



The University of the State of New York

The State Education Department
State Review Officer

No. 07-072

Application of a CHILD WITH A DISABILITY, by her parents, for review of a determination of a hearing officer relating to the provision of educational services by the Board of Education of the West Hempstead Union Free School District

Appearances:

Educational Advocacy Service, attorney for petitioners, Mary Tucker, Esq., of counsel

Guercio & Guercio, attorney for respondent, John P. Sheahan, Esq., of counsel

DECISION

Petitioners appeal from the decision of an impartial hearing officer which denied their request to be reimbursed for their daughter's tuition costs at Manhattan Day School (MDS) for the 2005-06 school year. The appeal must be dismissed.

At the commencement of the impartial hearing on May 10, 2006, petitioners' daughter was in the sixth grade at MDS (Tr. p. 562; Dist. Exs. 1 at p. 1; 11 at p. 1). MDS 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 student's eligibility for special education services (see 34 C.F.R. § 300.8[c]¹; 8 NYCRR 200.1[zz]) is not in dispute in this appeal.

Petitioners' daughter attended a non-public school from kindergarten through fourth grade (Tr. p. 593). The school district where petitioners resided determined that the student was eligible for special education services as a student with a speech or language impairment (Tr. pp.

¹ The Code of Federal Regulations (34 C.F.R. Parts 300 and 301) has been amended to implement changes made to the Individuals with Disabilities Education Act, as amended by the Individuals with Disabilities Education Improvement Act (IDEA) of 2004. The amended regulations became effective October 13, 2006. For convenience, and unless otherwise specified, citations herein refer to the regulations as amended because the regulations have been reorganized and renumbered.

518-519; Dist. Exs. 12 at p. 1; 21 at p. 2). Petitioners enrolled their daughter in MDS when she was in fifth grade for the 2004-05 school year (Tr. pp. 520-21, 522, 596-97, 620-21; Dist. Ex. 12 at p. 1).

Petitioners purchased a house in respondent's school district during summer 2005 (Tr. p. 527; see also Parent Ex. FFF). The student's mother visited respondent's transportation office on or about July 25, 2005 and submitted a request for the student to be provided with transportation by respondent to MDS for the 2005-06 school year (Tr. pp. 637-38). On July 27, 2005, the student's mother visited respondent's director of pupil personnel services (director) (Tr. pp. 45-46, 528). At that time, respondent's director provided her with certain forms that needed to be completed to begin the evaluation process (Tr. pp. 46-49). The student's mother completed some, but not all, of the paperwork on that day (Tr. pp. 48-49, 79, 92, 97, 98-99, 101, 102, 105, 209, 528-29, 529-33, 536, 716, 731-32, 764; Parent Exs. A; B; C; FF; GG; WW; FFF). While she was there, her husband also faxed certain documents to respondent regarding petitioners' residency in respondent's district (Tr. pp. 48, 92-93, 765; see Parent Exs. HH; UU). The student's mother dropped off additional documents to respondent's director during the first week in August (Tr. pp. 227, 529, 534, 537, 590-91, 725; see Dist. Ex. 11; Parent Ex. C). Petitioners were unavailable from August 15, 2005 until August 30, 2005 (Tr. pp. 532, 534, 537).

The student's mother met with respondent's director again on September 2, 2005 (Tr. pp. 79, 537). The student's mother provided respondent's director with certain documents related to residency and a signed parental consent form for the evaluation of the student by the Committee on Special Education (CSE) (Tr. pp. 79, 82, 83, 84, 88-89, 101, 102, 105, 120, 209, 213-15; 216, 240, 537-38, 540-41, 629, 653, 654; see Dist. Exs. 8; 33; 34; Parent Exs. EE; TT). There is a dispute between the parties with respect to what particular documents the student's mother submitted to respondent's director on July 27, 2005 and September 2, 2005. The record indicates that on September 2, 2005, the student's mother provided respondent's director a signed parental consent form granting respondent's CSE permission to evaluate her daughter to determine if she was a student with a disability (Dist. Ex. 6). On September 2, 2005, the student's mother also provided respondent's director with a separate written request that her daughter be evaluated (Dist. Ex. 8). The student's mother asserts that she had previously submitted the consent for evaluations in July 2005 to respondent's director (Tr. pp. 530, 536, 541). However, respondent's director testified that the student's mother did not submit the consent to her until September 2, 2005 (Tr. pp. 104, 131).

