The University of the State of New York
The State Education Department
State Review Officer

No. 07-010

Application of a CHILD WITH A DISABILITY, by his parents, for review of a determination of a hearing officer relating to the provision of educational services by the New York City Department of Education

Appearances:
Mayerson & Associates, attorney for petitioners, Gary S. Mayerson, Esq., of counsel

Hon. Michael A. Cardozo, Corporation Counsel, attorney for respondent, Andrew J. Rauchberg, Esq., of counsel

DECISION

Petitioners appeal from the decision of an impartial hearing officer which denied their request for reimbursement of tuition payments to the Rebecca School and which also denied their requests for funding for supplementary home-based special education itinerant teacher (SEIT) services and after school speech-language therapy. The appeal must be sustained in part.

Petitioners' son was four years old and attending the Rebecca School at the time the impartial hearing commenced on November 28, 2006 (see Parent Ex. B at p. 1; Tr. pp. 181, 207). At the time of the impartial hearing respondent was providing the child with six hours a week of home-based applied behavioral analysis (ABA) SEIT services (Tr. p. 39; Parent Ex. E at p. 1), and five hours a week of home-based speech-language services at a private agency (Tr. p. 128; Parent Ex. P at p. 1). The Rebecca School has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7]). The child's eligibility for special education services as a student with autism (see 34 C.F.R. § 300.8[c][1];[1] 8 NYCRR 200.1[zz][1]) is not in dispute in this appeal.

The child has significant global developmental delays (Parent Ex. K at p. 5), characterized by a severe receptive and expressive language disorder that includes verbal apraxia, a motor

[1] The Code of Federal Regulations (34 C.F.R. Parts 300 and 301) has been amended to implement changes made to the Individuals with Disabilities Education Act, as amended by the Individuals with Disabilities Education Improvement Act of 2004. The amended regulations became effective October 13, 2006. In this case, none of the new provisions contained in the amended regulations are applicable because all relevant events occurred prior to the effective date of the new regulations. However, for convenience, and unless otherwise specified, citations herein refer to the regulations as amended because the regulations have been reorganized and renumbered.

disorder of speech, as well as oral motor deficits that include an open mouth posture and significant drooling (Parent Ex. Y at pp. 1-2). The child's ABA special education teacher testified at the impartial hearing that the child's functioning was similar to that of a two year old child (Tr. p. 243). He required prompting for all self-care "adaptive living skills" (ADL) and was not toilet trained (Tr. p. 239). The child's mother described him as non-verbal (Tr. pp. 102, 128, 132, 167, 175). The child's home-based special education teacher and speech-language pathologist reported that the child needed to have a functional system of communication (Tr. pp. 59, 79-80). The child's occupational therapist at the Rebecca School reported that the child had challenges with processing sensory information and tended to seek sensory input through his mouth and through touch (Parent Ex. DD at p. 1). The occupational therapist also indicated that the child demonstrated weakness in gross motor planning (id.). The occupational therapist noted that when upset, the child would cry and mouth his hand and/or seek to grab other people's hair and chew on it (Parent Ex. DD at p. 2). These behaviors were consistent with the child's mother's description of behaviors the child demonstrated at home (Tr. p. 113) and other evaluations in the record (see Parent Exs. O; N; L; K; I).

Petitioners' son reportedly began receiving early intervention services when he was two and one-half years old (Tr. p. 137). He was initially referred to respondent's Committee on Preschool Special Education (CPSE) due to petitioners' concerns regarding his speech-language, gross motor, social-emotional, and cognitive development (Parent Ex. E at p. 1). A July 27, 2005 individualized education program (IEP) (Parent Ex. GG) is the earliest IEP included in the record and resulted from a CPSE review on that date (see Parent Ex. GG at pp. 1, 2). At that meeting, the CPSE determined that petitioners' son was eligible to receive special education services as a preschool child with a disability (id.). The CPSE also recommended a 12-month program and placement for the 2005-06 school year, when the child would still be in pre-school, in an 8:1+2 special class at the Marcus Avenue Early Childhood Development Program (Marcus) for five hours a day, five days a week (Parent Ex. GG at p. 1). The CPSE also recommended that the child's services be modified and that petitioners' son be provided with the related services of speech-language therapy, occupational therapy (OT), and physical therapy (PT), all provided individually, three times a week for 30 minutes (Parent Ex. GG at pp. 1, 2, 17). The CPSE also recommended a 1:1 paraprofessional and added home-based SEIT services for ten hours a week (Parent Ex. GG at pp. 1, 2). The child's mother testified that the child did not receive the recommended SEIT services until January 17, 2006, at which time he began to receive six of the ten recommended hours a week (Tr. pp. 121, 125). On October 25, 2005, respondent issued a related service authorization (RSA) for the child to begin to receive home-based speech-language services, which were provided at a private agency, in addition to his educational program at Marcus (Tr. p. 168; Parent Ex. P at p. 1).

Respondent's CPSE convened on October 28, 2005 (see Parent Ex. FF). At petitioners' request (Tr. p. 121), the CPSE added home-based individual speech-language therapy three times a week for 60 minutes to the child's program. These services were provided by a private agency (Tr. pp. 167, 173; Parent Ex. FF at pp. 1-2, 17-19).

A January 11, 2006 educational update prepared by a special educator at Marcus (Parent Ex. L at pp. 1, 4) reported the results of an assessment of the child using the Hawaii Early Learning Profile: Birth to Three Years (HELP birth-3). The assessment identified delays of greater than 33 percent in all areas of development including cognition, language, fine and gross motor, social, and self-help skills (Parent Ex. L at pp. 1-4). Specifically, social and language skills were each at the 18-month level (Parent Ex. L at pp. 2-3), cognitive skills were approximately at the 20 month

level (Parent Ex. L at p. 2), and adaptive skills were at the 20-month level (Parent Ex. L at p. 3). Fine motor skills were at the 15-month level and although no age level was reported for gross motor skills (id.), an earlier PT update written by the physical therapist at Marcus dated December 14, 2005 reported that assessment results based on the Hawaii Early Learning Profile checklist (HELP checklist), in conjunction with therapeutic handling and clinical opinion, indicated that the child's gross motor skills were at the 24-25 month level, which represented a greater than 33 percent delay in the performance of gross motor skills (Parent Ex. O at p. 3). A December 19, 2005, OT annual review report also indicated assessment results based on the HELP checklist and yielded a developmental age score at the 25-month level for fine motor skills (Parent Ex. N at p. 2), which was a more mature developmental age level than indicated in the January 11, 2006 educational update.

