



The University of the State of New York

The State Education Department State Review Officer

No. 07-117

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 Board of Education of the Hewlett-Woodmere Union Free School District

Appearances:

Law Offices of Michele Kule-Korgood, attorney for petitioners, Michele Kule-Korgood, Esq., of counsel

Ingerman Smith, LLP, attorney for respondent, Susan M. Gibson, 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 Kulanu Torah Academy (Kulanu) at Hebrew Academy of the Five Towns and Rockaway (HAFTR) for the 2006-07 school year and for services provided by a private inclusion consultant and a private behavior specialist. Respondent cross-appeals from the impartial hearing officer's determination that it failed to offer a free appropriate public education (FAPE) to the student for the 2006-07 school year. The appeal must be dismissed. The cross-appeal must be sustained.

Preliminarily, I will address two procedural issues. First, petitioners attach to their reply a copy of respondent's notice of its June 2007 Committee on Special Education (CSE) meeting dated June 25, 2007 and the student's individualized education program (IEP) for the 2007-08 school year dated June 29, 2007. Respondent objects to the submission of these documents as additional evidence. Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an impartial hearing officer's decision if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary to enable a State Review Officer to render a decision (Application of a Child Suspected of Having a Disability, Appeal No. 07-042; Application of a Child with a Disability, Appeal No. 06-058; Application of a Child with a Disability, Appeal No. 05-020). The record of

the impartial hearing closed on July 16, 2007 (Tr. p. 1422) and petitioners did not submit the documents dated June 2007 to the impartial hearing officer for his consideration. Additionally, I find that the documents are not necessary for my review. Therefore, I decline to consider the additional documentation that petitioners submitted with their petition.

Second, respondent asserts that the petition must be dismissed because petitioners did not properly serve a notice with petition as required by 8 NYCRR 279.3. Petitioners allege that the verified petition and accompanying papers personally served on respondent on October 9, 2007 inadvertently lacked a notice with petition, that a notice with petition was sent by facsimile to respondent's counsel on October 10, 2007, and that "a new, full set of papers with the notice of petition was re-served on respondent on October 11, 2007" (Pet'r Reply ¶ 53). Respondent answered petitioners' allegations in a timely manner and does not assert any prejudice from the delay in serving the notice with petition. Under the circumstances, I decline to dismiss the petition for petitioners' alleged improper service of the notice with petition.

The student's eligibility for special education services as a student with autism is not in dispute in this appeal (see 34 C.F.R. § 300.8[c][1][i];¹ 8 NYCRR 200.1[zz][1]). The student demonstrates significant delays in expressive and receptive language, difficulty with articulation, poor pragmatic language skills (Dist. Ex. 10 at p. 2), limited social skills (Dist. Ex. 8) and weaknesses in sensory processing and fine motor coordination (Dist. Ex. 15 at p. 2). He is described as having "significant delays in all areas of educational functioning" (Dist. Ex. 9 at p. 2), and is reported to engage in stereotypic behaviors when overwhelmed (Dist. Ex. 14 at p. 2). The student has been reportedly diagnosed as having autism and apraxia (Tr. pp. 359, 367, 980). At the time of the impartial hearing, the student had access to an augmentative communication keyboard device, which he used "with facilitation" (Tr. p. 325).

When the impartial hearing commenced in April 2007, petitioners' son was attending a 6:1+1 self-contained class at Kulanu at HAFTR (Tr. p. 424), where he was initially provided with mainstreaming opportunities for non-academic activities, and later, for academic classes (Tr. pp. 38-39, 79-80, 81-84, 93, 133, 181-84, 186-88, 1382-83). In addition to placement in a private school, petitioners obtained a private inclusion consultant and private behavior specialist who worked with the student and the staff of Kulanu and HAFTR (Tr. pp. 193, 199, 210-11, 213, 215, 222-23, 224, 241, 242, 243, 258, 261-62, 264-65, 270-74, 278-85, 310, 329, 348; see Parent Exs. G; H; K; L; M). Respondent provided the student with occupational therapy (OT), speech-language therapy and transportation to and from Kulanu (Tr. pp. 696-97, 1413). Neither Kulanu nor HAFTR have 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's mother reported that the student received a diagnosis of autism prior to his third birthday (Tr. p. 359; Dist. Ex. 8 at p. 1). Subsequently, the student attended a part-time

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 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.

center-based program, was home schooled and then attended state-approved private schools (Tr. pp. 359-60).

In 2000, petitioners moved to respondent's district and the student continued to attend a state-approved private school (Tr. p. 360). In 2004, the student's mother home schooled him (Tr. pp. 360-61). In October 2004, an augmentative and alternative communication evaluation was conducted by the Nassau Board of Cooperative Educational Services (BOCES) (Dist. Ex. 16 at p. 1). The evaluator reported that the student was a good candidate for an augmentative communication device because his ability to communicate was limited by his rapid rate of speech and fair articulation (id.). She opined that use of the DynaVox MT4 (DynaVox) would allow the student to "regulate his own language without the assistance of a caregiver" (id. at p. 5). As a result of this evaluation, the student was provided use of a DynaVox (Dist. Ex. 8 at p. 1).

Respondent's CSE met on August 25, 2005 for the student's annual review and to explore special education programs for the student for the 2005-06 school year (Dist. Ex. 4 at pp. 1, 10). Petitioners indicated that they wanted the student to return to a public school setting rather than continue home schooling (id.). At the August 2005 meeting, the CSE determined to continue the student's classification as a student with autism, and recommended that he be placed in a special class in one of respondent's elementary schools and receive various related services (id. at p. 10; Tr. p. 490). The resultant August 2005 IEP noted that petitioners "elected to continue home schooling with related services until an appropriate program for the student [was] determined" (id.).

In September 2005, petitioners unilaterally placed the student at a private school which the Commissioner of Education has not approved as a school with which school districts may contract to instruct students with disabilities (Tr. pp. 500, 755; see 8 NYCRR 200.1[d], 200.7).

