



The University of the State of New York

The State Education Department State Review Officer

No. 07-108

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 Long Beach City School District

Appearances:

Law Offices of Deusededi Merced, P.C., attorney for petitioners, Deusededi Merced, Esq., of counsel

Ingerman Smith, L.L.P., attorney for respondent, Christopher Venator, 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 the Communities Acting to Heighten Awareness and Learning (CAHAL) program at the Hebrew Academy of Nassau County (HANC) for the 2006-07 school year. The appeal must be sustained in part.

At the commencement of the impartial hearing on June 4, 2007, petitioners' daughter was attending the CAHAL program at HANC after being unilaterally placed there by petitioners. HANC has not been approved by the Commissioner of Education as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7). The student is classified as a student with a speech or language impairment, and her classification and eligibility to receive special education services are not in dispute (see 8 NYCRR 200.1[zz][11]). Prior to her enrollment at HANC, the student attended the Hebrew Academy for Special Children (HASC), a New York State approved nonpublic school, where she received, at public expense, preschool special education and related services for her disability.

As an infant, the student received early intervention services which included special instruction and physical and occupational therapy (Dist. Ex. 1 at p. 1). In June 2004, the student

underwent a psychological evaluation to determine her eligibility for services through the Committee on Preschool Special Education (CPSE) (id.). Administration of the Stanford-Binet Intelligence Scale: Fourth Edition yielded a partial test composite score of 87 (19th percentile) which placed the student in the low average range of intelligence (id. at p. 2). The evaluating psychologist reported that the partial composite score was based on the student's performance on four of eight recommended sub-tests and should be interpreted with much caution (id.). According to the psychologist, the student displayed low average functioning in terms of her word knowledge, verbal understanding of social situations and her ability "to depict" incorrect pictures (id.). The student performed in the average range on measures of her ability to interpret and organize visually perceived information, eye-hand coordination, visual motor skills and use of reasoning to solve novel problems (id.). On the Vineland Adaptive Behavior Scales: Interview Edition, the student's overall adaptive behavior score of 78 fell in the moderately low range in comparison to her peers (id.). The student's skills in the communication and socialization domains were judged to be adequate, while the student's motor skills and daily living skills were judged to be in the moderately low range (id.).

During the 2005-06 school year, the student attended a 12:1+2 full day preschool class at HASC (Dist. Ex. 2 at p. 1). The student received related services of individual speech-language therapy two times per week (Dist. Ex. 3 at p. 1), occupational therapy two times per week (Dist. Ex. 5 at p. 1) and individual physical therapy two times per week (Dist. Ex. 4 at p. 1).

On March 23, 2006, the student's HASC speech-language service provider completed a report outlining the student's progress (Dist. Ex. 3). The therapist reported that the focus of speech therapy had been improving the student's expressive, receptive and pragmatic language skills, as well as eye contact and attending (id.). According to the speech-language therapist, the student demonstrated improvement in all areas (id.). With regard to receptive language skills, the therapist reported that the student could identify a variety of items/pictures within the categories of body parts, objects, actions, spatial and colors (id.). The therapist further indicated that the student could identify items by use, comprehend descriptive concepts, part/whole relationships and pronouns (id.). The student was able to follow simple and familiar 1-2 step directives but continued to experience difficulty with increasingly complex directions (id.). With regard to expressive language, the speech-language therapist reported that the student was able to label a wide variety of items and pictures across semantic categories (id.). In addition, the student was able to respond to simple yes/no and "wh" (who, what, where) question forms (id.). The speech-language therapist reported that the student's pragmatic language skills had also improved to the point where the student was able to initiate brief conversations with adults and peers (id.). The therapist characterized the student's speech intelligibility as fair to good in known contexts (id.). She noted that the student demonstrated a lateral lisp during the production of silibants and sometimes experienced brief dysfluent episodes, especially when excited (id.). The speech-language therapist also reported that the student experienced regression following a long weekend and vacation; specifically, the student produced limited verbal language, responded inconsistently to directions and her initiation of conversations was significantly diminished upon returning (id.). The speech-language therapist characterized the student as having below age level expressive and receptive language skills and noted that her limited pragmatic abilities negatively impacted the student's communicative successes (id. at p.