A speech-language pathologist at Marcus conducted a speech-language update on December 21, 2005 (see Parent Ex. M). Administration of the Pre-School Language Scale-4 by the evaluator yielded standard scores of 50 (percentile rank of one) for both receptive language and expressive language (Parent Ex. M at pp. 1-2). The test scores were reported to be indicative of receptive and expressive language delays greater than 33 percent (id.). According to the evaluation report, in the area of receptive language skills the child demonstrated ability to follow simple one-step directions when provided with verbal and gestural cues, to follow routines, to identify five to eight familiar items in a group and demonstrate appropriate use of some objects during play, to respond to his name, and to localize a sound source when the source was not in view (Parent Ex. M at p. 1). In the area of expressive language skills, the evaluation report described the child as communicating his wants and needs by pushing/pulling behaviors, gestures, and occasional vocalizations such as some consonant and consonant vowel (CV) sounds (id.). The update reported that if agitated he might cry, bite his own hand or pull hair (id.). It stated that if seeking attention from others, the child was noted to grab the person's hand and lead them to the desired item (id.). The update also noted oral motor weakness and weaknesses in pragmatic skills (Parent Ex. M at p. 2).

In preparation for a meeting of respondent's CPSE, the child's SEIT, who was then providing the child with six hours of ABA services at home, evaluated the child on March 7, 2006 and prepared an age-out report on March 9, 2006 (see Parent Ex. K). According to the evaluation, administration of the Developmental Assessment of Young Children (DAYC) yielded developmental age level scores of 18 months (65 percent delay) for cognitive development, 16 months (69 percent delay) for language development, 20 months (61 percent delay) for social-emotional development, 29 months (43 percent delay) for motor development, and 17 months (67 percent delay) for self-help skills (Parent Ex. K at pp. 1-3). The SEIT's evaluation also reported that at the time of the evaluation the child was functioning more than two years below age level (Parent Ex. K at p. 5). The SEIT recommended ongoing 1:1 special education services in order for the child to function in his classroom and real-life setting, continuous prompting throughout the day, a 1:1 paraprofessional in school, special education support in the form of ABA, and continued speech-language therapy, OT, and PT (id.).

The CPSE reconvened on March 24, 2006 (see Parent Ex. C at p. 1). It recommended an increase of two hours a week in the child's home-based speech services for a total of five hours a week (Tr. pp. 125-26, 173; Parent Ex. C at pp. 2, 29). The record indicates that in May 2006 staffing problems resulted in a reduction of the child's after school speech-language services to two hours a week, and that these after school services then increased in July 2006 to four hours a week (Tr. pp. 126-27, 165-66, 173).

A March 28, 2006 speech-language progress report by speech-language pathologists from the agency that provided the child with home-based speech-language services (see Parent Ex. I) stated that at that time, the child presented with receptive and expressive language impairments and oral motor deficits secondary to autism (Parent Ex. I at p. 1). As it related to the child's receptive language skills, the report stated that the child had difficulty following directions and identifying items on request, but was beginning to follow one-step directions and identify body parts (Parent Ex. I at pp. 1-2). As it related to the child's expressive language skills, the report described the child as lacking a mode of functional communication, except for the use of some basic signs to request food and toys (Parent Ex. I at p. 1). Consistent with the December 21, 2005 speech-language update prepared by a speech-language pathologist at Marcus (see Parent Ex. M), the progress report stated that the child's oral motor deficits were characterized by an open mouth posture and decreased control of oral secretions resulting in significant drooling (Parent Ex. I at p. 1; Parent Ex. M at p. 1). The progress report also noted the child's poor range of motion of the articulators used for speech production and that this affected his speech production ability (Parent Ex. I at p. 1). The progress report also advised that the use of PROMPT, a tactile kinesthetic approach that provides proprioceptive input to the oral musculature that aids with the needed "mapping" for the movements of the articulators during speech sound production, facilitated improvement in the child's articulation of basic consonant-vowel-consonant-vowel (CVCV) combinations (Parent Ex. I at pp. 1-2). Based on the child's receptive, expressive, and oral motor impairments, the speech-language pathologists recommended an increase in the child's home-based speech-language services from three individual 60-minute sessions a week to five such sessions a week (Parent Ex. I at p. 2).

On March 30, 2006, the child's special education teacher at Marcus prepared a statement for respondent requesting that petitioners' son continue to have access to a one-to-one (1:1) aide during the 2006-07 school year (Parent Ex. J). The report indicated that the 1:1 aide had been providing the child with significant and important benefits and that he required such a service to assist him during the 2006-07 school year (id.).

On May 10, 2006, respondent's Committee on Special Education (CSE) convened to develop the child's IEP for the 2006-07 school year when he would be in kindergarten (Parent Ex. B at p. 1). The CSE recommended 12-month services in a special 6:1+1 class in a specialized school in District 75 (Parent Ex. B at p. 2) due to the child's "extreme cognitive and language delays" and his tendency to exhibit self-injurious behaviors and aggression towards others (Parent Ex. B at pp. 20-21). The CSE also recommended related services in a separate location which included individual speech-language therapy three times a week for 30 minutes, individual OT two times a week for 30 minutes, and individual PT two times a week for 30 minutes (Parent Ex. B at p. 22). The CSE also recommended that petitioners' son be provided with a full-time crisis management paraprofessional in the classroom (id.) and that the child participate in alternative assessment because his extreme cognitive delays would "preclude participation in standardized testing" (id.). The CSE recommended that with adult supervision the child could participate in lunch, assemblies, trips and all other school activities (id.). The IEP provided that the recommended 12-month program would begin September 2006 and be for a one-year period (Parent Ex. B at pp. 1, 2).

