



The University of the State of New York

The State Education Department State Review Officer

No. 07-007

Application of the BOARD OF EDUCATION OF THE SPRINGVILLE-GRIFFITH INSTITUTE CENTRAL SCHOOL DISTRICT for review of a determination of a hearing officer relating to the provision of educational services to a child with a disability

Appearances:

Hodgson Russ LLP, attorney for petitioner, Jeffrey J. Weiss, Esq., of counsel

DECISION

Petitioner, the Board of Education of the Springville-Griffith Institute Central School District (district), appeals from the decision of an impartial hearing officer which determined that the educational program recommended by its Committee on Special Education (CSE) for respondent's son for the 2005-06 school year was not appropriate.¹ The appeal must be sustained.

At the commencement of the impartial hearing on June 2, 2006, the student was 12 years old and completing sixth grade where he was attending an integrated program in the general education setting (Tr. p. 116; Dist. Ex. 180 at p. 1). He has deficits in speech and language and in reading, as well as behavioral challenges and vision difficulties (Tr. p. 140; Dist. Exs. 136 at p. 1;

¹ The impartial hearing officer issued an initial decision on December 17, 2006 and an amended decision on December 27, 2006. Petitioner appeals both decisions. The amended decision incorporated the initial decision but for a correction of a finding. Because neither party appeals the correction made to the initial decision, and the decisions are otherwise essentially the same, I need not discuss the December 17, 2006 decision. My decision herein applies to both impartial hearing officer decisions. I have also reviewed respondent's procedural defenses and find them to be without merit; petitioner timely and properly served its appeal (8 NYCRR 279.2[c]; 8 NYCRR 275.8).

180 at pp. 3, 4). The student is classified as a student with autism² (Dist. Ex. 180 at p. 1). He has been the subject of six previous appeals to this office (Application of a Child with a Disability, Appeal No. 05-059; Application of a Child with a Disability, Appeal No. 04-105; Application of the Bd. of Educ., Appeal No. 04-085; Application of a Child with a Disability, Appeal No. 04-011; Application of a Child with a Disability, Appeal No. 03-050; Application of the Bd. of Educ., Appeal No. 02-070). Familiarity with the facts in those decisions will be assumed.

The focus of the present appeal is the appropriateness of the program offered to the student by petitioner during the 2005-06 school year. The student has been receiving special education services pursuant to his June 24, 2003 individualized education program (IEP) (Tr. p. 184; Dist. Ex. 67). Petitioner also has provided the student with curb-to-curb transportation pursuant to a stipulation dated September 23, 2005 (Dist. Ex. 13 at pp. 1-2) and agreed to provide occupational therapy services commencing approximately late January 2006 (Tr. p. 2027).

The June 24, 2003 IEP described the student as having positive interactions with teachers and peers, listening to others, and showing concern for friends in the classroom (Dist. Ex. 67 at pp. 5-6). He was attentive in class, demonstrated an eagerness to participate in instructional activities, enjoyed opportunities to work with peers in group activities, was successfully using greetings with peers and adults, and was using humor appropriately (Dist. Ex. 67 at pp. 2, 6). The June 24, 2003 IEP noted that respondent reported that her son had been experiencing anxiety at home, but teachers reported no evidence of anxiety within the school setting (Dist. Ex. 67 at p. 6).

An IEP developed for the student on March 28, 2006 described respondent's son as being well liked by classmates, enjoying playing and working with others, and enjoying games more when the rules were followed (Dist. Ex. 180 at p. 5). In the general education classroom, the student was described as having positive interactions with peers and teachers "a majority of the time," but experiencing difficulty on the bus, in the cafeteria, and in specialized reading class (*id.*). In a June 16, 2006 progress report, the student's special education teacher stated that the student

² Respondent's son's eligibility for special education programs as a student with a disability is not in dispute in this appeal (*see* 8 NYCRR 200.1[zz][6]). Although the record contains 267 exhibits, there is limited information regarding the student's clinical diagnoses. With the exception of reports from private evaluators which were completed after the CSE convened, in an attempt to develop a 2005-06 individualized education program (IEP) for the student, most of the available reports are dated 2004 or earlier. An independent functional behavioral assessment (FBA) conducted in March 2006 referred to a report of an evaluation by a developmental pediatrician completed in July 2000 which "provides impression of PDD NOS" (Pervasive Developmental Disorder Not Otherwise Specified) (Dist. Ex. 133 at p. 2). The neuropsychologist who conducted the FBA noted that the developmental pediatrician's report "specifically states 'his language and behavioral problems are too severe for him to be considered as an Asperger's Disorder. At the same time, he clearly does meet full criteria for a diagnosis of Autistic Disorder'" (*id.*). The record does not contain any additional information indicating that these clinical impressions, offered when the student was six years old, were subsequently supported by a definitive diagnosis. A Child Behavior Checklist (CBCL – Teacher Report Form 2) completed in March 2006 by the student's special education teacher yielded scores in the borderline clinical range (93rd to 97th percentiles) on scales for anxiety and attention deficit/hyperactivity problems, with his subscale score for inattention in the normal range and his score for hyperactivity identified as "high enough to warrant concern" (Dist. Ex. 133 at p. 1; Parent Exs. II, JJ). The same report yielded scores in the clinical range (above the 97th percentile) for oppositional defiant and conduct problems and suggests consultation to determine whether the student would meet diagnostic criteria for these disorders (Parent Exs. II, JJ).

participated well in class, responded well to teacher suggestions and asked questions when he was not sure of what was expected (Parent Ex. GG at p. 3).

With respect to evaluative information included in the record, the student received educational (Dist. Ex. 67 at p. 4), psychological (Dist. Ex. 135), and occupational therapy (Parent Ex. R) evaluations, when he was eight years old and in the third grade, during the 2002-03 school year. The Wechsler Individual Achievement Test (WIAT) was administered to the student in September 2002, at the beginning of the student's third grade year (Dist. Ex. 67 at p. 4). The student achieved subtest standard scores of 62 in basic reading, 57 in reading comprehension, 75 in listening comprehension, 77 in numerical operations, and 80 in math reasoning (*id.*).

A psychological evaluation of the student conducted in October 2002 included administration of the Wechsler Abbreviated Scale of Intelligence (WASI), which yielded a full scale IQ score of 88, in the low average range of cognitive functioning (Dist. Ex. 135 at p. 3). The student's verbal IQ score on the WASI was 80 and his performance IQ score was 93. Administration of the Kaufman Brief Intelligence Test yielded a composite IQ score of 100, which is at the 50th percentile (Dist. Ex. 135 at p. 4). The evaluator indicated that the student's performance on cognitive and achievement testing suggested a pattern consistent with a specific learning disability, and noted that she was unable to render an opinion as to whether the student met the diagnostic criteria for an autism spectrum disorder (Dist. Ex. 135 at p. 5).