2). She also recommended that the student continue to receive services for the following year (id. at pp. 1-2).

On March 26, 2006, the student's HASC preschool special education teacher completed a report outlining the student's educational progress (Dist. Ex. 2). She reported that based on information obtained from the Carolina Curriculum for Children with Special Needs and informal teacher observation, the student demonstrated cognitive skills in the 3.5 to 4.0 age range (id. at p. 1). She reported that the student was able to demonstrate many pre-readiness skills, but was easily distracted by visual and auditory stimuli and had difficulty sitting still (id.). She noted that these behaviors affected the student's ability to attend during structured activities and independent tasks, and that when the behaviors were present the student required continuous redirection from the teacher (id.). The special education teacher also reported that the student's gross motor, fine motor and sensory processing abilities had improved but that the student continued to demonstrate delays in these areas (id. at p. 2). The teacher indicated that the student wore orthotics and demonstrated difficulty with motor planning (id.). She further indicated that a sensory diet had been implemented for the student which consisted of brushing, wearing a weighted vest, jumping and "heavy work" such as crawling and pushing/pulling (id.). According to the special education teacher, the student's activities for daily living (ADL) skills were near age expectant levels (id.). The teacher reported that the student communicated using short sentences, continued to need prompting and encouragement to initiate and use language with adults, and that she required reminders to maintain eye contact (id.). With regard to social emotional development, the teacher indicated that the student engaged in parallel play and that symbolic play skills were emerging (id.). Although the student required prompting to initiate language with adults, her teacher reported that she used more spontaneous speech with peers in 1:1 and small group settings (id.). The special education teacher stated that while the student had made gains in the 12:1+2 classroom setting, she continued to exhibit delays (id.). The teacher also indicated that the student experienced regression after vacations and being absent (id.). The special education teacher recommended that the student attend an integrated six-week summer program run by HASC (Tr. pp. 266-67), and that she receive speech-language, occupational and physical therapies (Dist. Ex. 2 at p. 3). For the 2006-07 school year, the teacher recommended that the student be placed in a kindergarten class that provided support to address the student's delays with occupational, physical and speech-language therapy (id.). The teacher also noted that the student would benefit from experiences with typically developing peers (id.).

On March 26, 2006, the student's HASC occupational therapist completed a report outlining the student's progress (Dist. Ex. 5). The therapist reported that the student received occupational therapy services, both in and out of class, two times per week for 30 minute sessions each, to address sensory processing, sensory motor and fine motor/visual perceptual skills (id.). She reported that the student was cooperative during therapy sessions, but that she continued to be distracted by extraneous auditory and visual stimuli, which compromised her ability to remain focused on certain tasks, and that she often required verbal and physical cues to be redirected to attend (id. at p. 1). According to the occupational therapist, the student had demonstrated progress in her overall sensory processing abilities (id. at p. 2). The therapist described a sensory diet that had been implemented for the student, which included vestibular, proprioceptive and tactile input (id.). She reported that the student enjoyed being "brushed,"

"buzzed" and "squished," as well as enjoyed jumping on the trampoline, bouncing on the therapy ball and swinging on suspended equipment (id.). According to the occupational therapist, the student's attending improved after she engaged in these activities (id.). With regard to sensory motor skills, the occupational therapist reported that the student could ascend and descend stairs using alternate foot placement and without using handrails; climb, jump, run and pedal a tricycle; maneuver herself through a four part obstacle course; balance on each foot for three seconds and kick a stationary ball (id. at p. 2). With regard to fine motor/visual perceptual skills, the therapist reported that the student demonstrated a right hand preference and used a modified tripod grasp; that she was able to copy vertical and horizontal strokes, a circle, a cross and a triangle; draw a face with three recognizable facial features; copy basic block designs; cut across paper and along a straight path without cues for proper finger placement (id.). The student was not yet able to copy a square, and her ability to draw recognizable body parts and copy 6-cube steps was emerging (id.). The occupational therapist reported that the student required multiple verbal cues to remain on task during occupational therapy sessions (id.). The therapist stated that the student continued to exhibit delays in sensory processing, fine motor and visual perceptual abilities and recommended that the student continue to receive occupational therapy services throughout the summer and during the following school year (id. at p. 3).