Both petitioners attended the May 10, 2006 CSE meeting, which lasted for "an hour, hour and a half" (Parent Ex. B at p. 2; Tr. p. 116). The child's mother indicated that the major topic of discussion at the CSE meeting was the type of placement that would be good for the child (Tr. p. 116). In response to questioning at the impartial hearing, the child's mother indicated that there

was no discussion of particular sites and that she asked "where" the CSE was recommending placement for her son (Tr. p. 98). She also testified that she was told that respondent would mail her a paper and that she would have a booklet (Tr. pp. 98, 117, 146). She also testified that the district representative at the CSE meeting gave her his name and telephone number for her to call him regarding the child's placement (Tr. pp. 99, 117).

Subsequent to the May 10, 2006 CSE meeting petitioners visited a number of schools, including public schools and approved private schools (Tr. pp. 101-02). Respondent notified petitioners by letter of a specific placement site, PS 255 at School 16 (Tr. pp. 103, 105; Parent Ex. X). The child's mother visited that school on June 9, 2006, but for a number of reasons concluded that it was not appropriate for her son (Tr. pp. 103, 148-49). Petitioners communicated to respondent their rejection of the school and they received another letter from respondent which identified a second school (Tr. pp. 103, 105-06). The child's mother called that school and spoke with two persons on the telephone (Tr. pp. 104, 106-07, 150, 151). Based on the information obtained during that conversation, she concluded that the second school was inappropriate for her son (Tr. pp. 104, 150-51).

The child's mother also testified that she called the district representative from the May 10, 2006 CSE meeting to discuss the child's placement and advised him that she had looked at schools, that she had found a school that she thought would be appropriate for her son, and that the school was the Rebecca School (Tr. pp. 98-100, 117). The record does not indicate the date of the call and the child's mother testified that she "might have called him twice" (Tr. p. 98). During that telephone call, the district representative asked the child's mother to provide him with a list of the schools that she had looked at (Tr. p. 100). Petitioners did so, apparently sometime in the last two weeks of August (Tr. pp. 100, 102; see also Tr. pp. 102-03; Parent Ex. X). I note that the list of schools includes the school the child's mother visited on June 9, 2006, and also a statement that this school was not considered appropriate (see Parent Ex. X).

On September 5, 2006, petitioners submitted a due process complaint notice to respondent with respect to the appropriateness of the program offered to the child for the 2006-07 school year; including summer 2007 (see Parent Ex. A; see also 20 U.S.C. § 1415[b][7][A]). Petitioners' due process complaint notice indicated that the IEP developed at the May 10, 2006 CSE meeting was defective for a number of reasons including that no general education teacher, social worker, or educational evaluator attended that meeting; that respondent "failed to maximize exposure to general curriculum"; that parts of the IEP were copied from an earlier, preschool IEP; that the IEP did not offer individual parent training and counseling; that its goals and objectives were "unduly ambiguous," "insufficiently challenging," and "not objectively reasonable"; and that present levels of performance were not properly assessed, were not reflective of the student, and were "too vague and sparse" (Parent Ex. A at p. 2). Petitioners asserted that the May 10, 2006 IEP was the product of predetermination; that the child's "placement was not properly recommended, offered, and identified at the IEP [sic]"; and that a Functional Behavior Assessment (FBA) and Behavioral Intervention Plan (BIP) "should have been developed" (id.). The notice also indicated that services from the child's 2005-06 IEP had been "grossly unfulfilled" (id.).

Petitioners' due process complaint notice stated that they sought "prospective, declaratory, compensatory and remedial relief, and other appropriate relief deemed appropriate" and "reimbursement … to the extent that they incur costs and expenses attempting to provide an appropriate educational program for [their son]" (Parent Ex. A at p. 1). It stated that "[f]or 2006-07," petitioners' son was attending the Rebecca School and was also receiving six hours a week of

individual SEIT services and four hours a week of speech-language therapy, and indicated that this was less than the amount set out in his previous IEP (Parent Ex. A at p. 2). The due process complaint notice sought reimbursement for tuition at the Rebecca School, 10 hours a week of SEIT services, and additional group speech-language therapy (Parent Ex. A at p. 3). It also included a specific request for "a compensatory award as a result of grossly unfilled IEP mandates from [the] 2005-06 [school year]" (Parent Ex. A at p. 2; see also Parent Ex. A at p. 3)[2]

The impartial hearing officer was appointed on October 3, 2006 (IHO Decision at p. 2). The impartial hearing was scheduled for October 16, 2006 during the resolution period in order to determine the child's pendency placement (id.). At that time, petitioners requested the continuation of the after school SEIT and speech-language services which were set forth in the earlier IEP dated March 24, 2006 (see Parent Ex. C), that such services be provided as of the time their due process compliant notice was filed on September 5, 2006, and that petitioners be reimbursed for their payment for any such services (Tr. pp. 4-5). Petitioners did not request the continuation of any other services during the pendency of the impartial hearing as they had unilaterally enrolled their son in the Rebecca School (Tr. p. 5). Respondent's representative agreed to petitioners' specific request for pendency services (id.). The impartial hearing officer issued an interim order dated October 17, 2006, which memorialized the agreement of the parties and ordered respondent to provide the child with ten hours a week of home-based SEIT services and five hours a week of home-based speech-language services, effective September 7, 2006, the date respondent received petitioners' due process demand, through the duration of the proceedings (IHO Interim Decision at p. 3). The impartial hearing officer also ordered respondent to reimburse petitioners for any such services they had already provided upon receipt of appropriate evidence of payment (id.).

