



The University of the State of New York

The State Education Department

State Review Officer

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No. 09-050

Application of a STUDENT WITH A DISABILITY, by his parent, for review of a determination of a hearing officer relating to the provision of educational services by the [REDACTED] School District

Appearances:

Frazer & Feldman, LLP, attorneys for respondent, Laura A. Ferrugiari, Esq., of counsel

DECISION

Petitioner (the parent) appeal from the decision of an impartial hearing officer which denied his request to be reimbursed for his son's tuition costs at the Variety Child Learning Center (Variety) for the 2008-09 school year. The appeal must be dismissed.

At the time the impartial hearing convened in January 2009, the student was attending Variety in a kindergarten class (Tr. p. 12; see IHO Ex. I at p. 9). The Commissioner of Education has approved Variety 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 eligibility for special education programs and services as a student with autism is not in dispute in this appeal (Dist. Ex. 3 at p. 1; see 34 C.F.R. § 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

With regard to the student's educational history set forth in the hearing record, while the student was attending preschool, his parents and preschool providers noted the student's limited social interactions or pretend play and the student was evaluated by a private psychologist over five days in December 2006 and January 2007 (Parent Ex. B at p. 1). The psychologist observed the student at his preschool and, both the student and his parents attended weekly dyadic/triadic therapy sessions with the psychologist from January through May 2007 (id. at pp. 1-2). The psychologist noted that the student was generally noninteractive with peers and, while objects in his environment attracted his interest, he did little to initiate social exchanges (id. at p. 2). According to the evaluation report, the student had "remarkably well developed vocabulary" receptively that was inconsistently employed expressively and his reading ability had developed

beyond age expectation with respect to decoding and comprehension (id.). The psychologist indicated that the student's task focus and responsivity were not sufficient to comfortably carry out all formal testing procedures and that therefore, "true" estimates of the student's cognitive, language and motor skills were not obtained (id.). The psychologist indicated that the student was able to glean story lines and "enact" them while engaging in "alone-play," and that these skills were more evident in a 1:1 setting (id. at p. 3). The psychologist opined that the student showed features consistent with a neurodevelopmental disorder of relating and communicating and determined that he met the criteria for a pervasive development disorder, not otherwise specified (PDD-NOS) and hyperlexia (id.). The psychologist recommended, among other things, further interdisciplinary evaluation and the services of a full-time special education itinerant teacher (SEIT) for the 2007-08 school year in his preschool setting (id. at p. 4).

Upon an initial referral to the district's Committee on Preschool Special Education (CPSE) by the parents in summer 2007, a determination was made finding the student eligible for special education and related services as a preschool student with a disability, and an individualized education program (IEP) dated August 17, 2007 was created by the CPSE (Parent Ex. A). The August 2007 IEP indicated that the CPSE relied upon, among other things, a psychological evaluation, a social history, an occupational therapy (OT) evaluation, a speech-language evaluation and a classroom observation (id. at p. 4). With regard to academics, the August 2007 IEP noted that the student would not complete the tasks necessary for testing, but that the student could reportedly read and comprehend at a second grade level (id. at p. 3). The student's speech-language and articulation skills were also reported as an area of strength (id.). Socially, the August 2007 IEP noted that the student was unresponsive to attempts at social interaction and engaged in self-directed conversations (id.). The student avoided peers and did not respond when approached (id.). Physically, the student's gross motor skills were an area of relative strength and his fine motor skills were an area of weakness (id.). With regard to management needs, the August 2007 IEP indicated that the student needed prompting and supervision to engage in non self-directed activities (id.).