The student's physical therapist reported that in addition to receiving individual physical therapy two times per week, the student also participated in an adaptive gym class and gross motor group (Dist. Ex. 4). The focus of physical therapy was on improving the student's strength and control throughout her trunk and extremities, in addition to endurance, motor planning and safety awareness (id. at p. 2). According to the physical therapist, the student presented with low muscle tone and muscle weakness throughout her trunk and lower extremities (id. at p. 1). The therapist reported that in order to compensate for this weakness, the student often locked her joints or moved quickly to gain stability and control (id.). The therapist noted that the student also presented with laxity at her hips and postured in extreme hip adduction and external rotation, which she could correct when verbally cued (id.). The physical therapist described the student as an independent ambulator on both leveled and unlevelled surfaces (id. at p. 2). She noted that the student walked with excessive lateral trunk movements as a strategy to gain momentum (id. at p. 4). She further noted that the student tended to keep her weight forward when walking and lacked a timely heel strike (id. at p. 2). The therapist reported that according to the University of Michigan's Preschool Developmental Profile, gross motor section, the student was functioning solidly up to the 27-month level with a scattering of skills to the five year level (id.). According to the therapist, the student was independent on the playground, including her ability to pump a swing (id.). The therapist indicated that the student demonstrated decreased motor planning and required repetitive visual, verbal and tactile cues to help her accomplish a new gross motor task (id.). The therapist reported that over the course of the year the student had demonstrated increased muscle strength and control and had improved pelvis stability, which had allowed her to advance her jumping skills, single limb stance time and her newly acquired skill of hopping (id.). According to the physical therapist, although the student made some significant gains, she continued to display muscle weakness and low muscle tone at her trunk and hips (id.). The therapist recommended the continuation of physical therapy services (id. at pp. 2-3).

Respondent's school psychologist observed the student at her 12:1+2 HASC preschool placement on April 5, 2006 (Dist. Ex. 12). During her visit, the psychologist observed the student in her preschool classroom, and she also met with the student's teacher and speech therapist (Tr. p. 24; Dist. Ex. 12). According to the psychologist, the student's teacher described the student as a "very quiet little girl" who might relate spontaneously at times (Dist. Ex. 12). The student reportedly responded well to structure and schedules and it was noted that attentional issues might interfere with the student's academic performance (*id.*). The student was reportedly able to label shapes and colors, count and identify letters (*id.*). The psychologist noted that the student might continue to benefit from the related services that she was currently receiving, as well as a similar, structured program that would address her needs (*id.*).

Respondent's CPSE met on April 24, 2006 for an annual review of the student's preschool program (Dist. Ex. 7). The CPSE recommended that the student receive extended school year services for the months of July and August 2006, including occupational therapy, physical therapy, and speech-language therapy, as well as special education within a special class¹ at HASC (*id.*). Also on April 24, 2006, following the CPSE meeting, respondent's Committee on Special Education (CSE) met to determine the student's eligibility for school age special education services and to create an individualized education program (IEP) for the student for the 2006-07 school year commencing in September 2006 and ending in June 2007 (Dist. Ex. 8; Parent Ex. B).²

The April 2006 CSE classified the student as having a speech or language impairment and recommended that she be placed in a collaborative kindergarten program (Parent Ex. B at p. 1). The collaborative kindergarten class consisted of approximately 20 students, eight of whom were classified as students with disabilities, staffed by a regular education teacher, a teacher assistant, and a special education teacher for four periods per day (Tr. p. 276). This program was designated on the student's IEP as four, forty-two minute sessions per day of consultant teacher services (Dist. Ex. 8 at p. 1; Parent Ex. B at p. 1). In addition, the student was recommended to receive one period per day of resource room instruction with a 12:1 staffing ratio (*id.*), also referred to as the learning lab (Tr. p. 276). The CSE recommended the following related services: speech-language therapy two times weekly in a group of three; occupational therapy two times weekly in a group of two; and individual physical therapy two times weekly (Dist. Ex. 8 at p. 1; Parent Ex. B at p. 1). The April 2006 IEP did not include any program modifications, accommodations, supplementary aids and services or testing accommodations (Dist. Ex. 8 at p.