The impartial hearing commenced on November 14, 2006, and concluded on November 28, 2006. In a "corrected decision" dated December 28, 2006 (see IHO Decision at p. 20), the impartial hearing officer determined that neither a regular education teacher, nor a social worker, nor an educational evaluator was required to attend the May 10, 2006 CSE meeting (IHO Decision at pp. 8, 9). The impartial hearing officer found "no merit" to petitioners' claim that respondent failed to maximize exposure to the general curriculum (IHO Decision at p. 8). She also concluded that information that might have been copied from previous IEPs reflected information in relevant documents provided to the May 10, 2006 CSE meeting and that it could be expected that certain student information could remain the same during dates "close in time" (IHO Decision at pp. 9-10). The impartial hearing officer concluded that parent training and counseling did not need to be on the IEP. She also found that respondent's witness testified sufficiently that such training was a part of respondent's program and that petitioners provided no contrary testimony (id.). The impartial hearing officer further found that the goals and objectives on the IEP were "generally clear and specific," and "appropriate for the levels at which [the child] was assessed," and that they provided "adequate guidance to the child's teachers and providers" and addressed all relevant areas of need (IHO Decision at pp. 10-11). She also concluded that the child's present levels of performance on the IEP were adequate (see IHO Decision at p. 11). The impartial hearing officer concluded that there was no reason for an FBA or BIP, as the information in the evaluations and

[2] Prior to their September 5, 2006 due process complaint notice, petitioners had written respondent on June 11, 2006 stating that "with the end of the [2005-06] school year approaching, [their son's] IEP service mandates [were] far from being fulfilled" (Tr. pp. 128-29; Parent Ex. F). Petitioners' June 11, 2006 letter stated that they intended to seek reimbursement for their expenditures in attempting to secure the "fulfillment" of the IEP, and requested a proposal from respondent to compensate them for the hours that were not provided (Parent Ex. F). The record provides no information with respect to any response from respondent to this letter.

on the IEP indicated that "the nature of the child's behavior [was] understood" and "[was] being effectively addressed" (IHO Decision at p. 14).

The impartial hearing officer also concluded that the May 10, 2006 CSE had identified the child's placement at the CSE meeting, a site had been offered, petitioners had refused that site, another site was offered, and petitioners had not shown that they were harmed by the failure to identify a site at the CSE meeting (IHO Decision at p. 15). She also concluded that while petitioners did not like either site, they had not requested a CSE meeting, had not shown that either site was not in accordance with the IEP's recommendation or that it had not met particular regulations, and that there was no evidence that the offered sites would not have met the child's needs (id.).

With one exception, the impartial hearing officer concluded that petitioners had not shown that the IEP was predetermined and that the record indicated that the IEP reflected child-specific information and an appropriate placement (IHO Decision at p. 11). The impartial hearing officer concluded that the record showed that the amount of speech-language services provided to petitioners' son was not based on the child's individual needs but was a standard amount that did not vary (IHO Decision at p. 10). She also concluded that petitioners' son had "severe speech and language delays," and that the level of speech and language services did not meet those needs (IHO Decision at pp. 11-12).

The impartial hearing officer also found that except for the amount of speech-language therapy offered to the child, petitioners had not met their burden to show that the "overall program" recommended by the CSE was inappropriate (IHO Decision at p. 16). She indicated that petitioners "did not submit any allegation, evidence or testimony relative to the program recommended by the May 10, 2006, CSE and how it might be deficient," and concluded that therefore there was "no basis" for determining that the child needed other additional services after school (id.).

The impartial hearing officer further found that petitioners did not meet their burden of proof to show that the Rebecca School was an appropriate placement for their son (IHO Decision at pp. 16-18).

With respect to petitioners' request for compensatory services, the impartial hearing officer concluded that petitioners' son had not received the amount of SEIT services and speech-language services that were provided for in his 2005-06 IEP (IHO Decision at p. 18). She determined that the child should receive seven hours a week of SEIT services for the 2006-07 school year and 40 hours of speech-language therapy over the course of that school year (id.).

During the impartial hearing, petitioners had requested reimbursement for certain speech-language therapy provided to their son in September and October 2005. The impartial hearing officer determined that this request fell outside of petitioners' due process complaint notice and did not award the requested payment (IHO Decision at p. 19). During the impartial hearing, petitioners also requested that an assistive technology assessment be performed. The impartial hearing officer concluded that this request was also outside of petitioners' due process demand (id.). Therefore, she did not address the matter on the merits and referred it to respondent's CSE to be considered within 30 days of the date of her decision (IHO Decision at pp. 19, 20).

Petitioners appeal on a number of grounds and argue that a State Review Officer should order tuition reimbursement and payment for the child's continued attendance at the Rebecca School for the 2006-07 school year and the pendency level of SEIT and speech-language services for the 2006-07 school year. While they have withdrawn a number of their contentions raised at the impartial hearing, petitioners continue to assert on appeal that respondent's May 10, 2006 IEP was deficient. In particular, they argue that respondent had failed to provide their son with access to the general curriculum to the "maximum extent appropriate"; that no individual parent training and counseling was recommended or offered on the IEP; that the goals and objectives on the IEP were "unduly vague, insufficiently challenging and not objectively measurable"; that an FBA and BIP were required; and that the "site" of the child's program should have been developed and offered at the CSE meeting with the "full participation of parents as equal members of the IEP team" as a part of the placement and program determination process.

Petitioners also maintain on appeal that respondent's recommended program is "predetermined." In particular, petitioners argue that respondent's District 75 6:1+1 autism program offered to the child "is a cookie-cutter, one size fits all program and placement that is the only placement and program offered when a school age child has been diagnosed with autism" and asserts that "no other program was available to be considered" (Pet. ¶ 18). Petitioners also seek a determination that the impartial hearing officer's conclusion that respondent provided their son with an inadequate level of speech-language therapy (see IHO Decision at pp. 11-13) amounted to a deprivation of free appropriate public education (FAPE), that respondent's recommended amount of speech-language therapy was "the by-product of impermissible predetermination," and that the amount of speech-language therapy recommended on the IEP was inconsistent with the requirements of 8 NYCRR 200.13(a)(4). Petitioners also appeal the impartial hearing officer's finding that their son's placement at the Rebecca School was not an appropriate placement and that the child's placement there should be supplemented by the amount of SEIT and speech-language therapy provided to the child under pendency. Petitioners also claim that equitable considerations do not preclude or diminish petitioners' requested tuition reimbursement award.