A school psychologist employed by respondent conducted a psychological evaluation of the student on September 16, 2005 (Tr. pp. 1614-15, 1615-16; Dist. Ex. 12 at p. 1). The report of his evaluation (Dist. Ex. 12)² noted that staff at the student's school had reported that petitioners' daughter had difficulty with reading, decoding and comprehension, inferential thinking, and discerning cause and effect relationships (id. at p. 1). Administration of the Wechsler Intelligence Scale for Children: Fourth Edition (WISC-IV) by the psychologist yielded a full scale IQ score of 86 (18th percentile), which is in the low average range of cognitive ability (id.

² I note that the record contains multiple duplicative exhibits. For purposes of this decision, only District exhibits were cited in instances where both a District and Parent exhibit were identical. I remind the impartial hearing officer that it is his responsibility to exclude evidence that he determines to be irrelevant, immaterial, unreliable or unduly repetitious (see 8 NYCRR 200.5[j][3][xii][c]).

at p. 3). The student's verbal comprehension index of 83 (12th percentile) was in the low average range and her nonverbal reasoning index of 94 (34th percentile) was in the average range, with a relative weakness identified in visual concentration (id. at pp. 2, 3). The student's ability to sustain attention and concentration was in the low average range, as indicated by a working memory index of 80 (9th percentile) (id.). The evaluator noted that projective testing did not reveal major adjustment difficulties but that test data suggested that the student may feel overwhelmed by her environment (id. at p. 3).

Respondent's interim assistant director of special education and pupil personnel services, who was a school psychologist, observed the student at MDS on September 28, 2005 (Tr. pp. 362-63, 397-98; Dist. Ex. 13 at p. 1). In the written report of that observation, the psychologist reported that the student demonstrated "minor difficulty decoding multisyllabic words" when reading aloud (Dist. Ex. 13 at p. 2). The student was observed gazing out the window when other students read aloud, but she was, with some coaxing, able to offer correct answers when called upon after the teacher prompted her with leading questions (id.). As part of his observation, the psychologist met with the director of special services at MDS and the student's special education teacher (id. at p. 3). The student's special education teacher described the student as having difficulty with decoding and comprehension and indicated that the student was reading approximately one and one half years below grade level (id.). The student's teacher also reported that the student had inferential weaknesses, difficulty with cause and effect relationships and weak writing skills (id.). The teacher believed that the student required a small class in order to feel secure and comfortable (id.).

A speech-language pathologist employed by respondent conducted a speech-language evaluation of the student on October 7, 2005 (Tr. pp. 1769-70; 1771; Dist. Ex. 14 at p. 1). The written report of that evaluation described the student as "quiet but cooperative" and noted that she responded appropriately but did not engage in spontaneous conversation (Dist. Ex. 14 at p. 1). Formal assessment using the Test of Language Competence – Expanded Edition (TLC-EE), the Test of Auditory Perceptual Skills – Revised (TAPS –R) and the Comprehensive Assessment of Spoken Language (CASL) identified deficits in figurative language and the understanding of ambiguity, auditory memory skills and reasoning skills (id. at pp. 1-2).

A special education teacher employed by respondent conducted an educational evaluation of the student on October 12, 2005 (Dist. Ex. 15). Administration of the Wechsler Individual Achievement Test II (WIAT-II) yielded standard (and percentile) scores of 87 (19) for word reading, 77 (6) for reading comprehension, 101 (53) for pseudoword decoding, 89 (23) for numerical computation, 84 (14) for math reasoning, 93 (32) for spelling, 85 (16) for written expression, 76 (5) for listening comprehension and 83 (13) for oral expression (id. at p. 3). The evaluator noted that the student's relative strengths were in phonemic awareness and her ability to apply skills to decoding and encoding as well as in basic math calculations (id. at pp. 1, 2). The evaluator also reported that the student's writing sample reflected an ability to express herself in simple sentences with appropriate capitalization and punctuation, but described that sample as simplistic and lacking in development and elaboration (id. at pp. 2-3).