On November 1, 2005, respondent conducted an OT evaluation (Dist. Ex. 15). The evaluation report indicated that the occupational therapist was unsuccessful in her attempt to administer various standardized testing tools because the student presented with "severe anxiety that impacted upon his ability to cooperate and achieve appropriate data" (id. at pp. 1-2). The therapist reported that the student exhibited difficulties in sensory processing, fine motor coordination, visual motor integration, and visual perception (id.). The evaluator recommended individual OT services three times per week to address these difficulties (id. at p. 3).

On March 21, 2006, respondent conducted both a speech-language evaluation and an educational evaluation as part of respondent's three-year reevaluation of the student (Dist. Exs. 9 at p. 1; 10 at p. 1; see 20 U.S.C. § 1414[a][2][B]; 34 C.F.R. § 300.303[b][2]; 8 NYCRR 200.4[b][4]). Both evaluations were conducted by the same individual, who held certifications in both speech and special education (Tr. p. 919). In both evaluation reports, the evaluator indicated that the student "was unable to handle the demands of formal testing," as the student demonstrated limited attention and impulsive behaviors that interfered with formal testing procedures (Dist. Exs. 9 at p. 1; 10 at p. 1). The evaluator stated that evaluation of the student's speech-language and educational functioning was accomplished through modified formal and informal assessments (Dist. Exs. 9 at pp. 1, 2; 10 at p. 1).

In the speech-language evaluation report, the evaluator indicated that the student was able to use one to three-word verbal utterances to request tangibles and activities, label common familiar items and activities, and label simple pictures (Dist. Ex. 10 at p. 2). Although the student was able to refuse tangibles and activities by saying "No (plus the item)," he "often inappropriately verbalize[d] 'No (plus an item)' upon hearing words that he associated with words he may dislike" (*id.*). The student's receptive communication strengths included an ability to understand simple common nouns and verbs, one and two-step verbal directions, and non-verbal cues such as facial expressions (*id.*). Relative receptive weaknesses included vocabulary items and activities with which the student had no direct experience (*id.*). The student's pragmatic skills were described as poor (*id.*). The evaluator reported that the student's eye contact was inconsistent, he was distracted by noises and situations in his environment, he required redirection to task as well as visual supports and frequent verbal reinforcement to attend and participate, and he did not interact with people that he was unfamiliar with unless prompted to do so (*id.*). The student's spontaneous speech was characterized as "rapid and accompanied by imprecise articulation" that was described as unintelligible (*id.*). The evaluator noted that the student's mother reported that the student was not using the DynaVox and that it was easier for him to communicate using a keyboard (*id.* at p. 1).

As part of the educational evaluation, the evaluator administered the Wechsler Individual Achievement Test (WIAT-II) word reading subtest which yielded a standard score of 40 (<0.1 percentile) (Dist. Ex. 9 at p. 1). The evaluator reported that the student was able to identify and discriminate letters of the alphabet (*id.*). Although the student answered questions during formal testing, the evaluator reported that the student appeared eager for the test to be over and frequently made statements regarding the amount of time left by saying, "Go home?" (*id.*). The student was unable to complete the WIAT-II's numerical operations and math reasoning subtests, but the evaluator noted that he was able to count and add using manipulatives (*id.* at p. 2). The evaluator noted that the student demonstrated "significant delays in all areas of educational functioning" and that the student's receptive language skills appeared to be stronger than his expressive language skills (*id.*). The student was able to express simple ideas and make his requests known by stringing two to three words together (*id.*). He exhibited knowledge of many sight words, but it was difficult to determine his vocabulary level (*id.*).

On May 1, 2006, respondent conducted a psychological evaluation of the student (Dist. Ex. 8 at p. 1). The Survey Interview Form of the Vineland Adaptive Behavior Scales, Second Edition (Vineland-II) was completed with the student's mother to obtain information regarding the student's adaptive behavior and to assess the progress the student had made in his out-of-district placement (*id.* at pp. 1-2). Results of the Vineland-II yielded the following standard scores (SS) (percentile rank): communication SS 67 (1st percentile), daily living skills SS 58 (>1st percentile), and socialization SS 62 (1st percentile), for an adaptive behavior composite SS 61 (1st percentile) (*id.* at p. 3). The student was not present for the psychological evaluation and did not participate in any psychological testing for the May 1, 2006 evaluation (Tr. p. 630).

In a May 15, 2006 progress note, the director of OT at the student's private school indicated that the student was provided with a total of six sessions of therapy each week at the private school, individually and in a group setting, using a multi-sensory approach (Dist. Ex. 13 at p. 1). In addition to therapy sessions, the student was administered a sensory diet on an hourly basis (*id.*). The student was noted to have difficulty tolerating changes in plans, expectations and

routines and he required modifications and adaptations to help him process visual, auditory, and motor stimulation (id.). It was reported that the student demonstrated gains in tolerating a variety of novel situations and experiences as long as his individual sensory diet was followed consistently (id. at p. 2). He was also noted to be more organized and could transition more efficiently, especially within high traffic, high visual and auditory stimulating situations (id.). The OT progress report indicated that the student responded to greetings by adults and had recently demonstrated the ability to address a person by name (id.). He was able to participate in longer social engagement when prompting and choices were provided (id.). Decreased sensory defensive behaviors, emerging mood stability and arousal state, and emerging focus and attention were noted; as was improvement in postural tone/attention/adaptation, the development of bilateral motor patterns, emergence of praxis and improvement in fine motor skills regarding motor control, and spatial-temporal organization (id.). The progress report included a list of annual goals and short-term objectives addressing the student's interpersonal relationships with peers and adults, his fine motor and/or bilateral hand skills, and his sensory processing and sensory integrative skills (id. at p. 3).