An October 2002 report from an occupational therapy evaluation identified "widely varied" levels of ability in visual perceptual and motor planning skills, particularly related to handwriting (Parent Ex. R at p. 4). Overall gross motor skills and visual motor integration skills were age appropriate (*id.*). The evaluator described the student as "pleasant and cooperative" throughout testing, and noted that the student willingly accompanied her and attempted all tasks presented (Parent Ex. R at pp. 1, 4).

As part of the October 2002 occupational therapy evaluation of the student, a sensory profile was administered to determine whether sensory processing deficits might be contributing to the student's performance difficulties (Parent Ex. R at p. 5). The evaluator noted that when the student's mother was asked if she had concerns in this area, she did not identify any concerns (Parent Ex. R at p. 4). Completion of the sensory profile identified difficulty with auditory, visual, vestibular, touch and oral sensory processing, and difficulty with sensory processing related to endurance and tone, which the evaluator noted could affect the student's ability to sit for long periods of time, remain alert, and maintain participation with peers (Parent Ex. R at p. 6). The profile also identified "typical" ability to modulate sensory experiences in daily life, but noted difficulty with modulation of sensory input affecting emotional responses, which the evaluator indicated affected the student's ability to respond to social and environmental cues and become upset more easily (*id.*). The therapist indicated that she would confer with the student's parents and teachers to develop plans to support the student's performance in daily life (Parent Ex. R at p. 7).

The WIAT was re-administered to the student in April 2003, as he was completing his third grade year (Dist. Ex. 67 at p. 4). His standard scores increased in subtest areas measuring reading and math when compared with testing conducted in September 2002 (*id.*). On the April 2003 test administration, the student achieved a word reading score of 72 and a pseudoword decoding score

of 95, indicating progress when compared to his September 2002 basic reading standard score of 62 (id.). Other standard scores in reading and math also documented progress when compared to the student's 2002 scores, including standard scores of 66 (previously 57) in reading comprehension, 93 (previously 75) in listening comprehension, 100 (previously 77) in numerical operations, and 96 (previously 80) in math reasoning (id.).

The CSE convened on June 24, 2003 for a program review (Dist. Ex. 67). The June 24, 2003 CSE recommended that the student be placed in an integrated program and receive specialized reading, counseling and speech-language therapy (Dist. Ex. 67 at p. 10). Academic performance levels on the June 24, 2003 IEP noted that the student was making progress in math and reading, had increased his ability to work independently, was attentive in class, demonstrated an eagerness to participate in instructional activities and enjoyed opportunities to work with peers in group activities (Dist. Ex. 67 at p. 2). In the social development domain, the student was described as having very positive interactions with teachers and peers, listening to others and showing concern for friends in the classroom (Dist. Ex. 67 at p. 5). He had made many friends in the classroom and enjoyed playing and working with others (Dist. Ex. 67 at pp. 5-6). He successfully used greetings with peers and adults and was using humor appropriately (Dist. Ex. 67 at p. 5). Respondent reported that the student had been experiencing anxiety at home, but teachers reported no evidence of anxiety within the school setting (id.). The student's speech-language therapist reported that the student had increased his standard score on the Test of Problem Solving Skills (TOPS) from 82 to 109 (average range) during the 2002-03 school year and had also increased his score from 85 to 109 (average range) on the Test of Auditory Perceptual Skills (TAPS) (Dist. Ex. 67 at p. 3). The June 24, 2003 IEP noted that, in the physical development domain, the student had a February 2001 diagnosis of ocular motor dysfunction (Dist. Ex. 67 at p. 6). The June 24, 2003 IEP also noted that, in the management domain, the student participated in a classroom management system which had been individualized to meet his needs (id.). The system involved points exchanged for tangible rewards every three to four weeks and a checkmark system for inappropriate behavior (id.). It was noted that the student understood the program and rarely received checkmarks for inappropriate behavior (id.).

The CSE convened on August 17, 2004 for the student's annual review to prepare a 2004-05 IEP for the student's fifth grade year (Parent Ex. B). Approximately two weeks after the August 17, 2004 CSE meeting, a comprehensive developmental visual evaluation report addressing the January 2001 to August 2004 period was completed (Dist. Ex. 138). The August 30, 2004 report from a behavioral optometrist referred to a comprehensive evaluation conducted in January 2001 which identified "significant visual difficulties . . . that impair academic success" and recommended vision therapy (Dist. Ex. 136 at p. 1). The 2004 report indicated that there had been little change in the student's visual abilities and again recommended optometric vision therapy to address poor tracking skills and focusing difficulties (Dist. Ex. 136 at p. 2).

An independent occupational therapy evaluation of the student was conducted in July 2005 (Dist. Ex. 138). The evaluator reported that the student's attention and efforts during the evaluation were good and that the student did not demonstrate impulsivity or hyperactivity (Dist. Ex. 138 at p. 3). The evaluator opined that test results were an accurate measure of the student's capabilities (Dist. Ex. 138 at p. 1). The evaluator identified difficulties with visual organization and tracking, and referred to results of a previous evaluation that identified difficulty with auditory processing, a hypersensitive vestibular system, slowness to develop hand dominance, and an atypical approach

in visual motor skills (Dist. Ex. 138 at p. 4). Respondent's completion of a sensory profile identified "global sensory defensiveness and associated modulation, regulatory, and behavioral difficulties" (Dist. Ex. 138 at p. 2). The evaluator indicated that the student required accommodations and supports to participate in an academic program and recommended "occupational therapy services for acute development and ongoing monitoring of a plan that incorporates both sensory and behavioral components of his difficulty with socialization," as well as "ongoing assistance and accommodations for visual organization and tracking skills" (Dist. Ex. 138 at p. 4).

In October 2005 a second optometrist conducted a vision evaluation of the student and identified deficits in ocular motor skills, which would affect academic achievement, and with functional visual fields, which the evaluator indicated would affect the student's attention, the amount of effort it would require him to perform academically, and his eye-hand coordination (Dist. Ex. 139 at p. 2). The optometrist recommended a program of optometric vision therapy (Dist. Ex. 139 at p. 3).