Respondent argues in support of the impartial hearing officer's determination regarding the adequacy of the IEP and the inappropriateness of petitioners' placement and argues that equitable considerations do not support an award of tuition reimbursement. Respondent has not appealed the impartial hearing officer's determination to grant additional services to petitioners' son. An impartial hearing officer's decision is final and binding upon the parties unless appealed to the State Review Officer (20 U.S.C. § 1415[i][1][A]; 34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[j][4][v]). Consequently, this part of the decision is final and binding and I do not reach the issue of the propriety of that determination (Application of the Bd. of Educ., Appeal No. 05-092; Application of a Child with a Disability, Appeal No. 04-024; Application of a Child with a Disability, Appeal No. 03-108; Application of a Child with a Disability, Appeal No. 02-100; Application of a Child with a Disability, Appeal No. 02-073).

The central purpose of the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482)[3] is to ensure that students with disabilities have available to them a FAPE (20 U.S.C. § 1400[d][1][A]; see Schaffer v. Weast, 126 S. Ct. 528, 531 [2005]; Bd. of Educ. v. Rowley,

[3] Congress amended the IDEA, effective July 1, 2005 (see Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647 [2004] [codified as amended at 20 U.S.C. § 1400, et. seq.]). Since the relevant events at issue in this appeal occurred after the effective date of the 2004 amendments, the new provisions of the IDEA apply and citations contained in this decision are to IDEA 2004, unless otherwise specified.

458 U.S. 176, 179-81, 200-01 [1982]; Frank G. v. Bd. of Educ., 459 F.3d 356, 371 [2d Cir. 2006]). A FAPE includes special education and related services designed to meet the student's unique needs, provided in conformity with a written IEP (20 U.S.C. § 1401[9][D]; 34 C.F.R. §§ 300.17 and 300.22; see 20 U.S.C. § 1414[d]; 34 C.F.R. § 300.320). "The core of the statute" is the collaborative process between parents and schools, primarily through the IEP process (see Schaffer, 126 S. Ct. at 532). 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 parent, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parent were appropriate, and equitable considerations support the parent's claim (Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359 [1985]; Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). In Burlington, the court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (Burlington, 471 U.S. at 370-71). "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 developed a proper IEP" (Burlington, 471 U.S. at 370-71; Application of a Child with a Disability, Appeal No. 06-121; see 20 U.S.C. § 1412[a][10][C][ii]).

The first step is to determine whether the district offered to provide a FAPE to the student (see Mrs. C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]). 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, 427 F.3d at 192). While school districts are required to comply with all IDEA procedures, not all procedural errors render an IEP legally inadequate under the IDEA (Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). 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]; see also 34 C.F.R. § 300.513[a][1]). Under the IDEA, if a procedural violation is 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]). 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]; see also 34 C.F.R. § 300.513[a][3]; Matrejek v. Brewster Cent. Sch. Dist., 2007 WL 210093, at *2 [S.D.N.Y. Jan. 9, 2007]).

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 v. Florida Union Free Sch. Dist., 142 F.3d 119, 130 [2d Cir. 1998]), 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]). The IDEA, however, does not require school districts to develop IEPs that maximize the potential of a student with a disability (Rowley, 458 U.S. at 197 n.21, 199; see Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). 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, 300.116; 8 NYCRR 200.6[a][1]). The burden of persuasion in an administrative hearing challenging an IEP is on the party seeking relief (see Schaffer, 126 S.

Ct. at 537 [finding it improper under the IDEA to assume that every IEP is invalid until the school district demonstrates that it is not]).

An appropriate educational program begins with an IEP which accurately reflects the results of evaluations to identify the student's needs, establishes annual goals related to those needs, and provides for the use of appropriate special education services (Application of the Bd. of Educ., Appeal No. 06-076; Application of a Child with a Disability, Appeal No. 06-059; Application of the Bd. of Educ., Appeal No. 06-029).

Petitioners assert that respondent failed to offer their son access to the general curriculum to the maximum extent appropriate. The impartial hearing officer indicated that petitioners failed to provide sufficient evidence to show that this argument has merit. I agree.

The IDEA and the Regulations of the Commissioner of Education provide that an IEP must, inter alia, include a statement of present levels of academic achievement and functional performance, including a description of how the child's disability affects his or her involvement and progress in the general curriculum (20 U.S.C. § 1414[d][1][A][i][I][aa]; 8 NYCRR 200.4[d][2][i][a]; see also 34 C.F.R. § 300.320[a][1][i]). The IDEA and state regulations also require that the IEP include measurable annual goals, including academic and functional goals, designed to meet the child's needs arising from his or her disability, to enable the child to be involved in and progress in the general curriculum (20 U.S.C. § 1414[d][1][A][i][II][aa]; 8 NYCRR 200.4[d][2][iii][a][1]; see also 34 CFR § 300.320[a][2][i][a]). For a student who takes a New York State alternative assessment and for each preschool student with a disability, the state regulations provide that "the IEP shall include a description of the short-term instructional objectives and/or benchmarks that are the measurable intermediate steps between the student's present level of performance and the measurable annual goal" (8 NYCRR 200.4[d][2][iv]; see also 34 C.F.R. § 300.320[a][2][ii]). The IDEA and state regulations also provide that "the IEP shall indicate the recommended special education program and services that will be provided for the child to be involved and progress in the general education curriculum (20 U.S.C. § 1414[d][1][A][i][IV][bb]; 8 NYCRR 200.4[d][2]v][a][2]; see Schied v. Bd. of Educ. of Penfield Cent. Sch. Dist., 2006 WL 2927875, at *5 [W.D.N.Y. Oct. 12, 2006]; see also 34 C.F.R. § 300.320[a][4][ii]).