¹ Although the CPSE IEP indicates that the student was recommended for a 15:1 special class (Dist. Ex. 7), testimony by the CSE chairperson indicates the program was an integrated program (Tr. pp. 266-67, 268-69, 298-99).

² The hearing record contains two IEPs dated April 24, 2006, Parent Exhibit B and District Exhibit 8, which were both entered into the record without objection (Tr. pp. 7, 10, 11). It is unclear from the hearing record which IEP is in dispute in this appeal. At no time did petitioners specifically identify which IEP they are challenging. Throughout the impartial hearing, both parties referred to both IEPs (*see e.g.*, Tr. pp. 184, 290, 291, 299-302), and both parties refer to both IEPs in their pleadings on appeal. Neither party requests that I determine which IEP is in dispute. For purposes of this decision, I have reviewed both IEPs and references in this decision will be to both IEPs, except where one IEP does not contain information relevant to the discussion.

2; Parent Ex. B at p. 2). The IEP included annual goals related to following multi-step directions, responding appropriately to "wh" questions, using language for various communicative functions, initiating interactions with peers and adults, demonstrating sensory processing and movement organizational skills, demonstrating bilateral motor planning skills, demonstrating perceptual fine-motor readiness skills necessary for effective classroom performance, skipping while demonstrating good posture, matching and sequencing, and manipulating fasteners (Dist. Ex. 8 at pp. 4-6; Parent Ex. B at pp. 4-6).

A June 2006 neurology follow-up indicated that the student's neurological condition showed ongoing hyperactivity and learning issues and the doctor suggested consideration of use of medication for behavioral control (Parent Ex. D at p. 2).

On July 2, 2006, petitioners signed a tuition contract with HANC for the student's enrollment for the 2006-07 school year (Parent Ex. H at p. 1). On or about July 26, 2006, petitioners verbally notified respondent that they were unilaterally placing their daughter at HANC, and requested that respondent provide their daughter with related services only (Dist. Ex. 8 at pp. 1, 4; see Dist. Ex. 9). By letter dated August 31, 2006, petitioners notified respondent in writing that they were unilaterally placing their daughter at HANC and that they "will seek public funding" for the placement, and further, that "a description of their problems with the [CSE's] recommendations and [petitioners'] proposed solutions will be provided under separate cover" (Parent Ex. E at p. 2).

On October 19, 2006, the student underwent a psychological evaluation at the request of the service coordination department of the New York State Office of Mental Retardation and Developmental Disabilities (OMRDD) in order to assist the family in obtaining appropriate services (Dist. Ex. 10 at p. 1). The psychologist reported that the student was diagnosed with epilepsy in June 2006 but that petitioners had thus far declined to give the student the anti-seizure medication recommended by her neurologist (id.). According to the psychologist, the student's mother reported that the student was hyperactive and impulsive and appeared disorganized in her activities (id.). Petitioner further reported that the student tended to interrupt people who were talking or working on tasks, needed constant reminders to stay away from dangerous things, had frequent tantrums, and had been known to hit other children (id.). As reported by the psychologist, the student's neurologist had diagnosed her with an attention deficit hyperactivity disorder (ADHD), a pervasive developmental disorder (PDD) and complex-partial epilepsy (Dist. Ex. 10 at p. 2; Parent Ex. D at p. 2). The psychologist observed that the student had a pleasant, engaging manner and willingly stayed for testing while the rest of her family left the conference room (Dist. Ex. 10 at p. 2). He noted that the student displayed a high activity level, with some impulsiveness but that she was sufficiently cooperative to complete all tasks, with some encouragement (id.). He characterized the student's interest in presented activities as "short-lived" (id.).