By letter dated January 12, 2006, petitioner informed respondent that her son was suspended for a period of five days for insubordination or disorderly student conduct which interfered with the educational process of the school (Parent Ex. D-5). A CSE convened on January 19, 2006 for the student's annual review (Dist. Ex. 111). The CSE reviewed reports from the two vision therapy evaluations of the student conducted in August 2004 and September 2005, as well as the July 2005 occupational therapy evaluation report, a March 23, 2005 medical report and an April 22, 2003 educational evaluation report (Dist. Ex. 111 at p. 7). In addition, the CSE reviewed progress reports from the student's general education teacher, his special education teacher and his speech-language therapist (*id.*). The CSE recommended that the student continue in a 12:1+1 integrated special class and receive related services of resource room, counseling and speech-language therapy (*id.*). Consistent with recommendations in the July 2005 occupational therapy evaluation report, the CSE also recommended that the student receive occupational therapy (*id.*).

On March 10, 2006, an independent neuropsychologist completed a functional behavioral assessment (FBA) of the student (Dist. Ex. 133). The FBA evaluator noted in his report that respondent declined an interview for the FBA, and the record indicated that he obtained information about the student through a review of records, from interviews with petitioner's CSE chairperson and school psychologist, from a Child Behavior Checklist (CBCL) - Teacher Report Form completed on March 9, 2006 by three anonymous teachers, and from behavioral data collected over a period of six school days (Tr. p. 1465; Dist. Ex. 133 at p. 1; Parent Exs. II, JJ).

The CSE convened on March 28, 2006 to review the March 10, 2006 FBA (Dist. Ex. 180). Consistent with the recommendations in the FBA, the CSE revised the January 19, 2006 IEP, recommending that a positive behavior reinforcement plan be developed and that it include both long-term and short-term reinforcement schedules (Dist. Ex. 180 at pp. 2, 6). The CSE also recommended that, consistent with the recommendations in the March 2006 FBA, the student be assigned a one-to-one aide for passing in the hallways, lunch, all academic classes and all exploratory classes except for physical education (*id.*).

A behavioral intervention plan (BIP) was developed for the student in April 2006 (Dist. Ex. 115). The BIP described the student's target behaviors of hitting, kicking, pushing, throwing of objects, refusing services and refusing activities (id.). The plan allowed for eight levels of achievement over time, with each level allowing the student progressively increased time independent of a one-to-one aide (id.).

By letter dated April 4, 2006 to petitioner, respondent submitted a due process complaint notice requesting an impartial hearing (IHO Ex. 1 at p. 2). In her letter, respondent disagreed with recommendations made by petitioner's CSE for her son's 2005-06 school year program (IHO Exs. 1 at pp. 2, 6; 9). Respondent raised procedural and substantive claims pertaining to the student's 2005-06 school year program and FBA. Respondent also requested the June 24, 2003 IEP as her son's pendency placement (IHO Ex. 1 at p. 7).

By letter dated September 12, 2006, respondent requested a second impartial hearing (IHO Ex. 9). In her letter, respondent asserted that petitioner failed to prepare an IEP prior to the start of the 2006-07 school year and challenged the appropriateness of the pendency program, as modified by agreement (id.). Respondent additionally requested consolidation of both matters before the impartial hearing officer assigned to hear the matters challenged in her first hearing request (IHO Ex. 9 at p. 4). By letter dated September 19, 2006 the impartial hearing officer assigned to the first hearing request confirmed acceptance of the proposed consolidation (IHO Ex. 10).

The impartial hearing convened on June 2, 2006 and ended on October 19, 2006, after nine days of hearings. The impartial hearing officer found that the substantive portions of the January 19, 2006 IEP were sufficient to render the IEP "defective" (IHO Decision, p. 14). Despite this finding, the impartial hearing officer determined that a ruling regarding the appropriateness of the January 19, 2006 IEP was unnecessary because petitioner's CSE reconvened and developed a subsequent IEP dated March 28, 2006 (IHO Decision, pp. 14-15).

The impartial hearing officer noted that the March 28, 2006 IEP included the defects found in the January 19, 2006 IEP and contained provisions for the assignment to the student of a one-to-one aide on a full-time basis (IHO Decision, p. 15). He also concluded that the March 2006 FBA report that was reviewed by the CSE (Dist. Ex. 85) was inaccurate, unreliable, and not an appropriate "base" upon which petitioner's CSE could properly rely in amending the student's IEP (IHO Decision, pp. 16-17). He noted that although the student's pendency program called for speech-language, counseling, and specialized reading services in a group setting (Dist. Ex. 67), the student received all of his services individually (IHO Decision, pp. 19-20). He also found inappropriate the CSE recommendation for a one-to-one aide (IHO Decision, p. 20; see Dist. Ex. 180). Finding that the passage of time had rendered his ruling on the appropriateness of the March 28, 2006 IEP unnecessary, the impartial hearing officer stated that if he were to do so he would find that, in addition to the deficiencies found in the January 19, 2006 IEP, the provision of a one-to-one aide to monitor the student's behaviors was unfounded and inappropriate, and he would annul the March 28, 2006 IEP (IHO Decision, p. 21).³

³ The impartial hearing officer did not render a determination as to the appropriateness of the January 19, 2006 or the March 28, 2006 IEPs.

With respect to respondent's due process complaint notice dated September 12, 2006, the impartial hearing officer acknowledged petitioner's concession that it failed to have an IEP in place for the student at the commencement of the 2006-07 school year (IHO Decision, p. 23). The impartial hearing officer found that the continuation in 2006-07 of an IEP prepared for the student's 2003-04 school year, coupled with petitioner's failure to appropriately implement the student's pendency program, constituted a denial of a free appropriate public education (FAPE) to the student (*id.*). The impartial hearing officer concurred with respondent's allegation that the school psychologist's current involvement with her son's services was inappropriate.

The impartial hearing officer ordered the following: 1) that respondent select a qualified person to conduct an FBA and that petitioner cooperate with the selected evaluator to ensure a prompt completion of the assessment; 2) that petitioner assign another school psychologist to the student; that petitioner provide the student with transportation to and from Springville and the site of the vision therapy, including car service for therapy sessions scheduled after school hours or on non-school days; 3) that petitioner reimburse the additional liability insurance costs incurred by the optometrist as a cost of vision therapy; and 4) that petitioner pay for all costs associated with the student's attendance at The Gow School or any other private educational facility that was capable of meeting his special education needs (IHO Decision, pp. 20, 22, 24, 25).

