion, and he required continued verbal prompting to complete each task (Dist. Ex. 4). The occupational therapist noted that the student often engaged in self-stimulatory behavior such as banging the table or making a loud noise (*id.* at p. 1). When agitated, the student would jump up and down, crawl on the ground and avoid being touched (*id.*). The student's OT sessions concentrated on developing his ability to self-regulate responses to external stimuli, but the occupational therapist indicated that little progress had been made (*id.*). The occupational therapist noted that the student had made some improvements in his graphomotor skills (*id.* at p. 2).

In a February 2006 educational progress report, the student's teacher indicated that the student could read some sight words and read a full sentence with prompts (Dist. Ex. 2 at p. 1). He could answer "wh" questions using one to three words with prompts (*id.*). The student was able to identify numbers from one to the thousands; he knew his letters, the days of the week and the months of the year (*id.*). He was reluctant to participate in gym activities; he was starting to

engage some activities with his one-to-one aide but would drop to the floor before the activity was completed (id.). The student could run, jump and go up and down the stairs (id.). He could use a pencil to write, though he required coaxing to complete an assignment (id.). The student was able to use language to ask for his needs and wants (id.). The student's teacher indicated that ABA was being used for language based tasks (id. at pp. 1-2). The student was toilet trained and could eat independently, but needed to be reminded to use his fork (id. at p. 2). He could remove his jacket and put his school bag away (id.). The student's teacher indicated that he was an active child who requires constant one-to-one intervention (id.).

A speech-language progress report was completed on May 2, 2006 by a private therapist who provided instruction to the student individually for ten hours per week (Dist. Ex. 6). The private therapist noted that the student had improved his receptive and expressive language skills, pragmatic language skills, and overall speech intelligibility (id.). The student was now able to request things verbally with a minimal amount of prompts, and he was able to follow two to three step commands (id. at p. 1). His working vocabulary had grown and he was able to sequence six step picture cards and explain the story (id.). With regard to pragmatic language skills, the private therapist noted that the student had improved eye contact, increased attention span, and had fewer physical outbursts (id. at p. 2).

On May 10, 2006, respondent's Committee on Special Education (CSE) convened for the student's annual review and to develop his 2006-07 individualized education program (IEP) (Parent Ex. E at p. 1). The CSE recommended that the student continue his full year placement at HASC in an 8:1+2 special class with a 1:1 paraprofessional (id. at pp. 1, 24). The CSE recommended individual speech-language therapy 30 minutes each day for five days per week at HASC and ten individual 60 minute sessions per week after school (id. at p. 26). The CSE also recommended that the student receive two individual sessions of OT for 30 minutes each week and two individual sessions of PT for 30 minutes each week (id.).

By letter to petitioners dated June 12, 2006, the Rebecca School accepted the student (Parent Ex. C; see Tr. p. 26). On July 30, 2006, petitioners executed a contract with the Rebecca School for the student's enrollment for the 2006-07 school year (Tr. p. 203; Parent Ex. D). The student began attending the Rebecca School in September 2006 (Tr. pp. 11, 206).

Petitioners filed a due process complaint notice dated October 24, 2006, requesting an impartial hearing and reimbursement for their son's tuition costs at the Rebecca School for the 2006-07 school year (Parent Ex. A). The due process complaint notice alleged that respondent failed to offer the student a free appropriate public education (FAPE)<sup>2</sup> because HASC is an inappropriate program for the student (id. at pp. 1-2). An impartial hearing commenced on

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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]).

January 5, 2007 and concluded on April 30, 2007, after five days of testimony (Tr. pp. 1, 78, 231 316, 367). Both parties presented documentary and testimonial evidence.