The psychologist's report indicated that he administered the Stanford-Binet Intelligence Scale-Fifth Edition (SB5) to the student; however, later indicated that the student's intellectual functioning was assessed using the Wechsler Adult Intelligence Scale-III (WAIS-III) (id.). According to the psychologist, administration of the WAIS-III yielded a verbal IQ score of 95, a

performance IQ/nonverbal IQ score of 93 and a full scale IQ score of 94 which placed her in the average range of overall intellectual functioning (id.). The psychologist reported that the student demonstrated a relative strength in quantitative reasoning (standard score 122) and a relative weakness in working memory (standard score 80) (id.). He opined that the student's low score on working memory might be more related to the student's attention problems than actual memory skills (id.). The student's adaptive behavior was assessed using a tool referred to in the hearing record as the Adaptive Behavior Assessment Scale-2nd Edition, with the student's mother serving as informant (id.). The student received a general adaptive composite score of 40, indicating that her overall adaptive functioning was within the very low range (id.). The psychologist opined that the student met the criteria for ADHD, combined type (id. at p. 3). He noted however, that he saw no evidence of a PDD (id.). The psychologist recommended service coordination and referral to the CSE (id.). He further recommended that respondent provide behavioral consultation to petitioners to help manage the student's behavior problems and encourage independence skills (id.).

A social history was completed by the student's mother on January 22, 2007 (Dist. Exs. 6; 11 at p. 1). On the interview form, the student's mother indicated that the student's then current program was meeting her needs; however, the student needed more occupational therapy than what was allotted due to sensory motor dysfunction (Dist. Ex. 6 at p. 2). The student's mother indicated that the student had epilepsy and that she was in touch with a neurologist but the student was not yet on any medication (id.). The mother noted that the student was hyperactive, impulsive and aggressive and had tantrums (id.). The mother further reported that socially, the student was not age appropriate; that she was wild, screamed, and giggled incessantly (id.). According to the student's mother, the student was destructive, aggressive, and made other kids uncomfortable and she stole (id.). The student's mother opined that the student fit in better with younger children or other special education children (id.). The student was scheduled to begin receiving respite services that month (id.).

Respondent's psychologist conducted a three-year evaluation of the student in March 2007 (Dist. Ex. 11). The psychologist noted that based on feedback from the student's mother and teacher, and a review of "preceding records," it seemed unnecessary to conduct a psychological evaluation of the student at that time (id. at p. 1). The psychologist reviewed the results of the social history and October 2006 psychological evaluation (id.). According to the psychologist, the student's mother indicated that the student's program and teacher had made a "world of difference" (id.). As reported by the psychologist, the student's teacher indicated that math was a relatively strong area for the student (id.). The teacher further reported that the student required redirection, repetition, and one-to-one attention throughout the day to focus and perform (id.). The teacher also reported that the student did not make eye contact, take risks, talk to her classmates or play with others (id.). The psychologist stated that he observed the student in her classroom during a math lesson (id.). He noted that the student wore a weighted vest and sat closest to the teacher (id. at p. 2). According to the psychologist the student presented as cooperative and wanting to do well, as she responded to direction and participated appropriately and with enthusiasm (id.). He reported that the student appeared engaged and attentive to the teacher and did not interact with the other children (id.). The psychologist stated that he observed no significant issues during his observation (id.). He opined that the student might

benefit from continued related services, as well as a similarly structured program that could address the student's needs (id.).