In this case, the child's present levels of performance were adequately described in the May 10, 2006, IEP. The IEP accurately stated that petitioners' son presented with significant expressive and receptive language impairments as well as oral motor deficits, secondary to a diagnosis of autism (Parent Exs. B at p. 3; I at p. 1). In addition the IEP indicated that the child lacked a form of functional expressive communication, with the exception of some modified basic signs (id.). The IEP also noted that the child's social skills were at the 20-month level (Parent Exs. B at p. 4; K at p. 3). The child was described as able to seek assistance when he had difficulty by taking an individual's hand and providing an utterance (id.). In addition, the IEP indicated that the child responded to frustration by crying, biting his hand, or pulling hair (id.). The IEP also indicated that the child preferred to play independently but also allowed an adult to join (id.). The IEP stated that the child demonstrated motor skills at the 29-month level (Parent Exs. B at p. 5; K at p. 3). Fine motor skills were reported to be at the 25-month level (Parent Exs. B at p. 6; N at p. 2). In addition, the IEP noted that the child demonstrated sensory seeking behaviors that included biting his hand and mouthing hair and fuzz (Parent Exs. B at p. 6; L at p. 1; N at p. 1). It properly identified gross motor concerns involving balance and body tone (Parent Exs. B at p. 7; O at pp. 2-3)

The May 10, 2006 IEP stated that academically the child required a high student to staff ratio that would continually provide verbal prompts and would refocus him for learning (Parent Ex. B at p. 3). The IEP stated that the child needed "a highly structured environment with 1:1 instruction to perform fine motor tasks," and that tasks needed "to be broken down into small steps with reinforcers present for optimal performance" (Parent Ex. B at p. 7). The IEP accurately described the child's emotional management needs and recommended that they be addressed through modeling, reinforcement, and prompting of appropriate classroom behavior and a full time paraprofessional (Parent Ex. B at pp. 4, 22). It correctly indicated the child's need for sensory input and a sensory diet to address his sensory seeking behaviors, which included biting his hand and mouthing fuzz (Parent Exs. B at p. 6; L at p. 1; N at p. 1; O at p. 1). It recommended a 12-month placement in an autism special class in a specialized school district with a student to staff ratio of 6:1+1 to address the child's global, significant needs (Parent Ex. B at pp. 1, 2, 3-7, 20, 21, 22; see also Parent Exs. O, N, L, K, I, J). The IEP also provided the child with speech-language therapy, OT, and PT (Parent Ex. B at p. 22).

The IEP's goals matched all relevant areas of the child's significant needs including daily adaptive living skills, gross motor skills, fine motor skills, sensory processing, oral motor skills, expressive language skills, receptive language skills, pragmatic language skills, social skills and emotional skills (see Parent Ex. B at pp. 8-19; see also Parent Exs. O; N; L; M; K; I; J).

Because of the child's significant and multiple needs, the May 10, 2006 CSE determined that petitioners' son would participate in alternative assessments (Parent Ex. B at p. 22). The IEP therefore included appropriate short-term instructional objectives or benchmarks (see 8 NYCRR 200.4[d][2][iv]; see also 34 C.F.R. § 300.320[a][2][ii]). The IEP included a series of appropriate short-term instructional objectives relating to adaptive living skills including toileting and communicating the need for toileting, as well as hand washing and teeth brushing (Parent Ex. B at pp. 8, 19). It also included a series of appropriate short-term gross motor instructional objectives in order to improve the child's strength and balance relating to a variety of specific situations within the environment (Parent Ex. B at p. 9). The child's sensory processing goal was addressed by specific short-term instructional objectives relating to particular vestibular, tactile, and proprioceptive input, and pre-academic tasks which included imitating vertical and horizontal lines, making circular strokes, snipping paper, and assembling a three-piece form board puzzle (Parent Ex. B at p. 10). The IEP addressed the child's oral motor and feeding goals through specific short-term instructional objectives including the imitation of various lip and tongue movement patterns, the awareness of and reaction to drooling, bite and chewing patterns for lateralizing food from one side of the mouth to the other, lip closure to prevent food loss from the child's mouth, and the production of vowels and consonant-vowel combinations for speech (Parent Ex. B at pp. 12, 16). Oral motor short-term instructional objectives included jaw stability and lip closure, as well as tongue mobilization (Parent Ex. B at pp. 12, 15). The IEP included a number of short-term receptive language skills and instructional objectives including appropriate eye contact, vocalizing needs, spontaneous vocalization during communication exchanges and social interaction, receptive vocabulary of nouns and verbs, and following one-step and two-step verbal directions (Parent Ex. B at pp. 13, 17). Short-term expressive language instructional objectives included initiation and response to gestures; imitation of vocal sounds; use of single words; use of nouns; production of target sounds in isolation, syllables, and single word utterances; requesting objects through the use of one word vocalizations; requesting objects via signs; and beginning a basic Picture Exchange Communication System (PECS) by matching pictures to objects (Parent Ex. B at p. 13, 16). Pragmatic language short-term instructional objectives included attending, the use of ritual greetings, symbolic play, and cooperative play (Parent Ex. B at p. 14). Social and

emotional short-term instructional objectives included involvement in teacher selected activities, expression of needs through gestures and words, controlling unacceptable impulses such as hair pulling and hand biting, eye contact when interacting with others, independently returning and initiating greetings, engaging in pretend play activities, and sharing toys (Parent Ex. B at pp. 18-19). The IEP also included a short-term instructional objective related to the cessation of inappropriate behaviors (see Parent Ex. B at p. 11).

Based on my review of the IEP, I concur with the impartial hearing officer that the IEP was adequate. While the child could not be placed in a regular education class or program, his IEP properly described his needs, accurately reported his present levels of performance, set out goals in all appropriate areas of need, included appropriate short-term instructional objectives for each goal as a part of his alternate assessment program, recommended an appropriate placement for kindergarten, recommended appropriate strategies and a full-time paraprofessional to address his behavior, and provided related services in appropriate areas.