A May 15, 2006 speech-language therapy progress report prepared by the speech-language pathologist at the student's private school indicated that he received speech-language therapy five times per week in individual and group sessions (Dist. Ex. 14 at p. 1). Therapy focused on increasing the student's ability to engage in purposeful interactions with a communicative partner, increasing circles of communication with the communicative partner, categorization, and comprehension and answering of "WH" questions (id.). Therapy also focused on spontaneous use of language, commenting, and increasing play skills, as well as increasing the student's oral motor skills (id.). The progress report indicated that the student used a text to speech augmentative communication device with physical support (id.). Varying degrees of improvement were noted in the areas of therapeutic focus (id. at pp. 1-2). The progress report also stated that the student often relied on prompts or encouragement (id. at p. 2). Although he was able to remain calm and participate in many interactions, the student often became overwhelmed and exhibited various coping behaviors such as rapid pacing, using a high-pitched voice, rejecting activity by using stereotypic expressions such as "No _____," and gross arm and hand movements (id.). The progress report included a list of annual goals and short-term objectives to address the student's receptive and expressive language skills, and his pragmatic language skills (id. at p. 4).

On May 17, 2006, respondent's school psychologist, its director of special education, and other staff from respondent's school visited the student's private school and conducted an observation of the student (Tr. pp. 488, 494, 744-45; Dist. Ex. 12). The report of that observation included a description of the student's behavior during snack time with his peers (Dist. Ex. 12). The student was observed sitting appropriately at a table and, when prompted, he responded with one-word answers and removed his plate from the table and threw it in the garbage (id.). The report also indicated that the student appeared comfortable in his school environment and appeared to rely heavily on others for direction and comfort (id.).

By notice dated May 31, 2006, respondent advised petitioners that the CSE had scheduled a reevaluation meeting for June 21, 2006 (Parent Ex. F). On June 1, 2006, the student's mother completed a social history update form (Dist. Ex. 11 at pp. 1, 3). She reported that the student continued to make progress in all areas of development, indicated that his current

interests included rollerblading and swimming, and that he had minimal relationships with peers (id. at p. 2). On or about June 12, 2006, petitioners submitted a screening application form to Kulanu (Dist. Ex. 27).

The CSE met on June 21, 2006 to review the student's progress, results of the May 2006 reevaluations and to create an educational program for the student for the 2006-07 school year (Tr. p. 504; Dist. Ex. 3 at pp. 1, 12; Parent Ex. F). At the June 2006 CSE meeting, the student's mother received copies of the psychological evaluation report, the speech-language and educational evaluation reports (Tr. pp. 368, 369, 371, 466-67, 610). The hearing record reflects that she did not receive the OT evaluation report until prior to the start of the impartial hearing (Tr. pp. 362, 364, 448).

Participants at the June 2006 CSE meeting included, respondent's director of special education who acted as the CSE Chairperson, the school psychologist who prepared respondent's psychological evaluation report and had observed the student at his private school, the speech-language therapist and special education teacher who had conducted the student's educational and speech-language evaluations, respondent's transition coordinator, the student's mother, and an additional parent member (Tr. pp. 376, 502, 503-04, 744-45, 918-19; Dist. Exs. 3 at p. 12; 8; 9; 10; 12). The educational director from the student's private school, the student's speech-language therapist and occupational therapist from his private school, and the assistant principal at the BOCES Rosemary Kennedy School (BOCES-RK) participated by telephone (Tr. pp. 377, 504; Dist. Exs. 3 at p. 12; 5 at p. 1).

The June 2006 CSE recommended placement of the student in a 6:1+2 full-day special class at BOCES-RK with a 1:1 aide (Dist. Ex. 3 at pp. 1, 13). The June 2006 CSE recommended related services of individual OT three times per week for 40 minutes as well as group (5:1) OT two times per week for 40 minutes, individual speech-language therapy five times per week for 40 minutes, and parent training one time per month for 60 minutes (id. at p. 13). The June 2006 CSE recommended that the student be provided with assistive technology devices and services including an augmentative communication board (id. at p. 9). The resultant IEP stated that "no behavioral interventions" were needed at that time (id. at p. 2) and included recommendations for extended school year services including special class, parent counseling, speech-language therapy and OT (id. at pp. 9-10).

By letter dated July 20, 2006, respondent's director of special education wrote petitioners regarding the June 21, 2006 CSE meeting (Dist. Ex. 5). Respondent's letter reiterated the recommendations made by the June 2006 CSE (id. at pp. 1, 2). The July 20, 2006 letter also indicated that the CSE could not recommend that the student remain at his private school because it was not a state-approved school (id. at pp. 2-3).

The student and his mother visited BOCES-RK on August 14, 2006 (Tr. pp. 390, 1063-64, 1115-16). During that visit, the student's mother asked the school's vice-principal about mainstreaming opportunities, the school's curriculum, and its policies regarding "time out" rooms and the use of restraints (Tr. pp. 393, 394, 395, 414-15, 461-62, 1376, 1377).

By letter dated August 14, 2006, the principal of BOCES-RK informed respondent's director of special education that the student had been screened by the admissions committee and

that it had an appropriate placement for the student (Dist. Ex. 7). The principal indicated that the admissions committee of BOCES-RK was recommending the student's placement in a 6:1+1 class with specified amounts of individual OT and speech-language therapy (id.).

On or about August 15, 2006, petitioners received in the mail from respondent a copy of the student's IEP developed at the June 21, 2006 CSE meeting (Tr. pp. 382-83, 1375; see Parent Ex. D at pp. 3-4). An accompanying letter advised petitioners that the June 21, 2006 IEP was sent to respondent's Board of Education for approval (Parent Ex. D at p. 3).

Kulanu accepted the student in August 2006 (Tr. pp. 1397, 1408). On August 17, 2006, petitioners paid a deposit to Kulanu and returned the school's "Tuition Policy" form, which they had signed on August 8, 2007 (Tr. pp. 1379, 1380-81, 1407; Dist. Ex. 28; Parent Exs. Q; AA).

By letter dated August 22, 2006, the student's mother advised the CSE Chairperson that she was rejecting the student's placement at BOCES-RK and his June 2006 IEP (Dist. Ex. 6). The student's mother also advised the CSE that the student would be attending Kulanu and that she would be requesting an impartial hearing to pursue public funding for the student's placement at Kulanu (id.).