Respondent's CSE convened on November 3, 2005 (Dist. Ex. 1 at p. 1). The CSE members included the psychologist who had conducted respondent's psychological evaluation, the speech-language pathologist who had conducted respondent's speech-language evaluation, and the special education teacher who had conducted respondent's educational evaluation (Dist.

Ex. 29). The psychologist who had observed the student at MDS acted as the Chairperson of the CSE and was also acting as respondent's interim assistant director of special education and pupil personnel services (Dist. Exs. 13, 29; Parent Ex. D). Petitioners attended the CSE meeting (Dist. Ex. 29). Their advocate participated in the CSE meeting by telephone, as did the director of special education and the student's teacher at MDS (Tr. pp. 59, 134-35, 478, 1864, 1870; Dist. Ex. 29). The CSE determined that petitioners' daughter was a student with a disability (Dist. Ex. 1 at pp. 1, 4). The CSE reviewed evaluations of the student including respondent's social history, psychological evaluation, speech-language evaluation, educational evaluation, a health report, and its classroom observation of the student at MDS (Tr. pp. 1865, 1866, 1867, 1868, 1870-71, 1872). The minutes of the CSE meeting also indicate that the CSE considered the report of the student's teacher at MDS, the student's individualized education program (IEP) at MDS for the 2004-005 school year, and an earlier IEP from the school district where petitioners previously resided (Tr. pp. 114, 118, 402; Dist. Ex. 1 at p. 1; see also Dist. Exs. 10; 21; 22; 27; 28; 30; Parent Exs. D; EE; FF; GG; HHH). The CSE recommended that the student be placed in a self-contained class, which had a student to staff ratio of 15:1+1, and also be provided with speech-language therapy three times a week for 30 minutes in a group of five students (Tr. pp. 57, 1872; Dist. Ex. 1 at pp. 1, 4). Based on the evaluations and its discussions, respondent's CSE discussed and developed goals and objectives for study skills, reading, writing, mathematics, and speech-language (Tr. pp. 189-91, 477, 1875, 1892, 1925; Dist. Ex. 1 at pp. 4-6). Additionally, respondent's CSE determined that the self-contained program being offered to the student at respondent's school was "substantially equivalent" to the student's class at MDS and, therefore, respondent would provide transportation to MDS for the student (Tr. pp. 652, 1872, 1917; Dist. Ex. 4 at p. 1). The testimony at the impartial hearing indicated that neither petitioners nor their advocate raised any objection to the CSE's recommendations (Tr. pp. 189-90, 477, 478, 752-55, 1869, 1870, 1871-72, 1875). At petitioners' request, the CSE increased the amount of recommended speech-language services (Tr. pp. 1867, 1873). Petitioners and their advocate indicated at the meeting that they were pleased with the CSE's determination with respect to transportation (Tr. pp. 478, 545). Petitioners requested an opportunity to visit the class proposed for their daughter (Tr. pp. 545, 656, 657, 658). At the conclusion of the November 3, 2006 CSE meeting, petitioners signed and dated a form stating their agreement to the CSE's recommendation (Tr. pp. 543-44, 1875-76; Dist. Ex. 2).

The student's mother visited the CSE's recommended placement on November 16, 2005 with respondent's CSE Chairperson (Tr. pp. 453-54, 546-47). As a result of her visit and her conversation with the CSE Chairperson, she learned that there was only one girl in the recommended class, and that that one girl only attended the class during the afternoon (Tr. pp. 455, 458-59, 547, 549). The student's mother expressed her concern about the lack of girls in the class to the CSE Chairperson (Tr. pp. 458, 549).

Respondent Board of Education met on November 15, 2005 and approved the November 3, 2005 IEP (Dist. Exs. JJJ; III). By letter dated November 21, 2005, respondent's CSE notified petitioners that respondent Board of Education had approved the November 2005 IEP (Dist. Ex. 18). Respondent provided a copy of the November 2005 IEP to petitioners as an enclosure with its November 21, 2005 letter (see Dist. Ex. 18).