By due process complaint notice dated May 7, 2007, petitioners, through their attorney, rejected respondent's recommended program and requested an impartial hearing (Parent Ex. F).³ Petitioners alleged that respondent denied the student a free appropriate public education (FAPE)⁴ due to procedural and substantive deficiencies in the student's April 2006 IEP, arguing that: a) they were denied meaningful participation in the development of the IEP because the CSE did not consider their input and opinions (id. at p. 2); b) the IEP does not recommend a specific class for their daughter (id.); c) the IEP failed to include appropriate statements of present levels of performance and did not specify how the student's disabilities affect her involvement and progress in the general curriculum (id. at p. 3); d) the IEP failed to indicate what documents and evaluations the CSE used in making its recommendations (id.); e) the IEP failed to meet all of the student's educational and emotional needs because the CSE did not conduct a functional behavioral assessment (FBA) or an appropriate structured classroom observation of the student prior to the April 24, 2006 CSE meeting (id.); f) the CSE failed to adequately review and discuss the goals and objectives during the meeting (id.); g) the goals and objectives created for the student were generic and not tailored to the student's individual needs (id. at p. 4); and h) the April 2006 CSE meeting was not attended by all the required parties (id.). Petitioners sought tuition reimbursement for the CAHAL program at HANC (id.).

The two-day impartial hearing commenced on June 4, 2006 and terminated on June 20, 2006. By decision dated August 10, 2007, the impartial hearing officer determined that respondent's CSE had offered petitioners' daughter a FAPE for the 2006-07 school year and denied petitioners' request for tuition reimbursement for the 2006-07 school year. This appeal ensued.

Petitioners assert on appeal that the impartial hearing officer erred in determining that respondent's CSE offered their daughter a FAPE for the 2006-07 school year. Among other things, petitioners assert that: a) the CSE failed to consider an "appropriate and complete psychological evaluation" and an "appropriate and complete structured classroom observation" during the April 24, 2006 CSE meeting; b) the IEP developed at the April 24, 2006 CSE meeting failed to provide proper present levels of academic achievement, functional performance and

³ It was not until the May 7, 2007 due process complaint notice, dated approximately one year after the CSE made the recommendations in dispute, that petitioners notified respondent of their "concerns" with the proposed IEP. Respondent does not raise non-compliance with the requirements of 20 U.S.C. § 1412(a)(10)(C)(iii), therefore, I will not address the issue.

⁴ 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]).

individual needs, nor does it provide enough specificity regarding their daughter's deficits; c) the CSE did not develop appropriate annual goals for their daughter; d) the CSE members were procedurally limited by the CSE chair with respect to what programs they were allowed to consider; and e) the collaborative class placement recommended by respondent's CSE was an inappropriate placement. Petitioners also assert that the impartial hearing officer erred when he dismissed as "a nullity" the testimony of their daughter's then current teacher. Petitioners further assert that their unilateral placement at HANC was appropriate, and that they are entitled to tuition reimbursement. Respondent does not cross-appeal.

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];⁵ see 20 U.S.C. § 1414[d]; 34 C.F.R. § 300.320).

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, 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

⁵ 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.

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).

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]).

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, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the 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).

Returning to the instant appeal, petitioners argue that the April 2006 IEP is deficient in that it fails to accurately report their daughter's present levels of performance. Petitioners further contend that the goals and objectives on the April 2006 IEP were inappropriate and not objectively measurable. For the reasons set forth herein, I find that petitioners sufficiently demonstrated that the student was not offered a FAPE for the 2006-07 school year.

In developing an IEP, the IEP team must consider: "(i) the strengths of the child; (ii) the concerns of the parents for enhancing the education of their child; (iii) the results of the initial evaluation or most recent evaluation of the child; and (iv) the academic, developmental, and functional needs of the child" (20 U.S.C. § 1414[d][3]A). The IDEA requires that an IEP include a statement of the child's present levels of academic achievement and functional performance, including a description of how the child's disability affects his or her involvement and progress in the general curriculum; and for preschool children, as appropriate, how the disability affects the child's participation in appropriate activities (20 U.S.C. § 1414[d][1][A][i]; 34 C.F.R. § 300.320[a][1]; see also 8 NYCRR 200.4[d][2][i]). An IEP must also include measurable annual goals, including academic and functional goals, designed to meet the child's needs arising from his or her disability to enable the child to be involved in and progress in the general curriculum, and meeting the child's other educational needs arising from the disability (20 U.S.C. § 1414[d][1][A][ii]; 34 C.F.R. § 300.320[a][2][i]); see 8 NYCRR 200.4[d][2][iii]). In addition, an IEP must describe how the child's progress towards the annual goals will be measured and when periodic reports on the child's progress toward meeting the annual goals will be provided (20 U.S.C. § 1414[d][1][A][iii]; 34 C.F.R. § 300.320[a][3]; 8 NYCRR 200.4[d][2][iii][b],[c]).