Comments on the August 2007 IEP noted that the student had difficulty completing the psychological testing and portions of the speech-language testing (Parent Ex. A at p. 4). Comments with respect to the OT evaluation noted that the student perseverated more when enjoying an activity, did not imitate prewriting tasks but scribbled, and preferred to run around the perimeter of the playground (id.). The August 2007 IEP indicated that the student evidenced minimal eye contact, occasionally smiled, avoided interaction at other times, and "was most attentive during book reading at circle time" (id.). The August 2007 IEP included 21 goals and corresponding short-term objectives to address the student's deficits in language use, eye contact, play skills, gross and fine motor skills, daily living skills, and his perseverative and self-stimulatory behaviors (id. at pp. 5-10). The August 2007 CPSE recommended that the student attend preschool in a 10:1+2 special class with related services consisting of individual OT, group speech-language therapy in both push-in and pull-out sessions, and parent training and counseling (id. at pp. 1-2).¹ As reflected on the IEP and according to the parent, the district initially offered a full day program at an Interdisciplinary Center for Child Development (ICCD);

¹ Comments on the August 2007 IEP indicated that the CPSE recommended a class of 10 or 12 students and that the parents were free to choose a half-day program in a 10-student class offered by Variety (Parent Ex. A at p. 4).

however, the parent proposed that the student attend a half-day program at Variety and the district agreed (id. at p. 1; IHO Ex. I at p. 3).

A private speech-language pathologist completed a speech-language progress report dated December 18, 2008 (Parent Ex. C). The speech-language progress report indicated that therapeutic goals focused primarily on nurturing the student's motivation and ability to converse on a greater range of topics, responding more contingently to others' language, initiating verbal interactions with another on topics of shared interest, and demonstrating pleasure in play and interactions with the pathologist (id. at p. 1). The student's preferred topic of conversation initially revolved around numbers and calendars approximately 90 percent of the time, and the student's mother reported that, outside of therapy, utterances regarding calendar and number topics had decreased to approximately 70 percent from July 2008 to December 2008 (id.). The speech-language pathologist noted that the student's self-stimulatory behaviors, such as repetitively running in a circle, decreased substantially (id.). According to the speech-language pathologist, the student had recently become quietly attentive while symbolic play schemas were modeled, and the parents reported that the student watched television for as long as ten minutes at a time (id. at p. 2).

While the student was attending Variety for the 2007-08 school year, both the CPSE and the district's Committee on Special Education (CSE) met on February 29, 2008 regarding the student's transition to the CSE (Dist. Exs. 1; 2). CPSE meeting attendees included the CPSE chairperson, a regular education teacher, two psychologists, two speech therapists, a social worker, the student's classroom teacher, the parents, and a psychoanalyst (Dist. Ex. 1 at p. 4).² The February 2008 CPSE IEP noted that the CPSE reviewed, among other things, the student's speech-language therapy and OT progress reports, a physical therapy (PT) evaluation dated November 26, 2007, and the results of the Test of Language Development-Primary, Third Edition (TOLD-P:3) and the Peabody Developmental Motor Scales-Second Edition (PDMS-2) that were administered to the student in January 2008 (id. at pp. 2-3, 5). The February 2008 CPSE recommended continuation of the special education and related services described in the August 2007 IEP, modification of the student's speech-language therapy location and group ratio, and the addition of two individual sessions of PT per week for the remainder of the 2007-08 school year (id. at pp. 1-2, 5). Comments to the February 2008 CPSE IEP further described the student's activities in class, recent progress, and additional anecdotal information (id. at pp. 4-5). The CPSE IEP indicated that the recommended services and programs would begin on March 10, 2008 (id. at pp. 1-2).

The February 29, 2008 CSE, consisting of the same participants who had attended the CPSE meeting, convened on the same day as the CPSE and noted that the student was referred to the CSE due to his continuing deficits (Tr. pp. 42-43; Dist. Ex. 2 at pp. 4-5). The members of the February 2008 CSE agreed that the student should be classified as a student with autism (Dist. Ex. 2 at pp. 1, 5). The February 2008 CSE IEP continued the existing goals and corresponding short-term objectives, without modifications, from the student's August 2007 and February 2008 CPSE IEPs (compare Dist. Ex. 1 at pp. 5-12, and Dist. Ex. 2 at pp. 6-12, with Parent Ex. A at pp. 5-10). The hearing record reflects that the student's goals remained unchanged because he had not yet achieved them and his then current teacher did not anticipate that he would do so by the