By decision dated May 18, 2007, the impartial hearing officer determined that respondent offered the student a FAPE for the 2006-07 school year, and she denied petitioners' request for tuition reimbursement (IHO Decision at pp. 9-10). She found that the May 2006 IEP sets forth a program at HASC that addressed the student's special education needs (*id.* at p. 9). Given the student's progress at HASC in prior years, the impartial hearing officer found it was reasonable for the CSE to conclude that the student would continue to make progress at HASC (*id.* at p. 10). She also found that the evidence did not support petitioners' argument that their son would be placed in a class at HASC with lower functioning students (*id.*).

On appeal, petitioners seek reversal of the impartial hearing officer's findings, request that respondent's recommended program at HASC be found inappropriate, that the Rebecca School be found appropriate, and that respondent be ordered to reimburse petitioners for their son's tuition costs at the Rebecca School for the 2006-07 school year.<sup>3</sup> Petitioners argue that HASC is not an appropriate placement for the student because he would be placed in a class with lower-functioning children and contend that the student experienced regression during his three years at HASC. They argue that the Rebecca School is an appropriate placement for the student because he has made progress there.

Respondent answered petitioners' allegations, contending that its CSE offered the student a FAPE, that petitioners did not demonstrate the appropriateness of the Rebecca School, and that the equities do not favor an award of tuition reimbursement. Respondent requests that petitioners' appeal be dismissed in its entirety.

Petitioners filed a reply, responding to the contentions raised in respondent's answer and asserting additional arguments based on the student's report cards that were attached to the answer and not already a part of the hearing record.<sup>4</sup>

For the reasons set forth herein, I concur with the impartial hearing officer's decision that respondent offered petitioners' son an appropriate program for the 2006-07 school year.

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<sup>3</sup> As alternative relief, petitioners request that the impartial hearing be "reopened" on the ground they were precluded from entering copies of the student's report cards into the record. Although a discussion in the record reveals that petitioners requested a copy of the student's report cards from respondent (Tr. pp. 311-12), petitioners did not address this issue again at any time during the two remaining days of the impartial hearing. In reviewing the hearing record in this case, I note that both parties had an adequate opportunity to question witnesses, enter exhibits into evidence, and present their case over the course of the five-day hearing. Moreover, I have examined the petition for review, and find that the hearing record is adequately developed to render a decision with respect to the issues they raise in their appeal. Therefore, it is unnecessary to remand this case to an impartial hearing officer.

<sup>4</sup> The Regulations of the Commissioner of Education limit the scope of a reply to "any procedural defenses interposed by respondent or to any additional documentary evidence served with the answer" (8 NYCRR 279.6). I will accept the reply for the purpose of considering petitioners' arguments relating to the additional documentary evidence served with the answer, and will accept the report cards submitted by respondent with its answer.

The central purpose of the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) is to ensure that students with disabilities have available to them a FAPE (20 U.S.C. § 1400[d][1][A]; see Schaffer v. Weast, 546 U.S. 49, 51 [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]). 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]; see 20 U.S.C. § 1414[d]; 34 C.F.R. § 300.320).

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

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, 427 F.3d at 192). 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, 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, 546 U.S. at 59-62 [finding it improper under the IDEA to assume that every IEP is invalid until the school district demonstrates that it is not]).

In the instant case, respondent recommended for the student an 8:1+1 special class at HASC with related services for the 2006-07 school year (Parent Ex. E). The student's recommended class, according to testimony, was a multi-modality class that used ABA as one of its teaching methods along with other sensory integration techniques (Tr. pp. 249-50). There is a fully equipped sensory gym at HASC for the students to use (Tr. p. 295). The student's teacher at HASC has a Masters degree in both regular education and special education (Tr. p. 272). The teacher is also trained in ABA and writes the programs for her students (Tr. pp. 283-84).