The impartial hearing officer did not order compensatory services (IHO Decision, p. 26). Stating that he was "buoyed" by the fact that, despite petitioner's failure to provide the student with special education and services, the student appeared to be advancing from grade to grade and achieving passing grades in all subjects, the impartial hearing officer remanded the matter to petitioner's CSE for the development of an appropriate IEP (*id.*).

On appeal, petitioner alleges that the impartial hearing officer erred when he found that the student's IEPs were inappropriate and that the student was denied a FAPE during the pendency of the impartial hearing. In addition, petitioner asserts that the impartial hearing officer erred when he determined that the student's FBA was substantively inappropriate, directed petitioner to pay for another independent FBA, and ruled that petitioner inappropriately provided the student with a personal aide. Petitioner also challenges the impartial hearing officer's orders directing it to pay for private educational placement costs for the student; assign a school psychologist other than the student's current service provider to the student; and retain the student's vision therapy service provider, providing related transportation and reimbursement of the cost of additional liability insurance. Respondent denies petitioner's assertions and requests that the appeal be dismissed.

The central purpose of the IDEA (20 U.S.C. §§ 1400-1482)⁴ is to ensure that students with disabilities have available to them a FAPE (20 U.S.C. § 1400[d][1][A]; *Schaffer v. Weast*, 126 S. Ct. 528, 531 [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

⁴ On December 3, 2004, Congress amended the IDEA; however, the amendments did not take effect until July 1, 2005 (see Individuals with Disabilities Education Improvement Act of 2004 [IDEA 2004], Pub. L. No. 108-446, 118 Stat. 2647). As the relevant events in the instant appeal took place after the effective date of the 2004 amendments, the provisions of the IDEA 2004 apply and the citations contained in this decision are to the newly amended statute.

(20 U.S.C. § 1401[9][D]; 34 C.F.R. § 300.17;⁵ see 20 U.S.C. § 1414[d]; 34 C.F.R. § 300.22).⁶ The burden of persuasion in an administrative hearing challenging an IEP is on the party seeking relief (see Schaffer, 126 S. Ct. at 532, 537 [finding it improper under the IDEA to assume that every IEP is invalid until the school district demonstrates that it is not]).

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]). Pursuant to the IDEA, when procedural violations are alleged, an administrative officer may find that a child did not receive a FAPE only if the procedural inadequacies (a) impeded the child's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision making process regarding the provision of a FAPE to the child, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; see 34 C.F.R. § 300.513[a][2]; see also Matrejek v. Brewster Cent. Sch. Dist., 2007 WL 210093, at *2 [S.D.N.Y. Jan. 9, 2007]). Also, an impartial hearing officer is not precluded from ordering a school district to comply with IDEA procedural requirements (20 U.S.C. § 1415[f][3][E][iii]).

Both the Supreme Court and the Second Circuit have noted that the IDEA does not, itself, articulate any specific level of educational benefits that must be provided through an IEP (Rowley, 458 U.S. at 189; Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 122, 130 [2d Cir. 1998]), although the Supreme Court has specifically rejected the contention that the "appropriate education" mandated by the IDEA requires states to maximize the potential of students with disabilities (Rowley, 458 U.S. at 197 n.21, 189, 199; see Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). What the statute guarantees is an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [internal quotation omitted]; see Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Thus, a school district satisfies the FAPE standard "by providing personalized

⁵ 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. In this case, none of the new provisions contained in the amended regulations are applicable because all the relevant events occurred prior to the effective date of the new regulations. However, for convenience, citations herein refer to the regulations as amended because the regulations have been reorganized and renumbered.

⁶ The term "free appropriate public education" means special education and related services that--

- (A) have been provided at public expense, under public supervision and direction, and without charge;
- (B) meet the standards of the State educational agency;
- (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and
- (D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

(20 U.S.C. § 1401[9]).

instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203).

The IDEA directs that, in general, a decision by an impartial hearing officer shall be made on substantive grounds based on a determination of whether or not the child received a FAPE (20 U.S.C. § 1415[f][3][E][i]). The Second Circuit has determined that "a school district fulfills its substantive obligations under the IDEA if it provides an IEP that is 'likely to produce progress, not regression'" and if the IEP affords the student with an opportunity greater than mere "trivial advancement" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130; see also Perricelli, 2007 WL 465211, at *15), in other words, is likely to provide some "meaningful" benefit (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]). Objective factors such as the attainment of passing grades and regular advancement from grade to grade are generally accepted indicators of satisfactory progress and one important factor in determining educational benefit (Rowley, 458 U.S. at 207, n.28, 203-04; Walczak, 142 F.3d at 130; Viola v. Arlington Cent. Sch. Dist., 414 F. Supp. 2d 366, 382 [S.D.N.Y. 2006]). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.6[a][1]; see Walczak, 142 F.3d at 132). The LRE is defined as "one that, to the greatest extent possible, satisfactorily educates disabled children together with children who are not disabled, in the same school the disabled child would attend if the child were not disabled" Carlisle Area Sch. v. Scott P., 62 F.3d 520, 535 (3d Cir. 1995)."

Petitioner first asserts that the impartial hearing officer "erred by determining that the student was denied a FAPE during the pendency of this proceeding" (Pet. p. 14). In relevant part, the IDEA requires that during the pendency of any proceedings conducted pursuant to section 1415 of the statute, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of the child (20 U.S.C. § 1415[j]; see Educ. Law § 4404[4]; 34 C.F.R. § 300.518[a]).

As discussed above, during the pendency of the impartial hearing the student received services pursuant to the 2003-04 IEP (Dist. Exs. 2, 3, 67) with amended services provided by petitioner upon agreement of the parties (Dist. Exs. 2, 13). The June 24, 2003 IEP recommended a 12:1+1 integrated program for 300 minutes five times a week. Speech-language services were recommended for 30 minute sessions, three times a week in an individual setting and two times a week in a group setting (Dist. Ex. 67 at p. 1). Counseling was recommended for a 30 minute session, once a week in a group setting (id.). Specialized reading instruction was recommended for 30 minute sessions, in a group setting, five times a week (id.). By letter dated September 23, 2005, petitioner agreed to provide respondent's son with curb-to-curb transportation during the pendency of a 2005-06 hearing request (Dist. Ex. 2) initiated prior to the instant April 4, 2006 due process request (IHO Ex. 1).

As a result of an agreement reached during an impartial hearing held on December 15, 2005, the student's pendency program was amended to include math, science, social studies and English in an inclusion setting, specialized "one-on-one reading," 30 minutes of individual counseling once a week, and individual speech-language services four days a week in addition to group speech-language services once a week (Dist. Ex. 13 at pp. 1-3, 6-10). Petitioner also provided the student with occupational therapy services for 30-minute sessions twice a week

commencing January 2006, and agreed to continue such services during the of pendency of the proceeding (Dist. Ex. 13 at p. 2).