Petitioners assert on appeal that the statements of the student's present levels of academic achievement, functional performance and individual needs set forth in her April 2006 IEP do not provide a meaningful description of the student's abilities or needs, nor do they provide specificity regarding the deficits that need to be addressed. Petitioners argue that this information was readily available to the CSE. Petitioners contend that there is insufficient information in the IEP pertaining to the support that the teacher assistant would receive from the consultant teacher, the student's abilities with respect to activities of daily living, a description of the student's intellectual strengths and weaknesses (other than listing subtest scores), a description of the student's attending deficits and other social developmental weaknesses and the student's fine and gross motor weaknesses and need for a sensory diet.

I agree with petitioners that information regarding the student's ability to interact with adults and peers, the extent to which the student's attending weaknesses impacted her ability to learn, the student's need for orthotics and her need for a sensory diet were necessary to provide the student's teacher and related service providers a complete picture of her abilities and needs. This information was not sufficiently provided for in the IEP. Based on the above, I find that the April 2006 IEP does not contain adequate statements of the student's present levels of academic achievement, functional performance and individual needs.

Petitioners further assert that the CSE failed to develop appropriate annual goals for the student and that the student's annual goals were generic and not individually tailored to address her needs. They further contend that the April 2006 IEP did not contain any academic goals despite the student's demonstrated academic weaknesses. An IEP must include a statement of measurable annual goals (34 C.F.R. § 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). In addition to including a statement of measurable annual goals, an IEP must include a description of how the child's progress toward meeting the annual goals will be measured (20 U.S.C. § 1414[d][1][A][i][II], [III], see also 8 NYCRR 200.4[d][2][iii][b]). A review of the student's

April 2006 IEP reveals that while most of the annual goals broadly relate to an identified need of the student, the goals are not sufficiently specific and measurable. Significantly, the April 2006 IEP does not contain goals related to attending, despite indications from the student's preschool teacher that attending difficulties impeded the student's performance the most (Tr. p. 23).

Petitioners further assert that the CSE chairperson testified that the goals developed for the student failed to include the requisite specificity that would make them measurable. A review of the hearing record indicates that upon questioning, the CSE chairperson acknowledged the lack of specificity contained in many of the student's IEP goals (Tr. pp. 332-40). The CSE chairperson testified that the IEP did not contain goals specifically related to addressing the student's attending deficits (Tr. pp. 335-36). Upon review of the goals contained in the student's IEP, I concur with petitioners that the goals lack the requisite specificity needed to make them measurable. Although the goals contain evaluative criteria, the skills targeted for mastery are not sufficiently described so as to allow the student's teacher or therapists to understand the CSE's expectations with respect to each goal. I concur with petitioners that the April 2006 IEP does not contain measurable annual goals. Moreover, in addition to the deficiencies in the present levels of performance and the goals, I note that the April 2006 IEP did not include any program modifications, accommodations, or supplementary aids and services to support the student with her significant attending needs in a regular education environment (Dist. Ex. 8 at p. 2; Parent Ex. B at p. 2).

Based on the foregoing, I find that petitioners demonstrated at the impartial hearing that the April 2006 IEP was inadequate, resulting in a program that was not reasonably calculated to enable the student to receive meaningful educational benefit. Together, the level of the inadequacy of the present levels of performance and the level of the inadequacy of the annual goals resulted in an IEP that did not offer a FAPE to the student for the 2006-07 school year. Accordingly, petitioners have prevailed with respect to the first criterion of the Burlington/Carter analysis for tuition reimbursement.