By due process complaint notice dated January 22, 2006, petitioners requested an impartial hearing seeking tuition reimbursement for their placement of their daughter at MDS for the 2005-06 school year (IHO Ex. 1). Petitioners alleged that the CSE failed to offer their

daughter a free appropriate public education (FAPE)³ on procedural and substantive grounds (*id.* at p. 1). Petitioners asserted that they had signed a consent form for an initial evaluation on July 27, 2005 but that the CSE did not timely complete its evaluations and hold a CSE review meeting (*id.* at p. 2). They also asserted that respondent's recommended special education class was inappropriate because of the gender composition of the class (*id.*).

The impartial hearing commenced on May 10, 2006 and concluded on October 25, 2006 after 10 days of testimony. On May 19, 2006, at the second day of the impartial hearing, the CSE Chairperson indicated that the student's November 3, 2005 IEP contained a mistake and that contrary to the indicated speech-language classification on page one of the IEP, the CSE had determined to classify the student as a student with a learning disability (Tr. pp. 722-23).

Thereafter, by letter submitted to the impartial hearing officer on June 14, 2006, petitioners sought to amend their due process complaint to include objections with respect to respondent's CSE Chairperson's testimony that the classification listed on the November 3, 2005 IEP was in error (Tr. pp. 1014-20; IHO Ex. 14). Petitioners also requested that the impartial hearing officer nullify the classification set forth on the student's IEP and, asserting that the placement recommended by the IEP was based on an erroneous classification, requested that the impartial hearing officer find the recommended placement on the IEP was not appropriate (IHO Exs. 14; 17). Respondent objected to petitioners' request to amend the due process complaint notice and to nullify the classification and recommendation set forth in the existing IEP (*see* IHO Ex. 15 at pp. 4-5).

In an interim oral decision issued on July 10, 2006, the impartial hearing officer denied petitioners' request to amend their due process complaint notice (Tr. pp. 1251-1258). With respect to petitioners' related request for relief that he nullify the recommended program because of the error in the IEP, the impartial hearing officer concluded that it would be premature to decide that question until the parties had a full and fair opportunity to present evidence at the impartial hearing (Tr. pp. 1258-60). The impartial hearing officer also concluded that it would be premature to determine whether the CSE's Chairperson's testimony relating to the mistake on the IEP would bind respondent to such a mistaken classification or whether it would be considered a "Scribner's error" (Tr. pp. 1260-62). At the conclusion of the impartial hearing officer's oral decision, counsel for respondent set forth that petitioners' case should be constrained by the issues raised in their original due process complaint notice and objected to the consideration of any issues outside the scope of that due process complaint notice (Tr. pp. 1263-64).

The impartial hearing officer rendered a decision on May 22, 2007. He denied petitioners' request to amend their due process complaint notice due to respondent's objection and because it had not been made at least five days prior to the commencement of the impartial hearing (U.S.C. §1415[f][3][B]; 8 NYCRR 200.5[i][7][a]; IHO Decision at p. 5). He also

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, 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].

concluded that respondent was "bound" by the speech or language impairment classification memorialized on the IEP (IHO Decision at p. 5). However, the impartial hearing officer also credited the CSE Chairperson's testimony that the CSE had discussed and reached a consensus to change the student's classification from a speech or language impairment to a learning disability (id. at pp. 5-6). To the extent that the mistake on the student's IEP relating to her classification might be considered a procedural defect, the impartial hearing officer found that it was one that did not in and of itself deny the student a FAPE (id. at pp. 6-8). The impartial hearing officer also concluded that the November 3, 2005 IEP was reasonably calculated to enable the child to receive educational benefit and was likely to provide meaningful progress (id. at p. 9).

The impartial hearing officer also considered other contentions made by petitioners at the impartial hearing and concluded that: (1) petitioners were not deprived of a meaningful opportunity to participate in the development of their daughter's IEP due to respondent's failure to provide information regarding the make-up of the class with respect to the students' functioning levels at the CSE meeting (id. at pp. 9-13); (2) petitioners were not deprived of a meaningful opportunity to participate in the development of their daughter's IEP due to the failure of the CSE to provide information regarding the gender make-up of the proposed class (id.); (3) the gender make-up of the proposed class did not make the class inappropriate and did not violate any of the state regulations relating to instructional groups (id. at pp. 10, 11-13); and (4) the IEP was timely developed (id. at pp. 14, 15).