With respect to the impartial hearing officer's conclusion that it appeared that petitioner had arranged to have the student receive all of his special education and related services in isolation (IHO Decision, p. 19), the record shows that the student was part of an integrated general education class and received instruction within the integrated classroom (Dist. Ex. 180 at p. 1; Tr. p. 109). In addition to the regular education classroom teacher (Tr. p. 115), the student received instruction from a special education teacher and a teacher assistant (Tr. p. 114). Approximately five other special education students also received direct consultant services from the special education teacher and teacher assistant within the regular education class (Tr. p. 109). The student also attended physical education and exploratory classes, such as health, art, technology, music, home and careers, and computer class, in a regular education setting (Tr. pp. 135-36, 374; Dist. Ex. 67 at p. 11). The impartial hearing officer's determination that the student received instruction in an isolated setting is not supported by the record.

However, the record also shows that the student received all of his specialized reading services, speech-language, and counseling in an individualized setting (Tr. pp. 383, 668; Dist. Ex. 13 at p. 8). Although the June 24, 2003 IEP recommended group specialized reading instruction (Dist. Ex. 67 at p. 1), the December 15, 2005 agreement reached on the record during a prior impartial hearing specified "specialized one-on-one reading" instruction (Dist. Ex. 13 at p. 8). The student's speech-language needs were to be addressed in both individual and group settings (Dist. Exs. 13, 67). Petitioner, however, was unable to provide the requisite group speech-language services one day a week because of scheduling constraints (Tr. pp. 703-07). The special education director testified that respondent had requested speech-language services for her son during the last period of the school day to preclude interference with his general education and integrated classes (*id.*). She further testified that because the other students who had speech-language needs similar to those of respondent's son were scheduled for resource room during that period, as the only time at which resource room was offered, a group setting for speech-language services was not available (Tr. pp. 708, 1410-12). With respect to the group counseling services, the special education director testified that petitioner was unable to provide the student with such services because there were no special education students in the district with counseling needs similar to his needs (Tr. p. 710). Under these circumstances, I find that the speech-language and counseling services provided to respondent's son for the 2005-06 school year did not deny the student a FAPE.

Petitioner next challenges the impartial hearing officer's order directing it to assign to the student a school psychologist other than the student's current service provider. In his decision, the impartial hearing officer did not find the school psychologist's qualifications objectionable (IHO Decision, pp. 16-17, 24). Rather, the impartial hearing officer noted that the FBA evaluator obtained most of the material utilized in his assessment from his record review and from discussions with the school psychologist, and he concluded that the FBA report included many inaccurate facts regarding the student's behaviors (IHO Decision, p. 17). In addition, he noted that the report included inaccurate and "pejorative" statements about the student's family and his relationship with his family (*id.*). The impartial hearing officer determined that all such inaccuracies rendered the report unreliable and not an appropriate basis upon which petitioner could properly rely in amending the student's IEP (*id.*).

In light of the impartial hearing officer's failure to expressly cite to testimony or documentary evidence supporting his conclusions, I have carefully reviewed the entire record in search of support for the above conclusions. I have concluded that there is no support in the record for the impartial hearing officer's findings pertaining to the psychologist. Moreover, there is no challenge in the record to the school psychologist's credentials and qualifications (Application of a Child with a Disability, Appeal No. 98-60). Petitioner is free to assign her to respondent's son, at its discretion (see Slama v. Independent Sch. Dist. No. 2580, 259 F. Supp. 2d 880, 884 [D. Minn. 2003]; Application of a Child with a Disability, Appeal No. 98-50; Application of a Child with a Disability, Appeal No. 97-86; Application of a Child with a Disability, Appeal No. 96-51; Application of a Child with a Disability, Appeal No. 95-50; Application of a Child with a Handicapping Condition, Appeal No. 91-19). The impartial hearing officer is also cautioned to reference the hearing record to support his findings of fact (8 NYCRR 200.5[j][5][v]).

I now turn to the adequacy of the March 2006 FBA described above. Petitioner alleges that the impartial hearing officer erred when he found the student's March 2006 FBA was substantively inappropriate and directed petitioner to pay for another independent FBA. Petitioner challenges the impartial hearing officer's findings that the FBA at issue included inaccurate information about the frequency and severity of the student's behaviors, the student's relationship with his father, and the student's siblings.

A review of the March 2006 FBA shows that it identified target behaviors of refusal and unsafe behavior/physical aggression, with refusal defined as refusal to attend a school-based service or cooperate with instructions during a service (Dist. Ex. 133 at p. 2). It summarized situations in which the student refused, noting that most refusals were in regard to reading, but that speech therapy and counseling were also refused at times (*id.*). Physically aggressive behaviors were most likely to occur in situations with less structure and supervision (*id.*). Inappropriate behaviors appeared to be related to the student's perception that he would be academically challenged, that there would be no consequences for his actions, and, in the case of aggressive behaviors, that the behaviors would yield solutions to conflicts (Dist. Ex. 133 at p. 5). The FBA evaluator also observed that the student appeared to model inappropriate language from other students and opined that his refusals to participate in services may be modeled after his mother's refusals (*id.*).

The March 2006 FBA described previous interventions, including close adult proximity, reward systems within individual sessions, and longer-term reward systems, all of which had met with relative success (Dist. Ex. 133 at p. 4). The evaluator noted that the frequency and intensity of the student's physically aggressive behaviors diminished greatly when he was closely individually supervised (*id.*).

The FBA evaluator noted that the student received the services of an aide for a large portion of the school day and recommended that he also have an aide assigned to him during less structured times, when aggressive behavior was likely to occur (Dist. Ex. 133 at p. 8). He suggested that the student be given opportunities to earn independent time away from the aide by demonstrating appropriate behaviors, as this would give the student control over such opportunities (*id.*). To address the student's refusals, the evaluator recommended a system of both short-term and long-term reinforcement, loss of privileges as a consequence for refusal, and increased parental support for not refusing services (*id.*). Other recommendations included counseling sessions implementing

positive practice of appropriate responses, physical education class earlier in the day to allow the student to expend energy before academic classes, and creation of opportunities for the student to experience success in areas of strength (Dist. Ex. 133 at p. 9).