² The participation of the additional parent member was waived (Dist. Ex. 1 at p. 4).

end of the school year (Tr. p. 44). CSE meeting minutes indicated that the February 2008 CSE discussed co-teaching and special class placement options (Dist Ex. 2 at p. 5). The February 2008 CSE recommended that the student be placed in a 12:1+1 special class and the parents indicated that they could not agree without seeing a class profile, the class, and/or the teacher (id.) The February 2008 CSE recommended that the student receive related services of OT two times per week for 30 minutes in a group of three, PT two times per week 1:1 for 30 minutes, and speech-language therapy two times per week in a group of three and once per week 1:1 for 30 minutes (id. at p. 1). The CSE also recommended parent training and counseling (id.). The IEP indicated that the recommended services and program would begin in September 2008 (id.). The February 2008 CSE IEP noted that the parents raised concerns regarding whether there was sufficient staff in a 12-student special class and that the student was not toilet trained (id.). The parents requested an opportunity to meet again, review the student's goals and objectives in greater detail, and reconsider the recommended placement and frequency of speech-language services (id.).

In a letter dated April 18, 2008, the parent reiterated the concerns the parents had expressed at the February 2008 CSE meeting, and specifically noted that the student's IEP goals had been repeated and must be carefully considered before a placement was determined (Parent Ex. D). The parent indicated that a 12:1+1 "might not provide enough support for the student or address his deficits in play and developmental milestones" (id.). The parent indicated that the student should receive speech-language services five times per week, OT services should be provided to the student on an individual basis, and that parent training should be provided (id.).

The CSE reconvened on May 29, 2008 (Dist. Ex. 3 at p. 1). The May 2008 CSE attendees included the CSE chairperson, a special education teacher, a regular education teacher, a school psychologist, a social worker, the student's classroom teacher, and the parents (id. at p. 4).³ The CSE reviewed the goals and objectives and recommendations for the 2008-09 school year (id.). While the resultant May 2008 IEP indicated that related services were agreed upon, it also noted that the parents continued to have significant concerns regarding the recommended classroom placement at the district's school (id.). The CSE meeting minutes noted that the parents wished to visit and see the classroom and "determine if the teacher [would] be able to get the best out of their child" and the district staff indicated that a short visit was not a fair basis upon which to judge a teacher (id.). The CSE recommended that the student be placed in a 12:1+1 special class and encouraged the parents to speak with the district's assistant superintendant regarding their concerns (id.). The district staff at the May 2008 CSE meeting also indicated to the parents that they could request another CSE meeting after receiving the class profile (id.). A class profile was sent to the parents in July 2008 (Dist. Ex. 4).

In a letter to the district dated July 28, 2008, the parent requested that the CSE reconvene to discuss the proposed placement and that a CSE representative observe the student at Variety prior to the conclusion of the summer program on August 11, 2008 (IHO Ex. I at p. 10). In a letter dated August 4, 2008, the parent noted that he and the CSE chairperson spoke on the telephone on August 1, 2008 and the parent indicated that the student would attend a full-day 12:1+4 kindergarten class at Variety (id. at p. 9).

³ The participation of the additional parent member was waived (Dist. Ex. 3 at p. 4).