The impartial hearing officer also reviewed the program selected by petitioners and concluded that petitioners met their burden to show that MDS was an appropriate placement because respondent's CSE had determined that the student's program at that school was "substantially equivalent" to its own self-contained program and had agreed on that basis to provide transportation to that school as provided for by section 4402(4)(d) of the Education Law (IHO Decision at pp. 15-16). Finally, the impartial hearing officer concluded that equitable considerations would not support an award of tuition reimbursement (id. at pp. 17-18).

Petitioners appeal the impartial hearing officer's decision on a number of grounds. Respondent has submitted an answer which denies petitioners' material allegations and which asserts affirmative defenses that petitioners are attempting to raise issues that were never raised in their due process complaint notice, and that petitioners have raised new matters for the first time on appeal. Petitioners have filed and served a reply in response to petitioners' answer which asserts that they should be allowed to raise certain issues which they did not raise in their due process complaint notice.

I will first consider petitioners' assertion that the impartial hearing officer erred in not allowing them to amend their due process complaint notice. The party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the original request is amended prior to the impartial hearing or the other party otherwise agrees (20 U.S.C. § 1415[c][2][E] and [f][3][B]). A party "may amend its due process complaint notice only if [1] the other party consents in writing to such amendment and is given an opportunity to resolve the complaint through [a resolution session] or [2] the hearing officer grants permission, except that the hearing officer may only grant such permission at any time not later than 5 days before a due process hearing occurs" (20 U.S.C. § 1415[c][2][E][i][I] and [2]; 8 NYCRR 200.5[i][7][a][i] and [ii]). I note here that petitioners requested that their due process complaint notice be amended after the impartial hearing

commenced and that respondent objected to the requested amendment and any expansion of the issues beyond those which were set forth in petitioners' original due process complaint notice (Tr. pp. 1016, 1263-64; IHO Ex. 15 at pp. 4, 5). I therefore find that the impartial hearing officer correctly held that he was without authority to grant petitioners' request.

However, the impartial hearing officer also indicated that he would consider whether to bind respondent to the classification that appeared on the IEP and also what effect that may have on the issue of whether respondent's IEP was appropriate (Tr. pp. 1260-61). In rendering his decision, the impartial hearing officer decided issues that were not raised in petitioners' due process complaint notice.

Under the circumstances in this case, I find that the impartial hearing officer erred in considering and making findings with respect to any issues not specifically set forth in petitioners' due process complaint notice and in allowing petitioners to raise new issues over respondent's objection during the course of the impartial hearing that were not specified in their due process complaint notice (Application of the Dep't of Educ., Appeal No. 07-046). I will therefore annul the impartial hearing officer's decision as it relates to any and all issues except for the two issues which petitioners set forth in their original due process complaint notice: (1) whether respondent's evaluation of the student and the development of the IEP were timely; and (2) whether the gender composition of the class recommended for petitioners' daughter rendered that class inappropriate.

Further, petitioners assert claims on appeal that were not included in petitioners' due process complaint notice. Petitioners' due process complaint notice was not amended to include these claims nor did respondent consent to these claims being a part of the impartial hearing. I therefore find that these claims are outside the scope of my review and I will not consider them (Application of a Child with a Disability, 07-051; Application of a Child with a Disability, Appeal No. 06-139).

The central purpose of the 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 370-371; see 20 U.S.C. § 1412[a][10][C][ii]; 34 C.F.R. § 300.148).

A FAPE is offered to a child 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 procedural violations are alleged, an administrative officer may find that a child did not receive a FAPE only if the procedural inadequacies (a) impeded the child'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).

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 200.6[a][1]; see Walczak, 142 F.3d. at 132). 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]).

Petitioners assert that respondent's evaluation of the student and the development of their daughter's IEP was untimely. In particular, petitioners argue that they submitted a CSE referral and consent for respondent to evaluate their daughter on July 27, 2005, and that respondent was required to act within 60 days from that date.