In reviewing the accuracy of the information in the March 2006 FBA, I have given considerable weight to information in the student's various IEPs, which I find provide valid and reliable descriptions of the student's behavioral needs based upon reports by service providers who worked with the student on a daily basis. The FBA evaluator relied upon a review of these records, staff interviews, a six-day count of behaviors, and a CBCL – Teacher Report Form to identify the student's needs, and based his recommendations upon what he found. It is my determination that the FBA evaluator did so appropriately, relied upon valid information, and developed a thorough analysis with competent recommendations. The impartial hearing officer's conclusions pertaining to the psychologist are inconsistent with a reading of the record as a whole and with the above mentioned documentary evidence.

Petitioner additionally asserts that the impartial hearing officer erred when he found that the 2005-06 IEPs were substantively inappropriate, such that the IEPs did not contain appropriate present levels of educational performance, annual goals and short term objectives, and failed to meet the student's needs, including those demonstrated in occupational therapy, vision therapy, and behavior intervention.

The IEP developed at the March 28, 2006 CSE meeting described the student's levels of performance at that time (Dist. Ex. 180 at pp. 3-7). The March 28, 2006 IEP noted that, in the academic domain, the student had made progress in a general education math class but had difficulty with word problems, and noted that he received support in math from a special education teacher or teaching assistant (Dist. Ex. 180 at p. 3). Math was identified as a relative strength for the student, as he had good addition and subtraction skills, could compute multi-digit multiplication and division, and read numerical portions of graphs (Dist. Ex. 180 at p. 4).

Regarding the student's reading skills, his score of 96 percent on the IOTA Word Test for reading was at the 5.3 grade level, and it was noted that the student was able to read aloud with few mistakes (Dist. Ex. 180 at p. 3). Difficulty was noted in reading comprehension, but the March 28, 2006 IEP stated that the student did well when hearing a story read aloud or on tape, he could answer literal comprehension questions when they were presented orally, and he could comprehend material read aloud in a group setting (id.).

Regarding the student's writing skills, he was able to copy sentences from the board, had learned to describe the parts of a paragraph, and could dictate a paragraph and copy what had been written (Dist. Ex. 180 at pp. 3-4). The student's spelling scores were inconsistent, and it was noted that his spelling words were taken from the Orton-Gillingham reading program and that he learned best through auditory repetition (id.).

The March 28, 2006 IEP noted that the student completed all school projects and homework during the school day with monitoring or assistance of the special education teacher or aide (Dist. Ex. 180 at p. 3). Teachers reported that the student was attentive in general education classes and enjoyed working with peers in group activities (id.). Respondent's parent advocate reported that the student was not independent but wanted to be independent (id.).

The student's speech-language therapist reported that the student had average expressive language skills (Dist. Ex. 180 at p. 4). The March 28, 2006 IEP noted that respondent disagreed with this observation, and that her son's teachers reported that he had difficulty expressing thoughts and feelings within the school setting (id.). It was also noted that the student had difficulty listening when there were noises in the environment, such as in the cafeteria or when papers were rustling (id.).

Academic needs identified in the March 28, 2006 IEP included stating and writing answers to comprehension questions from the sixth grade curriculum; writing a paragraph with an introduction, five to seven supporting details and a conclusion; and solving multi-step word problems (Dist. Ex. 180 at p. 4). The March 28, 2006 IEP had a goal with three objectives for writing answers to comprehension questions, a goal with three objectives for writing a one-paragraph essay, and a goal for spelling (Dist. Ex. 180 at pp. 7-8). A math goal on the March 28, 2006 IEP addressed multi-step word problems and had three objectives (Dist. Ex. 180 at p. 8). All of the objectives included conditions of measurement, such as prompt levels or levels of assistance, levels of mastery through number of trials or percentages, and means of measurement, such as classroom assignments or tests and quizzes (Dist. Ex. 180 at pp. 7-8).

The student's identified needs for speech were to improve his expressive vocabulary for defining and describing items, improve sentence formulation, and improve pragmatic skills by commenting appropriately (Dist. Ex. 180 at p. 4). The March 28, 2006 IEP included a speech-language goal to address each of these three areas of need, with objectives for each goal that define the criteria for mastery and method of documentation (Dist. Ex. 180 at p. 9). The student's goal for defining and describing items indicated that vocabulary words would be selected from the academic curriculum and also stated that the student would describe attributes other than function (id.).

In the social-emotional domain, the March 28, 2006 IEP stated that the student enjoyed playing and working with others and had positive interactions with teachers and peers a majority of the time (Dist. Ex. 180 at p. 5). Less positive interactions were reported on the bus, in the cafeteria and in specialized reading class (id.). Teachers reported that the student had a good sense of fair play, as demonstrated by the fact that he enjoyed playing games when rules were followed (id.). Respondent disagreed with this observation (id.). The student's ability to initiate and sustain conversations with peers was identified as a strength, but he needed to learn skills of self-control and negotiating (Dist. Ex. 180 at p. 6). The March 28, 2006 IEP had two goals for counseling, one for applying four skill steps for self-control and a second for applying six skill steps for negotiating within scenarios in the counseling setting (Dist. Ex. 180 at p. 9). Both goals had corresponding objectives delineating successful trials required for mastery (id.). Additionally, the March 28, 2006 IEP reflected the CSE's review of the independent FBA completed on March 10, 2006, and included recommendations reflective of the FBA, including provision of a one-to-one aide and development of a BIP (Dist. Ex. 180 at p. 6).

The March 28, 2006 IEP noted, in the physical domain, the student's diagnosis of an ocular motor dysfunction and described in detail the needs to be addressed by vision therapy (Dist. Ex. 180 at p. 6). Teachers reported that the student exhibited increased eye movements and tipped his chair when he was anxious; they further stated that he fidgeted with items during class and was destructive to school materials (id.). Respondent reported that her son would flap his hands and

self-mutilate when anxious, and his teachers reported that he had shown tendencies to self-mutilate in school (*id.*). Results and recommendations from the July 2005 occupational therapy evaluation report were included in the present performance levels, as was the fact that the student participated in a home-based animal therapy program (*id.*).

Consistent with the vision therapy evaluation reports, the student's vision therapy needs were identified on the March 28, 2006 IEP (Dist. Ex. 180 at p. 6). A March 28, 2006 IEP goal for visual saccades to address the student's needs for control of eye movement included objectives which delineated the number of trials and measurement of progress by a vision therapist (Dist. Ex. 180 at p. 10). Consistent with the occupational therapy evaluation report, the student's needs in the areas of visual organization and a sensory diet were identified on the March 28, 2006 IEP (Dist. Ex. 180 at p. 6). The March 28, 2006 IEP contained a goal for right to left directionality and a goal for use of sensory strategies, each with supporting objectives which identify expected prompt levels or number of trials and describe the method of documentation of progress (Dist. Ex. 180 at p. 10).