In a due process complaint notice dated September 8, 2008, the parent alleged that the district's proposed placement did not have adequate classroom support or support for toilet training the student (IHO Ex. I at p. 5). The parent indicated that the student would not be able to find his way from the school entrance to his classroom and that he would be overwhelmed in the district's gymnasium and cafeteria settings (*id.*). The parent asserted that the student would not be able to focus in small groups in the proposed classroom setting and that there would be no appropriate role models for the student (*id.* at pp. 5-6). The parent alleged, among other things, that the student should not be taught to talk under his breath (self talk) to avoid disturbing other children and that a great deal of communication about the student is needed among the parent, school personnel and other professionals (*id.* at p. 6). The parent challenged the student's kindergarten placement for the 2008-09 school year because it was proposed before the student's 2008-09 IEP goals were finalized (*id.* at p. 7). According to the parent, the district failed to provide information about the district's proposed kindergarten program and the CSE delayed in sending the May 2008 IEP, sending the proposed classroom profile, and in conducting an observation of the student (*id.*). Among other things, the parent asserted the district attempted to unilaterally change the student's placement and that changing the student's placement would be detrimental for the student (*id.* at pp. 7-8). As relief, the parent proposed that the district place the student in Variety's 12:1+4 full-day kindergarten program (*id.* at p. 12).

In a letter dated September 16, 2008, the district responded to the due process complaint notice indicating that the CSE conducted two meetings, reviewed the student's progress and evidence of regression, noted the changes in the student's program over the 2007-08 school year, discussed the goals and objectives and related services in the proposed IEP, and reviewed program choices (Dist. Ex. 5 at p. 1). Among other things, the district asserted that the parents did not challenge the class size at the CSE meetings, that the parents were provided with a class profile, and that the student would be appropriately grouped in the district's proposed placement (*id.* at p. 2). The district also indicated that Variety was too restrictive, noting that the student would not have the opportunity to spend time with typically developing peers (*id.*). The letter indicated that a copy of the "Procedural Due Process Procedures" and a "parent handbook" was enclosed (*id.* at p. 3). The letter listed a contact person that the parents could direct any questions or concerns to (*id.*).

An impartial hearing convened in October 2008 and concluded in January 2009, after three days of testimony. In a decision dated March 12, 2009, the impartial hearing officer reviewed the evidence presented and determined that the parents appeared to agree with CSE in the development and content of the student's IEP and that their dispute with the district was focused on whether the staffing levels were appropriate in the district's proposed program (IHO Decision at pp. 6-11, 14).⁴ The impartial hearing officer noted that the student's present levels of performance were reviewed in detail at the February 2008 CSE meeting and staff from Variety advised the February 2008 CSE that the student had made little progress toward his annual goals and that the student should continue to work on them (*id.* at pp. 13, 15). The impartial hearing officer also determined that the IEP goals and objectives were discussed at the May 2008 CSE meeting and that the parents were given the opportunity to suggest revisions to them (*id.* at pp. 14, 16). The impartial hearing officer noted that the parents requested and received a class

⁴ The hearing record indicates that staff at Variety relied upon the goals and objectives set forth in the May 2008 IEP (Tr. p. 349).

profile of the district's proposed 12:1+1 placement, but did not avail themselves of a follow-up CSE meeting offered by the district (*id.* at pp. 14-15). The impartial hearing officer further found that there were no procedural violations that impeded the student's right to a free appropriate public education (FAPE) or impeded the parents' ability to participate in the process (*id.* at p. 16).

The impartial hearing officer reviewed the testimony and documentary evidence regarding the language-based program in the district's proposed program, the student's behavior, the student's toileting needs, and the staffing ratio (IHO Decision at pp. 16-21). The impartial hearing officer also considered evidence with respect to the student's program at Variety to the extent that he found it probative of the student's current needs (*id.* at pp. 18-19). The impartial hearing officer rejected the parent's arguments that the district should have placed a requirement for a communication log or notebook on the student's IEP and that the district unilaterally changed the student's placement for the 2008-09 school year (*id.* at p. 20). The impartial hearing officer also noted that the district provided the student with two opportunities to participate in the district's proposed class during the 2007-08 school year and that the student did not have difficulty adjusting to the class and he participated "nicely" (*id.* at p. 21). The impartial hearing officer concluded that the district's proposed placement was appropriate for the student and, therefore, dismissed the remaining aspects of the parent's claims without further review (*id.* at pp. 20-21).