Upon receiving petitioners' August 22, 2006 letter, respondent's director of special education telephoned petitioners and spoke with the student's mother (Tr. pp. 696-97, 1412-13; see also Tr. pp. 1403-04, 1409). She advised the student's mother that respondent was unable to pay for petitioners' son to attend Kulanu because it was not approved by New York State to provide special education services to students with disabilities (id.). The student began attending Kulanu at HAFTR in fall 2006 (Tr. p. 361).

By due process complaint notice dated November 14, 2006, petitioners requested an impartial hearing seeking tuition reimbursement at Kulanu for the 2006-07 school year, reimbursement for special education services provided by private providers, provision of assistive technology to the student, and transportation (Dist. Ex. 1). Petitioners alleged that respondent had failed to offer the student a free appropriate public education (FAPE) for the 2006-07 school year. More specifically, petitioners' alleged that: 1) the June 2006 CSE was not validly composed because no regular education teacher was present; 2) the CSE failed to sufficiently notify petitioners that a representative from BOCES would be participating in the June 2006 CSE meeting; 3) the CSE recommendation was predetermined, which precluded petitioners' participation; 4) the "evaluations conducted by the school district were entirely insufficient and inappropriate, failing to provide sufficient information upon which to base a change in placement;" 5) the services in the IEP were inconsistent with what was discussed at the June 2006 CSE meeting and were inappropriate; 6) the assistive technology recommendation was not appropriate given the student's skills; and 7) the goals and objectives were insufficient and did not address the student's needs (Dist. Ex. 1 at pp. 1-2).

In the response to the due process complaint notice, dated November 30, 2006, respondent denied the allegations in petitioners' due process complaint notice (Dist. Ex. 2). The response also stated that the parties agreed to waive the resolution meeting (id. at p. 3; see 20 U.S.C. § 1415[f][1][B][i]; 34 C.F.R. § 300.510[a][3][i]; 8 NYCRR 200.5[j][2][iii]).

The impartial hearing commenced on April 16, 2007 and concluded on June 18, 2007, after six days of testimony. The impartial hearing officer rendered a decision dated August 29, 2007 which denied petitioners' request for reimbursement for their son's tuition costs at Kulanu for the 2006-07 school year, as well as their requests for reimbursement for the services provided by a private inclusion consultant and a private behavioral specialist (IHO Decision at p. 19).

The impartial hearing officer concluded that petitioners demonstrated that the student had social capabilities that would enable him to derive meaningful educational benefit from contact with non-disabled students, and therefore, found that petitioners had met their burden in showing that respondent's recommendation for placement at BOCES-RK was inappropriate because it was not a placement in the least restrictive environment (LRE) (IHO Decision at p. 7). The impartial hearing officer then addressed petitioners' other allegations regarding the June 2006 IEP and found that they lacked merit (*id.* at p. 9). However, because he found that respondent had not offered the student a program in the LRE, the impartial hearing officer concluded that respondent had not offered the student a FAPE for the 2006-07 school year.

The impartial hearing officer addressed the appropriateness of Kulanu and concluded that petitioners did not demonstrate that the student had cognitive capabilities that would enable him to derive meaningful educational benefit from inclusion in regular education classes and that petitioners, therefore, did not show that their placement of the student at Kulanu was appropriate (IHO Decision at p. 18). Therefore, he denied their requests for reimbursement for tuition and services for the 2006-07 school year.

Petitioners appeal the impartial hearing officer's conclusion that the student's placement at Kulanu was inappropriate. They also assert that they cooperated with respondent and that equitable considerations favor tuition reimbursement. Petitioners further assert, among other things, that the student was not properly evaluated, that the June 2006 IEP was inadequate and that the placement at BOCES-RK was predetermined and inappropriate.

Respondent cross-appeals from the impartial hearing officer's determination that the recommended placement at BOCES-RK was not in the LRE. Respondent also asserts that the student's placement at Kulanu was not appropriate and that equitable considerations preclude an award of reimbursement for payment of the student's tuition at Kulanu and for the services of the inclusion consultant and the behavioral specialist.

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 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 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]).

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 [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).

Respondent contends that any procedural error that may have occurred did not rise to a denial of a FAPE to the student. For the reasons set forth herein, I find that petitioners failed to demonstrate that any procedural error impeded their son's right to a FAPE, significantly impeded their opportunity to participate in the decision-making process surrounding the provision of FAPE to their son, or caused a deprivation of educational benefits.

Initially, I will address petitioners' contentions concerning the adequacy of the evaluations of the student conducted by respondent as part of the student's three-year reevaluation. A reevaluation of the student is required if the school district "determines that the educational or related service needs, including improved academic achievement and functional performance, of the child warrant reevaluation" or upon request of the student's parents or teacher (20 U.S.C. § 1414[a][2][A][i]-[ii]; see 34 C.F.R. § 300.303[a]; 8 NYCRR 200.4[b][4]; see also Perricelli, 2007 WL 465211, at *10-11). Unless otherwise agreed to by the parent and the school district, a reevaluation must be conducted at least once every three years and not more than once per year (20 U.S.C. § 1414[a][2][B]; see 34 C.F.R. § 300.303[b]; 8 NYCRR 200.4[b][4]). "[T]he reevaluation shall be sufficient to determine the student's individual needs, educational progress and achievement, the student's ability to participate in instructional programs in regular education and the student's continuing eligibility for special education" (8 NYCRR 200.4[b][4]; see also Perricelli, 2007 WL 465211, at *11). Further, as part of its reevaluation, a school district is required to review existing evaluative data with respect to a student with a disability and determine whether additional data is necessary (20 U.S.C. § 1414[c][1][A] and [B]; 34 C.F.R. § 300.305; 8 NYCRR 200.4[b][5]).