I turn now to whether petitioners have met their burden of demonstrating that their unilateral placement of the student at HANC for the 2006-07 school year was appropriate (Burlington, 471 U.S. 359).

In order to meet their burden, the parents must show that the services provided were "proper under the Act" (Carter, 510 U.S. at 12, 15; see Burlington, 471 U.S. at 370), i.e., that the private services addressed the child's special education needs (see Gagliardo, 489 F.3d at 112, 115; Frank G., 459 F.3d at 363-64; Walczak, 142 F.3d at 129; Matrejek, 471 F. Supp. at 419), and while parents are not held as strictly to the standard of placement in the LRE as school districts are, the restrictiveness of the parental placement may be considered in determining whether the parents are entitled to an award of tuition reimbursement (Rafferty v. Cranston Pub. Sch. Comm., 315 F.3d 21 [1st Cir. 2002]; M.S. v. Bd. of Educ., 231 F.3d 96, 105 [2d Cir. 1998]). However, this must be balanced against the requirement that each child with a disability receive an appropriate education (Briggs v. Bd. of Educ., 882 F.2d 688, 692 [2d Cir. 1989]).

For the 2006-07 school year, the student was placed in a 12:1+2 self-contained kindergarten class in the CAHAL program at HANC (Tr. pp. 112-13, 192; Parent Ex. F at p. 2). The actual student-to-teacher ratio of the student's class was 9:1+1 (Tr. p. 112). The students' ages ranged from five to six years old and their intellectual abilities ranged from low average to high average depending on the performance area (Tr. p. 169). In relation to her peers, the student was judged to have average intellectual and reading abilities and slightly above average math abilities (Tr. pp. 169-70). The majority of children in the class presented with difficulties with attending, social judgment and problem solving, as well as speech-language deficits including weaknesses processing information (Tr. p. 171). Respondent asserts that the private placement was inappropriate because it failed to sufficiently offer the student the opportunity to model the behavior of typically developing peers. Petitioners' witness testified that CAHAL ran self-contained classes only, no inclusion or collaborative programs (Tr. pp. 191-92). Opportunities for mainstreaming included music once a week and gym twice a week with a "buddy" kindergarten class, daily recess and assemblies (Tr. pp. 181-82). The student was not mainstreamed for any of her academic classes (Tr. p. 218). The student's preschool special education teacher testified that the student would benefit from experiences with typically developing peers (Tr. pp. 55, 257; Dist. Ex. 2 at p. 3). Respondent's CSE chairperson stated that the student had been in a 12:1+2 class and then a 15:1+2 class, noting that the progression was toward a less restrictive environment and a more mainstreamed program (Tr. p. 279). He opined that placing the student in a self-contained classroom "would have been going in the wrong direction" (Tr. p. 280). According to the CSE chairperson, there was a general consensus at the CSE meeting, including the HASC staff, to move in the direction of a collaborative placement model (Tr. pp. 256-57, 278-80). Although petitioners' witness opined that placement in a regular education classroom with supports for the student was not appropriate because of the noise level and stimulation (Tr. pp. 183-84), I concur with the impartial hearing officer that this witness' testimony was of limited value. The witness acknowledged that at the time of the April 24, 2006 CSE meeting she was unfamiliar with the student (Tr. p. 194). Although the hearing record does not indicate how the student performed in her 15:1+2 extended school year (ESY) program, information regarding her academic and social abilities suggests that she was able to be appropriately educated in a less restrictive classroom environment than the more restrictive special class chosen by petitioners. Based on the foregoing, I find that petitioners did not meet their burden in demonstrating that their placement of their daughter at HANC for the 2006-07 school year was appropriate. Therefore, petitioners' request for tuition reimbursement is denied.

I have considered the parties' remaining contentions and find that I need not reach them in light of my determination or they are without merit.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the impartial hearing officer's decision is annulled to the extent that it found that respondent offered the student a FAPE for the 2006-07 school year.

Dated: Albany, New York
November 1, 2007

PAUL F. KELLY
STATE REVIEW OFFICER