I also agree with the impartial hearing officer's conclusion that the failure to have parent counseling and training on the IEP did not rise to the level of a denial of FAPE (see IHO Decision at pp. 8-9). At the impartial hearing, respondent's representative testified that parent training and counseling "is a part and parcel of District 75 programs for children who are classified with autism" (Tr. pp. 266, 267). Respondent's representative also agreed with petitioners' attorney during cross-examination that parent counseling and training was "embedded" in its program for such children (Tr. p. 272). In light of the testimony that respondent's recommended program for petitioners' son included parent counseling and training services, and that petitioners did not show that they would need parent counseling and training as set forth in the state regulations in order for their son to receive educational benefit from his recommended program, I find that respondent's failure to list parent counseling and training and the services that it would provide petitioners on the IEP did not deprive their son of a FAPE (see Application of a Child with a Disability, Appeal No. 06-102). I do agree with petitioners, however, that parent counseling and training should have been identified on the child's IEP.

I do not agree with petitioners' assertion that the May 10, 2006 IEP was inadequate because the annual goals and short-term instructional objectives were "unduly vague, insufficiently challenging, and not objectively measurable." As indicated above, the annual goals on the child's IEP were appropriate as they were relevant to the child's areas of significant need as indicated by evaluations in the record (see e.g., Parent Exs. O; N; L; M; K; I; J) and all areas of significant need had annual goals attached to them (see Parent Ex. B at pp. 8-19). I also find, however, that the annual goals were vague and not measurable (see Application of a Child with a Disability, Appeal No. 99-92; Application of a Child with a Disability, Appeal No. 98-75; Application of a Child with a Disability, Appeal No. 95-15). Nonetheless, most of the short-term instructional objectives in the IEP were behaviorally specific and measurable and clarified those annual goals by providing the requisite specificity to enable the child's teachers to understand the CSE's expectations. Therefore, a FAPE was not denied (Application of a Child with a Disability, Appeal No. 05-076; Application of the Bd. of Educ., Appeal No. 04-031; Application of a Child with a Disability, Appeal No. 03-102; Application of a Child with a Disability, Appeal No. 03-095; Application of the Bd. of Educ., Appeal No. 02-025; Application of a Child with a Disability, Appeal No. 99-92; Application of a Child with a Disability, Appeal No. 99-6; Application of a Child with a Disability, Appeal No. 98-75; Application of a Child with a Disability, 95-15).

Nor do I agree with petitioners' claim that the annual goals and short-term instructional objectives in the IEP were "insufficiently challenging." I first note that petitioners point to no particular annual goal or specific short-term instructional objective with respect to this assertion. Petitioners' son has global, significant delays. I have reviewed the record and find that the short-term instructional objectives in the May 10, 2006 IEP were appropriately related to the child's needs, and the accomplishment of such short-term instructional objectives would result in meaningful improvement in light of the child's disability.

I concur with the impartial hearing officer that respondent's CSE was not required in this case to conduct an FBA or to include a BIP as part of the child's May 10, 2006 IEP. My review of the record indicates that respondent's CSE was responsive to the behavioral information relative to the child and the child's needs in this area. The March 9, 2006 report for petitioners' son advised that he needed "continuous prompting" (Parent Ex. K at pp. 3, 4, 5) and that he "would benefit from a 1:1 paraprofessional while in school" (id. at p. 5). The March 30, 2006 written "request to continue" the child's 1:1 aide (Parent Ex. U) also stated that the child "currently requires a 1:1 aide to assist him during his school day" (id.). Moreover, that document explains that the considerable progress the child had made over the course of the year "can be attributed to his having a one on one aide" (id.). That evaluative document also stated that the child "learns best in a highly structured environment with minimal distractions, where tasks are presented individually" and that "(t)his can only be accomplished with an aide at [the child's] side"; that the child "has made cognitive language and social gains as a direct result of this individual attention"; and that "without an aide, [the child] would not have made the same amount of progress" (id.). The report also stated that during the brief periods when the aide has been absent the child's behavior "has regressed" and that in such circumstances he is "much more likely to engage in self-stimulatory behaviors that directly interfere with his learning" (id.).

The May 10, 2006 IEP provided that modifications for the child's needs included "a high student staff ratio to continually verbal [sic] prompt and refocus academic learning" and "modeling, reinforcement, prompting of appropriate classroom behavior" (Parent Ex. B at pp. 3, 4). As indicated above, the May 10, 2006 IEP also recommended that petitioners' son be provided with a full time 1:1 crisis management paraprofessional (Parent Ex. B at p. 22). Respondent's CSE further addressed the child's behaviors by including in the short-term instructional objectives in the May 10, 2006 IEP that the child would desist from certain behavior as a result of being refocused by his teacher (Parent Ex. B at p. 11). I find that by including the referenced short-term instructional objectives; by providing for modeling, reinforcement, and prompting of appropriate classroom behavior; and by recommending a full-time 1:1 crisis management paraprofessional on the child's IEP, respondent's CSE appropriately addressed the child's behavioral needs within the 6:1+1 classroom environment and in school related activities.

Petitioners' "predetermination" argument on appeal is that respondent's District 75 6:1+1 autism program that was offered to their son "is a cookie-cutter, one size fits all program and placement that is the only placement and program offered when a school age child has been diagnosed with autism," and they assert that "no other program was available to be considered." I note here that petitioners did not make this claim at the impartial hearing. Petitioners also did not provide any evidence at the impartial hearing that respondent's 6:1+1 program was the only type of program offered to children with autism as they claim here. Because petitioners failed to raise the claim below, I will dismiss the claim. Moreover, I note that the record does not support petitioners' claim. The record indicates that respondent's CSE considered multiple instructional environments for petitioners' son. In particular, the IEP states that a special class (12:1+1) in a

community school district was "considered insufficient to address [the child's] extreme cognitive and language delays" and also that a "residential placement" was "considered overly restrictive" (see Parent Ex. B at p. 21). I also agree with the impartial hearing officer that there was a significant amount of discussion at the May 10, 2006 CSE meeting about the child's placement, a fact that petitioners admit (see Tr. p. 116).