Petitioners contend that respondent failed to discuss with them the existing evaluative data on the student, and failed to discuss what additional evaluative data was needed to formulate an appropriate IEP for the 2006-07 school year. During the June 21, 2006 CSE meeting, CSE members presented reports, provided information regarding the student's progress made during the 2005-06 school year and offered opinions about his needs for 2006-07 (Tr. pp. 377-78, 455, 503-12). The speech-language and occupational therapists who had provided related services to the student at his private school during the 2005-06 school year submitted progress reports based on their interactions with the student (Dist. Exs. 13; 14). The education director and the student's speech-language and occupational therapists from his private school participated in the June 2006 CSE meeting by telephone and actively participated in the CSE's discussions, providing information for the development of the student's IEP (Tr. pp. 377-78, 455, 503-12; Dist Ex. 3 at p. 12). Through their reports and participation, staff from the student's private school provided accurate information regarding the student's needs and present performance levels (see Dist. Exs. 13 at pp. 1-2; 14 at pp. 1-2). I note that the hearing record does not indicate that these individuals expressed disagreement with any of the information contained in the IEP regarding

the student's performance. Because of their contact with the student, these individuals were best qualified to determine whether any additional assessments may have been required, and the hearing record does not show, nor do petitioners allege, that any additional evaluations were recommended by these participants during the meeting (see Tr. pp. 377, 504, 1411). Moreover, there is no information in the hearing record to indicate that the student's mother, who participated in the CSE meeting, expressed any disagreement with the CSE's determination of the student's present levels of performance, his special education needs, or expressed the opinion that he required additional evaluations. Based on the above, I find that respondent discussed the evaluative data used to formulate the June 2006 IEP and the student's mother was afforded an opportunity to request additional evaluations, but did not do so.

Petitioners also contend that the educational evaluation and speech-language evaluations conducted by respondent were not appropriate. The hearing record indicates that the student was not feeling well on the day of these evaluations, that he was anxious, and that he had difficulty attending and responding to directions (Tr. pp. 366, 370, 960; Dist. Ex. 9 at p. 1). Testing was conducted in a setting unfamiliar to the student by an evaluator with whom he had not had regular contact since the 2004-05 school year (see Tr. pp. 361, 479-80, 919, 1356). The evaluator testified that she chose to administer tests that she was most comfortable administering and that she had used in the past when evaluating children similar to the student (Tr. pp. 923, 935-36). The evaluator testified that she modified the educational assessment provided to the student and allowed him to point instead of providing verbal responses (Tr. pp. 936-37, 941). The evaluator further reported that the student's mother was present for the speech-language evaluation and for at least part of the evaluation provided the student with cueing and prompting (Tr. pp. 925, 976). Given the student's receptive, expressive and pragmatic communication deficits, as well as his anxiety, I find that the June 2006 CSE appropriately relied on other sources of information regarding the student's performance to develop an IEP.

Petitioners further contend that while the impartial hearing officer correctly held that respondent should have conducted a nonverbal intelligence test of the student, the impartial hearing officer erred in concluding that respondent's failure to conduct such testing was "explainable" (IHO Decision pp. 8-9). Respondent's school psychologist administered the Survey Interview Form of the Vineland-II to the student's mother (Dist. Ex. 8 at p. 1-2). The school psychologist explained that she selected this instrument, in part, because of the difficulties encountered during the March 21, 2006 speech-language and educational evaluations (Tr. pp. 732-33, 737-38; see Dist. Exs. 9 at p. 1; 10 at p. 1). The school psychologist opined that the student would not have responded positively to the pressures of more testing, including nonverbal testing, and that additional formal testing would not have yielded any additional information (Tr. pp. 733, 797). She testified that, for this student, what was important was his adaptive behavior and that the Vineland-II was an appropriate assessment tool to obtain that information (Tr. pp. 734, 738-39). I also note here that the psychologist's evaluation report states that its purpose was to "gather information regarding [the student's] adaptive behavior" and to assess the student's progress as a result of his out-of-district placement (Dist. 8 at pp. 1-2), which under the circumstances, were appropriate purposes. Based on the information before me and absent any specific request from petitioners, I find that respondent was not obligated to conduct a nonverbal intelligence test of the student as part of his reevaluation.

Petitioners argue that respondent failed to provide a copy of the evaluations to them prior to the June 2006 CSE meeting which deprived them of meaningful participation in the IEP developmental process. The impartial hearing officer concluded that while "ideally" petitioners should have received "some of the information" prior to the June 2006 CSE meeting, the student's mother could have requested additional time to review the evaluations (IHO Decision at p. 9). The impartial hearing officer further concluded that the fact that the student's mother did not receive the results of the evaluations until the time of the June 2006 CSE meeting did not deprive the student of a FAPE (*id.*). The IDEA and its implementing regulations provide that "a copy of the evaluation report and the documentation of determination of eligibility shall be given to the parent" (20 U.S.C. § 1414[b][4][B]; 34 C.F.R. § 300.306[a][2]; 8 NYCRR 200.4[b][6][xiii] and [c]). Here, the hearing record indicates that the student's mother received at the June 2006 CSE meeting all the evaluations conducted by respondent except for the November 2005 OT evaluation (Tr. pp. 362, 364, 368, 369, 371, 466-67, 610). Further, the evaluations were discussed at the June 2006 CSE meeting including a May 15, 2006 OT progress report from the student's private school (Tr. pp. 377-78, 455, 503-12). For these reasons, I concur with the impartial hearing officer's conclusion that the fact that petitioners did not receive the evaluations prior to the June 2006 CSE meeting did not deny the student a FAPE.