The parent appeals, proceeding pro se, and contends that there was no discussion of present levels of performance at the May 2008 CSE meeting.⁵ The parent asserts that the impartial hearing officer erred in determining that the recommended placement was appropriate because the student was not achieving his IEP goals and the student should not be moved to a program with less supports that does not provide small group instruction in quiet place. According to the parent, the district's recommended placement would not be able to support the student's cognitive strengths in reading and math. The parent argues that the impartial hearing officer improperly allowed the district's counsel to provide answers to a witness, prevented the parent from examining a special education teacher's qualifications, ignored evidence regarding the district's offer to provide a 1:1 aide, and failed to order additional speech-language and parent training services. Among other things, the parent contends that the impartial hearing officer erred in finding that communication protocols could be left to the district's discretion, finding that the IEP was properly developed, relying on testimony proffered by the district, and failing to rely on evidence favorable to the parent. For relief, the parent seeks an order directing the district to provide a 12:1+4 placement at Variety, speech-language services five times per week, and reimbursement for his costs related to contesting placement and the impartial hearing.

In its answer, the district alleges that the parent's petition for review fails to state a claim and does not comply with State practice regulations governing appeals. The district denies the substantive allegations in the petition and contends that the recommended 12:1+1 placement without an additional 1:1 aide was an appropriate placement for the student. The district argues that the parent failed to raise claims regarding language instruction or parent training in his due process complaint notice or at the impartial hearing and should be precluded from raising them on appeal. The district asserts that Variety is inappropriate for the student because it did not

⁵ The parent does not allege whether the present levels of performance were inaccurate.

provide an opportunity to interact with typically developing peers and he was unable to meet any of his 2007-08 goals and objectives while attending Variety. The district contends, among other things, that the parent failed to meet his burden to show that Variety was an appropriate placement for the student for the 2008-09 school year and that equitable considerations do not favor the parent. The district urges affirmance of the impartial hearing officer's decision.

In a reply, the parent asserts that that the petition for review adequately identifies how the impartial hearing officer erred and the relief requested. With respect to adherence to the practice regulations, the parent argues that any irregularities were adequately addressed by allowing the district extra time to serve its answer. Among other things, the parent alleges that he raised the district's failure to provide language instruction five times per week at the February 2008 CSE meeting and that he should not be precluded from raising it on appeal.⁶

Two purposes of the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]).

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 (A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; 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 student, 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]; 8 NYCRR 200.5[j][4][ii]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

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 student 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

⁶ Several aspects of the parent's reply impermissibly address the merits of the parties' dispute. To the extent that the allegations in the reply do not respond to the district's procedural defenses asserted in the petition for review or address additional documentary evidence served with the answer, I decline to consider them (8 NYCRR 279.6).

specific level of educational benefits that must be provided through an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 130 [2d Cir. 1998]; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see P. v. Newington Bd. of Educ., 546 F.3d 111, 114 [2d Cir. 2008]; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs (34 C.F.R. § 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals related to those needs (34 C.F.R. § 300.320[a][2]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (34 C.F.R. § 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see 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). Subsequent to its development, an IEP must be properly implemented (8 NYCRR 200.4[e][7]; Application of a Child with a Disability, Appeal No. 08-087).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student 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 (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]). 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 (471 U.S. at 370-71; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student 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).

The New York State Legislature amended the Education Law to place the burden of production and persuasion upon the school district during an impartial hearing, except that a

parent seeking tuition reimbursement for a unilateral placement has the burden of production and persuasion regarding the appropriateness of such placement (Educ. Law § 4404[1][c], as amended by Ch. 583 of the Laws of 2007). The amended law took effect for impartial hearings commenced on or after October 14, 2007; therefore, it applies to the instant case (see Application of the Bd. of Educ., Appeal No. 08-016).

At the outset, I will address the procedural defenses asserted by the district with regard to the compliance with the practice regulations. Although the district correctly states that the parent failed to number the allegations in his petition for review (see 8 NYCRR 279.8[a][3]), consonant with the discretion afforded me by the State regulations, I decline to dismiss the petition on this ground (see Application of a Student with a Disability, Appeal No. 09-034 Application of a Student with a Disability, Appeal No. 08-048; Application of a Child with a Disability, Appeal No. 07-099).