The impartial hearing officer concluded that the parties agreed that the student would be treated as an initial referral upon proof of residency (IHO Decision at p. 13). He also found that petitioners provided proof to respondent of their residency in respondent's school district on September 2, 2005 and that respondent was required to complete an initial evaluation and develop an initial IEP within 60 days from that date (id. at p. 14). The impartial hearing officer also indicated that it was uncontradicted that the November 3, 2005 CSE meeting had been initially scheduled for the latter part of October but was required to be rescheduled because MDS was closed for religious observations on the originally scheduled date and was unable to participate (IHO Decision at p. 14; Tr. pp. 1928-1931).

I concur with the impartial hearing officer's conclusion that respondent's evaluation of the student and its development of the student's IEP were timely. I note that while petitioners continue to argue that they referred their daughter to the CSE and provided respondent with a consent to evaluate her on July 27, 2005, their appeal does not dispute the impartial hearing officer's conclusion that the parties agreed that petitioners' daughter would be treated as an initial referral upon submission of proof of residency. I find that the record supports the impartial hearing officer's conclusion (see Tr. p. 47). The parties' dispute when petitioners referred their daughter to respondent's CSE and provided written consent to evaluate her. A review of the hearing record provides evidence to support respondent's contention and the impartial hearing officer's conclusion that on September 2, 2005, petitioners completed the submission of all documentation necessary to establish their residency in respondent's school district, and the record shows that a signed consent form was also turned over to respondent at that time (Tr. pp. 46, 71, 77-78, 90, 91, 92-93, 94, 124, 212-15, 228, 230, 240, 629-30, 653-54, 731-32, 764, 765; see Dist. Exs. 31; 32; 33; 34; Parent Ex. FFF)

With respect to the time period by which respondent was required to complete its evaluations of the student, the IDEA provides in relevant part that an initial evaluation is to take place within 60 calendar days from the date that consent is received from the parent (20 U.S.C. § 1414[a][1][C][i][I]). In this case, evaluations were completed within that sixty day period (see Dist. Exs. 11; 12; 13; 14; 15; Parent Ex. C).

Respondent was also required to develop a written IEP within 60 school days from the date that consent is received from the parent (see 8 NYCRR 200.4[d]; Application of a Child with a Disability, Appeal No. 04-112; Application of a Child with a Disability, Appeal No. 04-008; Application of a Child with a Disability, Appeal No. 03-008). In this case, petitioners did not receive a written IEP at the November 3, 2005 CSE meeting (Tr. pp. 162, 550; see also 52, 53, 56); however, the student's program had been developed at the November 3, 2005 CSE meeting (Tr. pp. 52, 53, 56, 162, 167-69, 426, 429-30). The record is not clear when the IEP was put in writing, but by letter dated November 21, 2005, respondent referenced the IEP and mailed petitioners a copy of it (Tr. pp. 198-202; see Dist. Ex. 18). The record also does not contain information that would identify which days during the 2005-06 school year respondent provided instruction to its students (see 8 NYCRR 200.1[n]). Nor does it contain other information from which it can be determined that a written IEP for the student was not in existence within 60 school days of September 2, 2005. I therefore find that petitioners have not shown that respondent did not timely develop an IEP for the student for the 2005-06 school year.

Petitioners' due process complaint notice set forth that respondent's recommended special education class was not appropriate for their daughter because she would be the only girl in the

class during the morning (IHO Ex. 1 at p. 2). Exclusive of petitioners' daughter, respondent's recommended class for the student contained seven or eight students, all but one who were boys (Tr. pp. 172-73, 279, 314, 421; Parent Ex. EEE). Petitioners' daughter would have participated in regular education classes for music/chorus, gym, art, an inclusion science class, reading, lunch, and recess which would have provided her with opportunities to be with other girls in the sixth grade in addition to the one enrolled in the recommended class (Tr. pp. 62, 245, 285-93, 325, 330-34, 442, 1279-80). Additionally, the student would have had the opportunity to meet other female peers as a result of participation in sports and other extracurricular activities (Tr. pp. 341-44, 1279, 1281). As discussed below, I find that petitioners have not shown that the gender composition of respondent's special education class renders that recommended placement inappropriate.