I also concur with the impartial hearing officer's finding that the CSE was not required to conduct a functional behavioral assessment (FBA) and develop a behavioral intervention plan (BIP) in order to offer the student a FAPE for the 2006-07 school year (IHO Decision at pp. 7-8). The Regulations of the Commissioner of Education state that an FBA should be performed as part of a reevaluation if the student's behavior impedes his or her learning or that of others (*see* 8 NYCRR 200.4[b][4]; *see also* 200.4[b][1][v]). Where behavior impedes a child's learning, the CSE must properly assess that behavior as an initial step in developing an appropriate IEP (Application of a Child with a Disability, Appeal No. 07-012; Application of the Bd. of Educ., Appeal No. 05-123; Application of the Bd. of Educ., Appeal No. 05-031; Application of a Child with a Disability, Appeal No. 03-057; Application of a Child with a Disability, Appeal No. 02-032; Application of a Child with a Disability, Appeal No. 01-094; Application of the Bd. of Educ., Appeal No. 01-060). "The failure to properly consider and assess behavior that interferes with or impedes a child's learning or the learning of others violates the student's right to a FAPE" (W.S. ex rel. C.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 149 [S.D.N.Y. 2006]).

The June 21, 2006 IEP states that "no behavioral interventions were needed" (Dist. Ex. 3 at p. 2). Respondent's director of special education reported that the student had been successful with a behavior token system used at his prior private placement and petitioners did not contest this (Tr. pp. 519-21). Further, respondent's director of special education reported that the recommended BOCES-RK program had a similar token system in effect (Tr. pp. 519-21; *see also* Tr. pp. 1081-84). In addition, the June 2006 CSE recommended that the IEP include a 1:1 aide for the student to ensure his smooth transition into the BOCES-RK program (Tr. pp. 514, 520-21, 666-68; Dist. Ex. 3 at p. 12). Based on the hearing record before me, I find that the token-based behavior management program in the proposed class at BOCES-RK and the assistance of a 1:1 aide would have appropriately addressed the student's behavioral needs.

Turning to petitioners' contention that the June 2006 CSE was improperly constituted, I concur with the impartial hearing officer that petitioners have not shown that the attendance of a regular education teacher was required at the June 21 2006, CSE meeting. The CSE must

include not less than one regular education teacher of the child if the child is, or may be, participating in the regular education environment (20 U.S.C. § 1414[d][1][B][ii]; see 34 C.F.R. § 300.321[a][2]; see also 8 NYCRR 200.3[a][1][ii]). The regular education teacher "shall, to the extent appropriate, participate in the development of the IEP of the child, including the determination of appropriate positive behavioral interventions and supports and other strategies and supplementary aids and services, program modifications, and support for school personnel (20 U.S.C. § 1414[d][3][C]; see 34 C.F.R. § 300.324[a][3]; 8 NYCRR 200.3[d]).

At the time of the June 21, 2006 CSE meeting, the student was attending a special education private school (Tr. p. 38). Prior to attending that program, the student was either home-schooled or attended other private special education programs (Tr. pp. 360-61, 754). The student was not attending a regular education program and the hearing record does not indicate that the student was being considered for placement in a regular education program for the 2006-07 school year. Therefore, I concur with the impartial hearing officer's finding that the June 2006 CSE was not mandated to have a regular education teacher in attendance.

Petitioners assert that the annual goals and short-term objectives contained in the June 21, 2006 IEP are inadequate. Petitioners allege that the IEP received by them on or about August 15, 2006 from respondent omitted certain annual goals and short-term objectives that had been developed at the June 21, 2006 CSE meeting including those relating to receptive language skills, expressive language skills (including objectives relating to the use of an augmentative communication device), pragmatic language skills, addition and subtraction (Tr. pp. 11, 515-17, 615-16; see also Dist. Ex. 14 at p. 3). The hearing record reflects that the absence of some of the annual goals and short-term objectives on the IEP provided to petitioners was inadvertent resulting from a records conversion problem and respondent changing the computer software program used for its IEPs (Tr. pp. 11, 515-17, 615-16; see also Dist. Exs. 3 at p. 14; 13 at p. 3; 14 at p. 3). During the impartial hearing, respondent provided additional documentation regarding specific goals and objectives that had been agreed to at the June 21, 2006 CSE meeting (Tr. pp. 11, 515-17; see Dist. Ex. 14 at p. 3). The impartial hearing officer did not make any determinations with respect to the appropriateness of the goals (see IHO Decision at pp. 5-9).

An IEP must include a statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum; and meet each of the student's other educational needs that result from the student's disability (see 20 U.S.C. § 1414[d][1][A][i][II]; 34 C.F.R. § 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). Each annual goal shall include the evaluative criteria, evaluation procedures and schedules to be used to measure progress toward meeting the annual goal during the period beginning with placement and ending with the next scheduled review by the committee (8 NYCRR 200.4[d][2][iii][b]; see 20 U.S.C. § 1414[d][1][A][i][III]; 34 C.F.R. § 300.320[a][3]).

As indicated above, the hearing record shows that the June 2006 CSE had sufficient evaluative information to identify the student's needs and present levels of performance and that the IEP adequately reflected them. Furthermore, the student's special education needs and performance levels reflected the information contained in the evaluations and progress reports discussed at the June 21, 2006 CSE meeting (see Tr. pp. 377-78, 455, 503-12; Dist. Exs. 3 at pp. 3-5; 8; 9; 10; 11; 12; 13; 14).

Given the specificity of the OT and speech-language progress reports from the student's private school providers and teachers, and the meaningful participation by all CSE members regarding the student's goals, I find that the annual goals set forth on the June 2006 IEP were appropriate. The recommended annual goals reflect the student's special education needs as identified in the progress reports from the student's private school teachers and providers, as well as those needs identified in the goals and objectives attached to the therapy progress notes (Dist. Exs. 3 at pp. 3-5; 13 at p. 3; 14 at p. 3). I further find that, the objectives clarify the annual goals and adequately address the student's academic, speech-language, pragmatic and augmentative communication, social and emotional, fine motor and sensory processing needs so as to enable the student to receive educational benefit (Application of a Child with a Disability, Appeal No. 05-076; Application of a Child with a Disability, Appeal No. 05-058; Application of a Child with a Disability, Appeal No. 04-068).