With regard to the district's allegation that the parent has failed to state a claim, a petition for review must comply with State regulations, which provide in pertinent part that: "[t]he petition for review shall clearly indicate the reasons for challenging the impartial hearing officer's decision, identifying the findings, conclusions and orders to which exceptions are taken, and shall briefly indicate what relief should be granted by the State Review Officer to the petitioner" (8 NYCRR 279.4[a]; see Application of a Student with a Disability, Appeal No. 08-143; Application of a Student with a Disability, Appeal No. 08-004; Application of a Child with a Disability, Appeal No. 07-112; Application of a Child with a Disability, Appeal No. 07-024; Application of a Child with a Disability, Appeal No. 06-097; Application of a Child with a Disability, Appeal No. 06-096; see also Application of the Bd. of Educ., Appeal No. 06-122). In this case, the allegations asserted by the parent in the petition for review are not ambiguous insofar as the parent clearly states the reasons why he believes the district's recommended placement for the student was inappropriate, identify the findings and conclusions of the impartial hearing officer to which he objects, and describe the relief he is seeking, which includes, among other things, an order directing placement of the student at Variety for the 2008-09 school year and reimbursement for the amounts that the parents have paid for that placement upon the presentation of their receipts (see Application of a Child with a Disability, Appeal No. 06-138; Application of a Child with a Disability, Appeal No. 06-097; Application of a Child with a Disability, Appeal No. 06-096). Furthermore, the district was not precluded from formulating a responsive answer (see Application of a Student with a Disability, Appeal No. 08-111). Consequently, I will not dismiss the parent's petition (see Application of the Bd. of Educ., Appeal No. 07-097; Application of a Child with a Disability, Appeal No. 06-138; Application of a Child with a Disability, Appeal No. 06-097; Application of a Child with a Disability, Appeal No. 06-096).

Turning to the merits of the issues presented on appeal, upon careful review of the entire hearing record, I find that the impartial hearing officer, in a thorough, well-reasoned, and well-supported 22-page decision, correctly held that the district sustained its burden to establish that the special education programs and services recommended by the CSE for the 2008-09 school year offered the student a FAPE (IHO Decision at pp. 8-22). The impartial hearing officer accurately recounted the facts of the case, set forth the proper legal standard to determine whether the district offered the student a FAPE for the 2008-09 school year, and he fully

addressed each alleged defect asserted by the parent in support of his allegations that the district failed to offer the student an appropriate placement (id. at pp. 6-22; see IHO Ex. I at pp. 5-7). The decision shows that the impartial hearing officer carefully considered the testimonial and documentary evidence presented by both parties, and further, that he weighed the evidence in support of his conclusions and properly supported his conclusions with citations to the hearing record (IHO Decision at pp. 6-22). The hearing record amply supports the impartial hearing officer's conclusion that, given the circumstances of the case, the district's special education programs and services — including the recommended 12:1+1 special class in a language based program — offered the student a program that was appropriate to meet his special education needs and was reasonably calculated to enable him to receive meaningful educational benefits. I find that there is no reason to disturb the findings of fact and conclusions of law of the impartial hearing officer (see Application of a Child with a Disability, Appeal No. 06-136; Application of the Bd. of Educ., Appeal No. 03-085; Application of a Child with a Disability, Appeal No. 02-096). In conclusion, based upon an independent review of the entire hearing record, I find that the impartial hearing was conducted in a manner consistent with the requirements of due process and that there is no need to modify the determinations of the impartial hearing officer (34 C.F.R. § 300.514[b][2]; Educ. Law § 4404[2]).

THE APPEAL IS DISMISSED.

Dated: Albany, New York
June 11, 2009



PAUL F. KELLY
STATE REVIEW OFFICER