Petitioners argue that the student would not be placed in HASC with children of similar functional levels. A FAPE must be tailored to the unique, individual needs of a child by means of an IEP (Rowley, 458 U.S. at 181; Mrs. B., 103 F.3d at 1115). The Regulations of the Commissioner of Education require that in special classes, students must be suitably grouped for instructional purposes with other students having similar individual needs (8 NYCRR 200.1[ww][3][i], 200.6[a][3], 200.6[g][2]; Application of a Child with a Disability, Appeal No. 05-102; Application of a Child with a Disability, Appeal No. 03-023). The similarity of abilities and needs may be demonstrated through the use of a proposed class profile or by the testimony of a witness who is familiar with the children in the proposed class (Application of a Child with a Disability, Appeal No. 02-028; Application of a Child with a Disability, Appeal No. 94-7).

The testimony adduced at the impartial hearing demonstrates that the student would be grouped with children having similar individual needs. The educational supervisor at HASC explained that the school has four classes for children with autism and that students are grouped according to their age and functional levels (Tr. pp. 248, 252). Previous attempts had been made at HASC to move the student into a class with higher functioning students without success (Tr. pp. 253, 287-90). The student's management paraprofessional, who had worked with the student for three years at HASC (Tr. p. 380), indicated that, at times during the 2005-06 school year, she worked with the other children in the student's class (Tr. pp. 406-07). She testified that there was

at least one other child in the classroom whose reading and math performance was at the same level as petitioners' son, and another child had expressive language skills similar to those exhibited by petitioners' son (Tr. pp. 396, 406-07). The student's teacher at HASC testified that there were other verbal children in the student's class (Tr. p. 273). At HASC, the student's teacher and paraprofessional worked with the student individually (Tr. pp. 276, 407). According to the paraprofessional, the student's teacher would sometimes give more difficult work to the student, but she would have to repeat assignments (Tr. p. 411). Although petitioners' contend that their son would be the highest functioning child in his class at HASC, I find that the hearing record indicates that he would have been appropriately grouped with children having similar individual needs.

The hearing record also demonstrates that the student made progress during the 2005-06 school year at HASC. The student's teacher at HASC testified that the student progressed in the areas of behavior, toilet training, math, reading sentences and decoding words (Tr. p. 296). While the evidence shows that the student's behaviors, such as banging on the floor and taking off his shoes, had not completely vanished, the evidence also shows these behaviors had diminished, and the student had become more independent (Tr. pp. 296-97). Progress reports from the student's various service providers also detail the improvements the student made during the 2005-06 school year (Dist. Exs. 2; 4; 5; 6; 7).

Based upon the information before me, I find that the program proposed in the May 2006 IEP, at the time it was formulated, was reasonably calculated to enable the student to receive educational benefit (Viola v. Arlington Cent. Sch. Dist., 414 F. Supp. 2d 366, 382 [S.D.N.Y. 2006] [citing to J.R. v. Bd. of Educ., 345 F. Supp. 2d 386, 395 n.13 [S.D.N.Y. 2004]; see Cerra, 427 F.3d at 195; see also Mrs. B v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; Application of a Child with a Disability, Appeal No. 06-112; Application of a Child with a Disability, Appeal No. 06-071; Application of the Bd. of Educ., Appeal No. 06-010; Application of a Child with a Disability, Appeal No. 05-021). In light of the foregoing, I concur with the impartial hearing officer's conclusion, for the reasons set forth above, that respondent offered the student an appropriate program at HASC. Having determined that the challenged May 2006 IEP offered the student a FAPE, I need not reach the issue of whether the Rebecca School was appropriate for the 2006-07 school year (Mrs. C. v. Wheaton, 916 F.2d 69, 66 [2d Cir. 1990]; Walczak, 142 F.3d at 134; Application of a Child with a Disability, Appeal No. 05-038; Application of a Child with a Disability, Appeal No. 03-058). Accordingly, petitioners' request for reimbursement of their son's tuition costs at the Rebecca School for the 2006-07 school year is denied.

I have reviewed petitioners' remaining contentions and find them to be without merit.

**THE APPEAL IS DISMISSED.**

**Dated: Albany, New York  
August 29, 2007**

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**PAUL F. KELLY  
STATE REVIEW OFFICER**