Regarding petitioners' contention that respondent failed to sufficiently notify them of the participation of the assistant principal of BOCES-RK at the June 2006 CSE meeting, I concur with the impartial hearing officer's finding that the assistant principal's participation does not demonstrate that respondent predetermined its recommendations for the student or impeded petitioners from participating in the formulation of their son's IEP. The IDEA sets forth procedural safeguards that include providing parents an opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child" (20 U.S.C. § 1415[b][1]). Federal and state regulations governing parental participation require that school districts take steps to ensure that parents are present at their child's IEP meetings or are afforded the opportunity to participate (34 C.F.R. § 300.322; 8 NYCRR 200.5[d]). Although school districts must provide an opportunity for parents to participate in the development of their child's IEP, mere parental disagreement with a school district's proposed IEP and placement recommendation does not amount to a denial of meaningful participation (see Sch. for Language and Communication Development v. New York State Dep't of Educ., 2006 WL 2792754, at *7 [E.D.N.Y. Sept. 26, 2006] ["Meaningful participation does not require deferral to parent choice"]). Conversations about possible recommendations for a child, prior to a CSE meeting, are not prohibited as long as the discussions take place with the understanding that changes may occur at the CSE meeting (see Rye City Sch. Dist., 454 F. Supp. 2d at 147-48; Nack v. Orange City Sch. Dist., 454 F.3d 604, 610 [6th Cir. 2006]; Deal v. Hamilton County Bd. of Educ., 392 F.3d 840, 857-860 [6th Cir. 2004]; Application of a Child with a Disability, Appeal No. 06-121).

As previously discussed, the hearing record reveals that the June 2006 CSE reviewed evaluative reports. The student's mother participated at the June 2006 CSE. The student's mother testified that the June 2006 CSE meeting was "just shy of two hours" long (Tr. pp. 377, 504, 1411). The CSE Chairperson testified that the student's mother was an "active participant" at the CSE meeting and that "based on what we were hearing around the table," the CSE "wrote [the annual goals for the IEP] together" (Tr. pp. 512, 514-15, 614). The student's mother testified that as a result of her participation in the process, augmentative communication device goals and goals relating to addition and subtraction were added and at least one goal was deleted (Tr. pp. 454-56). The impartial hearing officer found credible respondent's explanation that the assistant principal of BOCES-RK was invited to the June 21, 2006 CSE meeting because the student had been accepted at that school the previous year (IHO Decision at p. 8), and that finding is supported by the hearing record (Tr. p. 503; Dist. Ex. 17). Under these circumstances, there is

inadequate evidence to conclude that petitioners were prevented from meaningfully participating in the formulation of their son's IEP or that the CSE engaged in impermissible predetermination.

Next, I review the impartial hearing officer's conclusion that the placement recommended by the June 2006 CSE was not reasonably calculated to enable the student to receive educational benefit in the LRE. The IDEA "expresses a strong preference for children with disabilities to be educated 'to the maximum extent appropriate,' together with their nondisabled peers" (Walczak, 142 F.3d at 122). A FAPE must be provided to a child with disabilities in the "least restrictive setting consistent with the child's needs" (see Perricelli, 2007 WL 465211 at *1, citing Walczak, 142 F.3d at 122, 132). In addition, federal and state regulations require that districts ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services (34 C.F.R. § 300.115[a]; see 8 NYCRR 200.6[a][1]). In determining an appropriate placement in the LRE, the IDEA requires that children with disabilities be educated to the maximum extent appropriate with children who are not disabled and that special classes, separate schooling or other removal of children with disabilities from the regular educational environment may occur only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily (20 U.S.C. § 1412[a][5][A]; see 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.6[a][1]; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 144 [N.D.N.Y. 2004]; Walczak, 142 F.3d at 122). The Court in Walczak further noted that even when mainstreaming is not a "feasible alternative, the statutory preference for a least restrictive placement applies" (Walczak, 142 F.3d at 132, citing Sherri A.D. v. Kirby, 975 F.2d 193, 206 [5th Cir. 1992]). The placement of an individual student in the LRE shall "(1) provide the special education needed by the student; (2) provide for education of the student to the maximum extent appropriate to the needs of the student with other students who do not have disabilities; and (3) be as close as possible to the student's home" (8 NYCRR 200.1[cc]; see 34 C.F.R. § 300.116). Consideration is also given to any potential harmful effect on the child or on the quality of services that he or she needs (34 C.F.R. § 300.116[d]; 8 NYCRR 200.4[d][4][ii][c]). Federal and state regulations also require that school districts ensure that a continuum of alternative placements be available to meet the needs of children with disabilities for special education and related services (34 C.F.R. § 300.115; 8 NYCRR 200.6). The continuum of alternative placement includes instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions; and the continuum makes provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement (34 C.F.R. § 300.115[b]).

Petitioners assert that BOCES-RK was overly restrictive because the program allows no contact with typically developing peers, is too far from the student's home, and would not permit the student any access to the general curriculum. A review of the hearing record shows that the information available at that time of the June 2006 CSE supported respondent's recommended placement at BOCES-RK and that the recommended placement was appropriate in terms of LRE considerations.

Further, testimony by the BOCES-RK assistant principal indicated that based upon the student's functioning and the results of the CSE evaluations at the time the CSE made the June 21, 2007 recommendation for the BOCES-RK school, the assistant principal recommended placing the student in a 6:1+2 class in the lower middle school (Tr. p. 1066). The assistant

principal described the 6:1+2 class as one of the highest functioning classes in the school with students who were verbal and able to do independent work, as well as able to engage in more group activity and less discrete trial instruction (Tr. pp. 1066-67). In addition, the students in this class were described as having higher social skills, and addressing those skills was a big part of classroom activity (Tr. p. 1071).

The BOCES-RK assistant principal indicated that the student was appropriately placed in the recommended 6:1+2 class based upon the verbal abilities of the students in the class, and that all of the students in the class utilized a classroom-wide behavior management system that she opined was appropriate for the student (Tr. p. 1071). The academic levels in the class ranged from pre-K to second grade, which were consistent with respondent's school psychologist's estimate of some of the student's academic skills (Tr. pp. 761, 1071). According to the assistant principal, the students in the class had more independent activities of daily living skills (Tr. p. 1071). Based on the student's functioning level, the assistant principal opined that the student would be appropriate for the 6:1+2 classroom (id.).