The March 28, 2006 IEP stated that, in the management domain, the student was able to participate in all learning activities and contributed to the classroom environment but did not consistently follow classroom rules, and that several behavior management systems had been attempted but none had been continuously successful (Dist. Ex. 180 at p. 10). A communication book was used to share information with respondent regarding her son's needs in this area (*id.*). The March 28, 2006 IEP identified the student's need for a behavior management system to address defiance and appropriate behavior with peers (*id.*). The two social-emotional goals on the student's March 28, 2006 IEP addressed these needs (Dist. Ex. 180 at pp. 9-10), as did provision of a one-to-one aide and recommendation for development of a BIP (Dist. Ex. 180 at pp. 7, 9-10).

Moreover, with respect to the appropriateness of the services offered to the student during the pendency period, the impartial hearing officer properly acknowledged that the student continued to advance from grade to grade and is passing all of his classes (IHO Decision, p. 26). In a February 2, 2006 Progress Report (Parent Ex. GG at p. 7), the student's special education teacher reported that the student had become less reluctant to write essays but was able to do so without scripting if assisted with prompts and planning (*id.*). He had difficulty with spelling, often refused to do his spelling assignments, and had requested that he be given the same spelling words required of his classmates instead of an individualized list (*id.*). Decoding was at sixth grade level, but the student had difficulty with comprehension questions, particularly inferential questions (*id.*).

In a April 11, 2006 Progress Report (Parent Ex. GG at pp. 8-9), the student's specialized reading teacher reported that the student was doing work at or near sixth grade level in all of his classes. In his reading program, he was working on advanced skills such as prefixes, suffixes and root words, which were proving to be easy for him. The school psychologist who provided counseling services to the student reported that he had demonstrated progress in his ability to discuss appropriate responses to various situations but had difficulty understanding why it was important to choose these responses. His speech-language therapist reported that the student had been working on identifying inferences and was performing at 78 per cent accuracy. He was continuing to use language for communication but had difficulty with eye contact, tone and socially appropriate dialogue when he was anxious.

Further, the student's June 14, 2006 Report Card listed final grades of 77 in Language Arts, 76 in Math, 75 in Science, 74 in Social Studies, 92 in Art, 80 in Computer, 93 in Home/Careers, 74 in Health, 83 in Music, 88 in Technology and 77 in Physical Education (Parent Ex. HH).

In the June 15-20, 2006 Progress Report (Parent Ex. GG at pp. 3, 9, 10), the student's special education teacher reported that the student participated well in class, responded well to teacher suggestions and asked questions when he was not sure of what was expected (Parent Ex. GG at p. 3). In math, his computation skills were reported to be at grade level and he was able to perform operations in story problems when the problem was read to him and portions of the required computation was given to him one at a time (id.). He could write answers to questions using complete sentences, although his teacher noted that he had more difficulty doing this in his English/Language Arts program and often refused offers of help (id.). In spelling, the student had difficulty, spelled words phonetically, and responded positively when corrections were made (id.).

The student's specialized reading teacher reported that the student had mastered all of the reading and writing skills in the entire Orton-Gillingham program, including the Advanced Language Tool Kit, and was independently reading sixth grade academic material and demonstrating comprehension of what he had read (Parent Ex. GG at p. 9).

The student's speech-language therapist reported that the student had been working on identifying and expanding inferences and had met this goal at the 80 per cent accuracy level by identifying an inference with one detail in 116 trials out of 144 (Parent Ex. GG at p. 10). He also met his goal for using eye contact during conversations in 23 of 24 trials, initiated topic changes in 24 of 24 trials, and demonstrated the ability to ask for clarification of information or respond to requests in 23 out of 23 trials (id.).

The school psychologist who provided counseling services to the student reported that she had engaged respondent's son in conversations about transition from sixth to seventh grade but he had been resistant to this topic (Parent Ex. GG at p. 9).

The record reveals that the student achieved passing grades and made measurable progress in his areas of need. For example, in reading, when the student completed the specialized, phonically-based reading program that had been implemented for him, instruction continued at a more advanced level. Decoding was no longer emphasized, and the student's reading comprehension needs became the priority. Likewise in math, as the student acquired skills at each grade level, he was taught higher level math skills. His progress in each of these areas is documented in his present performance levels. I note, for example, that the student made progress in reading, listening comprehension and math, as evidenced by his scores on the WIAT administered in September 2002 and April 2003 (Dist. Ex. 67 at p. 4) and that his scores on the IOTA indicated an increase in reading from third grade level in 2004 to fifth grade level in 2005, (Dist. Exs. 67 at p. 3 at pp. 4-5; Parent Ex. B at p. 2).

Based on the above, I find that the impartial hearing officer erred when he found that the 2005-06 IEPs were substantively inappropriate. Petitioner's recommended March 28, 2006 IEP included appropriate present levels of educational performance, annual goals and short term objectives and recommendations which were developed to meet the student's needs, including those demonstrated in occupational therapy, vision therapy, and behavior intervention.

Petitioner contends that the impartial hearing officer erred by finding that it inappropriately provided the student with a personal aide. Early records indicate that the student enjoyed unstructured activities, but the student is now having difficulty at these unstructured times (Parent Ex. B at p. 4; Dist. Ex. 133 at pp. 6-7). Early records also indicate that the student is able to participate in a program which awards points or tokens to be exchanged for rewards (Dist. Ex. 67 at p. 6). In third and fourth grade, the student participated in a system of tokens and checks, and was able to earn rewards every two to three weeks, comparable to the rate at which his classmates earned rewards (*id.*). Teachers reported that the student was successful with this program and it was no longer necessary by the end of fourth grade (Parent Ex. B at p. 4). When difficulties arose with refusal and aggression, staff observing the student were able to articulate target behaviors (Dist. Ex. 67 at p. 6; Parent Ex. B at p. 4).