The student is currently enrolled in an all-girl class at MDS (Tr. pp. 468, 691, 840). The record indicates that the student's social development has benefited from her enrollment in this class and that her self-esteem and confidence have improved (Tr. pp. 895, 902, 906-07, 913-14, 917-18, 919, 921). The student's teacher at MDS testified that the student's placement in an all-boy class would intimidate her, cause insecurity, anxiety, be overwhelming, cause her to shut down, and affect her academics (Tr. pp. 848, 904, 910, 915, 917, 921). The private psychologist who appeared at the impartial hearing on behalf of petitioners testified that the proposed class, because of its gender composition, would be devastating, overwhelming, cause anxiety, be isolating, and affect her academic functioning (Tr. pp. 1066-67, 1088, 1182, 1196, 1199, 1239).

Respondent's witnesses testified that the student would fit in with the recommended class (Tr. pp. 329, 1287-88). Respondent's interim assistant director of special education testified that the academic setting in the recommended class was appropriate for the student and that there was no reason to believe that petitioners' daughter would feel overwhelmed in that class (Tr. pp. 470-71). The school psychologist's evaluation indicated that the student may feel overwhelmed by her environment at times and may not be aware as to how to effectively meet challenges presented to her (Dist. Ex. 12 at p. 3). The psychologist testified at the impartial hearing that he did not see anything "overtly threatening or uncomfortable" in her gender drawings and that the comment in his evaluation that the student may feel overwhelmed by her environment was not related to the gender of the peers in her class (Tr. pp. 1532, 1621, 1631). He also testified that the proposed class was an appropriate recommendation (Tr. p. 1705).

Based on my review of the impartial hearing record, I find that respondent's proposed class was appropriate for petitioners' daughter. State regulations provide that students who are placed together for purposes of special education are to be grouped by similarity of individual needs, including social needs, and that the size and composition of special classes are to be based on the similarity of the individual needs of the students, including their levels of social development (see 8 NYCRR 200.6[a][3] and [g][2]; see also 8 NYCRR 200.1[ww][3]). In this case, I find that the record does not show that the gender composition of the recommended class will result in petitioners' daughter being placed in a class composed of students of dissimilar social needs. Even if it did, I note that state regulations provide that the social needs of a student shall not be the sole determinant of placement (8 NYCRR 200.6[a][3][ii]).

Further, the evidence does not show, as a result of the gender composition of the proposed class, that this particular student cannot be expected to receive educational benefit in the recommended class. The testimony of petitioners' witnesses that the student would be

overwhelmed and intimidated and would "shut down" as a result of the gender of the proposed class, is not a conclusion that is supported by the evaluations or other documentary evidence in the record. Furthermore, the record does not suggest that placement in respondent's proposed class would be inconsistent with the student's social or emotional needs or that the student's emotional or social needs would not be able to be addressed in respondent's proposed class because of its gender composition. I also note that while the record shows that the student's social development has benefited from enrollment in her current class and while her self-esteem and confidence have improved, the record does not show that petitioners' daughter would not have been able to continue to develop socially or that her emotional status would have been adversely affected in respondent's recommended class because of the gender composition of that class. The record indicates that the teacher assigned to the recommended class is alert to the social and emotional needs of the students in her classroom and that she provides classroom instruction and programming in a way that is supportive of the social and emotional needs of the students in her class (Tr. pp. 352-53). She testified that she would address any social needs that the student manifested (Tr. pp. 353-55), that the recommended school had guidance counselors and a school psychologist who are available to assist her, that the school psychologist checks in with her class frequently and that she works closely with that person (Tr. pp. 357-58; see also Tr. pp. 1278-79).

Based on the information before me, I find that petitioners have not prevailed with respect to the first criterion of the Burlington/Carter analysis for an award of tuition reimbursement for their daughter's attendance at MDS for the 2005-06 school year. Having so determined, the necessary inquiry is at an end and there is no need to reach the issue of whether MDS was an appropriate placement (see M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d. Cir. 2000]; Walczak, 142 F.3d at 134; Application of a Child with a Disability, Appeal No. 03-058).

THE APPEAL IS DISMISSED.

**Dated: Albany, New York
September 4, 2007**

**PAUL F. KELLY
STATE REVIEW OFFICER**