Academically, the hearing record indicates that the 6:1+2 class uses the same reading program that the student had used in the past (Tr. pp. 751, 1074; Dist. Ex. 12). In addition, an occupational therapist pushes into the class to address handwriting instruction and uses the Handwriting Without Tears program (Tr. p. 1075). In math, students in the class are taught addition and subtraction as well as money exchange skills (Tr. pp. 1076-77). Science activities include the study of weather, tornadoes and butterflies (Tr. p. 1074). The class participates in adaptive physical education, music and art (Tr. p. 1075). Some students participate in chorus and/or eight chime ensemble (id.).

The BOCES-RK assistant principal reported that during a typical day in the recommended 6:1+2 class there is a structured breakfast time where students practice activities of daily living such as tooth brushing or combing hair, choice making, independent use of containers and utensils, plate setting and cleanup (Tr. p. 1075). There is also a circle and calendar time to enable students to engage in group activities and to address their social skills (Tr. pp. 1075-76). The assistant principal indicated that there may be guided reading activities where the teacher reads to students and they are required to answer "WH" questions or participate in arts and crafts projects related to stories (Tr. p. 1076). Literacy work is addressed by the teacher reading authentic literature to students, asking the student's questions, and using the literature for theme-based instruction (Tr. pp. 1075-76). Individual math goals and money exchange skills are addressed by students having access to a school store, learning how to tell time, and learning how to follow a schedule according to a clock (Tr. p. 1076). Students are taught addition and subtraction and if appropriate, they are taught to use a calculator (Tr. pp. 1076-77). The class routine includes individual task completion ("ITC") where students are taught to follow their own activity schedules and independent skills (Tr. p. 1077).

Petitioners further alleged that respondent's recommended placement was inappropriate. The impartial hearing officer did not address this issue. In a letter to petitioners, respondent described the 6:1+2 placement at BOCES-RK as a highly structured educational environment that used a number of research-based methodologies including applied behavioral analysis (ABA), visual strategies, the Picture Exchange Communication System (PECS) and other augmentative communication systems (Dist. Ex. 5 at p. 2; Parent Ex. D at p. 2). Positive

reinforcement strategies were used to promote skill acquisition along with task analysis in order to break down activities into manageable tasks (id.). Behavioral strategies were implemented throughout the program during individual and small group instruction (id.). The curriculum used at BOCES-RK was an integration of functional academics, life skills/activities of daily living, community skills, communication skills, and vocational skills (id.). The staff at BOCES-RK was described as knowledgeable regarding the use of augmentative communication devices (id.). The strategies and methods employed at the BOCES-RK program were consistent with the strategies with which the student previously demonstrated success (id.). Based on the foregoing, I find that the recommended program would have adequately addressed the student's needs (see Tr. pp. 1055, 1056-58, 1061, 1066-67, 1072-77, 1080-84, 1088-89, 1105-06, 1128-30, 1140, 1165-70; Dist. Exs. 24; 25).

Petitioners assert that the student was not suitably grouped for instructional purposes at BOCES-RK with students who had similar needs. 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 200.6[a][3], 200.1[ww][3][i], 200.6[g][2]; Application of a Child with a Disability, Appeal No. 07-068; Application of a Child with a Disability, Appeal No. 06-041; Application of a Child with a Disability, Appeal No. 05-102; Application of a Child with a Disability, Appeal No. 03-023; Application of a Child with a Disability, Appeal No. 01-084). I have reviewed information in the hearing record describing the special education class that the student would have been assigned to at BOCES-RK (see Tr. pp. 1057-58, 1066-67, 1069-74, 1075, 1090-91, 1097-98, 1102-09, 1118-19, 1121-30, 1154-55, 1160-61, 1174-76; Dist. Exs. 7; 18; 23; 24). Based on the information before me, I find that petitioners have not demonstrated that the student was not suitably grouped for instruction in his recommended special class at BOCES-RK.

Petitioners assert that the related services offered at BOCES-RK differed from those set forth on the student's June 2006 IEP. Petitioners cited differences in the frequency of the related services recommended, and also noted that the CSE recommended individual parent counseling once a month, a service that would not have been provided at BOCES-RK (Tr. pp. 1146-47, 1185, 1202-03; Dist. Ex. 3 at p. 9). The impartial hearing officer did not address this issue. While the recommended related services at BOCES-RK were not identical to the recommendations made by the June 21, 2006 CSE, BOCES-RK advised respondent that an amended IEP would be necessary prior to the student's entrance in its program (see Dist. Ex. 7). Respondent's director of special education testified that had petitioners not rejected the IEP and its placement of the student at BOCES-RK, the CSE would have reconvened and that BOCES-RK would have been required to comply with the IEP unless it was changed (Tr. pp. 702-04, 1346). The assistant principal of BOCES-RK testified that if the CSE did not amend the IEP at this second meeting, BOCES-RK would have provided the related services as set forth in the June 21, 2006 IEP (Tr. pp. 1189, 1190, 1198). Under these circumstances, I am not persuaded by petitioners' contentions that BOCES-RK does not meet the requirements of the student's IEP.

After a thorough review of the hearing record, I find that the IEP developed at respondent's June 21, 2006 CSE meeting and respondent's program and placement recommendations were reasonably calculated to confer educational benefit to the student (see

Rowley, 458 U.S. at 192). Therefore, 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 son's attendance at Kulanu at HAFTR for the 2006-07 school year or for their request for reimbursement for services provided by a private inclusion consultant and a private behavior specialist. Having so determined, the necessary inquiry is at an end and there is no need to reach the issue of whether the student's placement at Kulanu at HAFTR and those services were appropriate (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).

I have considered the parties' remaining contentions and I find them to be without merit.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS SUSTAINED.

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

Dated: **Albany, New York**
 December 10, 2007

PAUL F. KELLY
STATE REVIEW OFFICER