The March 10, 2006 FBA identified the situations in which behaviors occurred – unstructured settings and academic situations in which the student was concerned that he might become frustrated – and paired these situations with appropriate strategies (Dist. Ex. 133 at pp. 3-4, 7-9). The student already had the services of a teacher assistant in structured settings, and the record suggests that such support was beneficial, as the student has a record of progress in his inclusion classes, where a teacher assistant was available to assist him (Dist. Ex. 133 at p. 7; Parent Ex. HH). Previous attempts at identifying an appropriate strategy to address the student's behaviors in sixth grade were not successful, as evidenced by the number of disciplinary infractions in the record (Parent Ex. D). The FBA evaluator used information in the record to develop a recommendation which addressed the behaviors in the environments in which they were likely to occur. I find that his recommendation of a one-to-one aide in these settings was appropriate. An aide would provide structure, which would decrease the likelihood of occurrence of inappropriate behaviors. Utilizing time away from the aide as a reinforcement would capitalize upon the student's desire for independence, a priority identified by respondent's parent advocate, who reported that the student wanted to be independent (Dist. Ex. 180 at p. 3). Fading of the aide would allow the student to develop an understanding of the consequences of his behaviors, an area of understanding identified as difficult for the student (Dist. Ex. 133 at p. 5).

Petitioner also asserts that the impartial hearing officer erred to the extent that he directed it to specifically retain the student's vision therapy service provider (optometrist), provide related transportation to his office, and reimburse him for the cost of increasing his liability insurance to the amount requested by petitioner. Respondent has the right to challenge a change in her son's vision therapy if she believes that he would receive less adequate vision therapy as a result of the change (see Application of a Child with a Disability, Appeal No. 97-86; Application of a Child with a Disability, Appeal No. 95-81). However, her preference for a particular related service provider is not determinative (Application of a Child with a Disability, Appeal No. 97-86; Application of a Child with a Handicapping Condition, Appeal No. 91-19; Application of a Child with a Disability, Appeal No. 94-12).

In February 2006 petitioner submitted an agreement to the optometrist which set forth, among other things, transportation reimbursement rates and a condition requiring the optometrist to produce a valid certificate of liability insurance prior to the administration of vision therapy services (Dist. Ex. 183 at p. 2). Without a signed agreement before its CSE, petitioner's March 28, 2006 IEP recommended that respondent's son receive vision therapy services from the optometrist once a week for 50-minute sessions at a special location, for a period of six to seven months (Dist.

Ex. 180 at p. 2). Petitioner does not challenge the provision of vision therapy services to respondent's son. Rather petitioner seeks reversal of the impartial hearing officer's determinations directing it to pay for related transportation and liability insurance costs for this particular optometrist, on the ground that it has the discretion to locate and retain an appropriately certified or licensed service provider.

State regulations require related services to be provided by individuals with the appropriate certification or license in each area of related service (8 NYCRR 200.6[b][3]). Petitioner, in its discretion, may select qualified school district employees or contract with qualified independent providers to provide related services to its students (Application of a Child with a Disability, Appeal No. 97-86; Application of a Child with a Handicapping Condition, Appeal No. 90-4). I find that the impartial hearing officer erred when he directed petitioner to retain a particular optometrist and pay insurance expenses for that optometrist and transportation. Petitioner is advised that, consistent with the March 28, 2006 IEP, it must provide for the student to have access to a qualified vision therapy provider as part of its program to appropriately address the student's needs.

Respondent did not demonstrate that her son was not offered a FAPE for the 2005-06 school year. Moreover, the record shows that respondent did not request private placement in either of her impartial hearing requests (IHO Exs. 1; 9). The impartial hearing officer exceeded his authority in sua sponte directing petitioner to pay for a private school placement for the student in the absence of any evidence in the record demonstrating that such a placement was appropriate.

Petitioner concedes that the student's annual review meeting to develop an IEP for the 2006-07 school year had not yet been conducted at the beginning of the school year (Tr. p. 1843) and does not appeal the impartial hearing officer's findings for the 2006-07 school year (*id.*). Given petitioner's concession, I will not disturb the impartial hearing officer's conclusion on this issue despite evidence that two CSE meetings were scheduled, on June 8, 2006 and on September 14, 2006, which did not go forward due to the apparent lack of availability of respondent (Tr. pp. 1433-34; 1679). I do note, however, that it is petitioner's affirmative obligation to offer the student a FAPE (20 U.S.C. § 1412[a][1]; Applications of a Child with a Disability and the Bd. of Educ., Appeal Nos. 04-050 and 04-052) and have an IEP in place prior to the beginning of each school year (34 C.F.R. § 300.323[a]). A CSE may proceed without a parent or guardian in attendance and the CSE may make decisions in the parent's or guardian's absence if a school district is unable to convince a parent or a guardian to attend, so long as the school maintains a detailed record of its attempts to secure a parent's participation (34 C.F.R. § 300.322[d]; 8 NYCRR 200.5[d][3]&[4]; Application of a Child with a Disability, Appeal No. 05-059; Applications of a Child with a Disability and the Bd. of Educ., Appeal Nos. 04-050 and 04-052).

Based upon a review of the record, I conclude that the 12:1+1 program in an integrated classroom recommended by petitioner's CSE was reasonably calculated to enable the student to receive educational benefit and that petitioner offered respondent's son a FAPE in the LRE during the 2005-06 school year (see Cerra, 427 F.3d at 194-95; Rowley, 458 U.S. at 206-07; Application of a Child with a Disability, Appeal No. 06-116; Application of a Child with a Disability, Appeal No. 06-112; Application of a Child with a Disability, Appeal No. 06-071). Accordingly, with the exception of the impartial hearing officer's order remanding this matter to petitioner's CSE to develop and implement an appropriate IEP for the student immediately (IHO Decision, p. 26), I will annul the impartial hearing officer's decision and orders.

Finally, as part of my review of the entire record I find it necessary to address the issue of cooperation between the parties. Respondent has threatened both petitioner's director of special education and the independent evaluator with administrative, civil, or criminal proceedings if they did not comply with her demands (Parent Exs. C-8 at p. 2; C-10 at pp. 2-3). A lack of cooperation has been evidenced in the behavior shown by respondent at CSE meetings. In addition to ending her telephonic participation in the March 28, 2006 CSE meeting prior to its completion and without explanation (Dist. Ex. 94), respondent refused to attend the October 17, 2006 CSE meeting because the school psychologist who supplied information for the March 2006 FBA was scheduled to attend (Tr. pp. 2001-02, 2035). Nonetheless, the actions undertaken by respondent reflect a breakdown in meaningful communication between respondent and petitioner which can only be improved by the parties' mutual attempts. Accordingly, I encourage respondent and petitioner to work positively for the benefit of the student.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that, but for the impartial hearing officer's order remanding this matter to petitioner's CSE to immediately develop and implement an appropriate IEP for the student, the impartial hearing officer's decisions and orders are annulled.

Dated: **Albany, New York**
 March 19, 2007

PAUL F. KELLY
STATE REVIEW OFFICER