Further, the record shows that the educational program set forth in the IEP prepared for petitioners' son by respondent's CSE offered adequate programming to meet the child's individual needs (see Rowley, 458 U.S. at 181-82, 188-89, 201, 203-04, 210). The IEP included a recommendation for a full time 1:1 crisis management paraprofessional. Additionally, the annual goals and short-term instructional objectives reflected the specific needs of petitioners' son. Further, I do not agree with petitioners' claim that "predetermination" in respondent's recommended program is shown by a lack of "individual development of individual goals and objectives at the CSE meeting." The claim that the annual goals and short-term instructional objectives were not developed at the CSE meeting was not asserted at the impartial hearing (see e.g., Parent Ex. A; Tr. pp. 20-35, 281-86) and I therefore dismiss the claim on appeal. However, I do note that the record does not show that the CSE had decided on the child's annual goals and short-term instructional objectives before the CSE meeting. To the contrary, it indicates that annual goals and short-term instructional objectives were discussed at the May 10, 2006 CSE meeting, that the CSE determined to use the annual goals and short-term instructional objectives from the child's earlier IEP, and that petitioners had the opportunity to participate in the decision-making regarding annual goals and short-term instructional objectives but did not do so (see Tr. pp. 116-17, 117-19). I also agree with the impartial hearing officer that respondent's CSE discussed the child's needs as well as his placement at its meeting (see Tr. pp. 98-99, 116). Additionally, the impartial hearing officer correctly concluded that the record does not show that respondent prevented petitioners from participating in the CSE meeting or that questions or statements from them were disregarded.

The impartial hearing officer concluded that the amount of speech-language therapy recommended by the May 10, 2006 IEP was predetermined (IHO Decision at p. 11; Tr. p. 110). Respondent has not appealed this determination and therefore I do not review it.

Petitioners argue on appeal that the amount of speech-language therapy recommended in the IEP does not meet the requirements set forth in 8 NYCRR 200.13(a)(4) regarding the amount of language instruction to be provided to children with autism and that the recommended amount of speech-language therapy in the May 10, 2006 IEP did not offer a FAPE. I do not agree with petitioners that the recommendation by respondent's May 10, 2006 CSE to provide their son with individual speech-language therapy 30 minutes a day, three times a week (see Parent Ex. B at p. 22) amounted to a deprivation of a FAPE. I have reviewed the evaluative information in the record relating to the child's speech and language needs including, but not limited to, the December 21, 2005 speech-language update (Parent Ex. M), the January 11, 2006 educational update (Parent Ex. L at pp. 2-3), the March 7, 2006 report (Parent Ex. K at pp. 2-3, 4-5), and the March 28, 2006 speech-language therapy progress report (Parent Ex. I), all completed prior to the May 10, 2006 CSE meeting. I find that the May 10, 2006 IEP properly identified and described the child's speech and language needs when considering those evaluations (see Parent Ex. B at pp. 3, 4). As indicated above, the May 10, 2006 IEP established annual speech and language related goals and short-term instructional speech and language related objectives that were related to the speech and language needs in those evaluations (see Parent Ex. B at pp. 12, 13, 14, 15, 16, 17). The receptive, expressive, and oral motor short-term instructional objectives in the May 10, 2006 IEP were

specific and measurable and they were also consistent with the information in the speech-language therapy progress report closest in time to that CSE meeting (see Parent Ex. B at pp. 12, 13, 14, 15, 16; Parent Ex. I at pp. 1-2). I note also that the May 10, 2006 IEP reflected the speech and language related information in the child's March 7, 2006 report prepared by the child's SEIT and included annual goals and short-term instructional objectives which addressed, among other things, the speech and language needs set out in that report. I further note that 11 of the 23 goals on the May 10, 2006 IEP, and 42 of the 79 short-term instructional objectives in that IEP, addressed various speech, language, and oral motor needs of the child (see Parent Ex. B at pp. 8, 12-17). Further, petitioners have not shown that the speech and language related annual goals and short-term instructional objectives included in the May 10, 2006 IEP could be appropriately taught only by a speech-language therapist, and I find that this is not the case. Additionally, petitioners have not shown that the special education and related services and supplementary aids and services recommended by respondent's May 10, 2006 CSE for the child's 12-month 2006-07 IEP were insufficient for petitioners' son to advance appropriately toward attaining the speech and language related annual goals set forth in that May 10, 2006 IEP (see 20 U.S.C. § 1414[d][1][A][i][IV][aa]; 8 NYCRR 200.4[d][2][v][a][1]; see also 34 C.F.R. § 300.320[a][4][i]). Moreover, a social-emotional goal and corresponding short-term instructional objectives (see Parent Ex. B at p. 18) integrated the child's need to use speech-language skills in tasks that would encourage him to express himself with words and gestures, initiate greetings, and interact with others.

I find that respondent offered petitioners' son a comprehensive program to address his speech and language needs and that his educational program in this area was reasonably calculated to enable the child to receive educational benefits and would be likely to provide the child with meaningful progress in this important area of significant need. Further, the May 10, 2006 IEP included relevant and appropriate detail related to the child's needs and present levels of performance, and included a set of appropriate annual goals and short-term instructional objectives with respect to the balance of the child's cognitive, motor, social-emotional, and self-care areas of need (see Parent Ex. B at pp. 4, 5, 6, 7, 8, 9, 10, 11, 18, 19; Parent Exs. C; K). Therefore, and taking into account that respondent's annual goals and short-term instructional objectives were comprehensive and integrated across all of the child's relevant program domains, I find that respondent's recommendation to provide the child with individual speech-language therapy for 30 minutes, three times a week did not amount to a deprivation of a FAPE. I also note that petitioners have not provided any evidence to show that their son would not have been able to receive a meaningful educational benefit as a result of the educational program recommended by respondent's CSE at its May 10, 2006 CSE meeting. Moreover, and with respect to the overall program recommended by respondent's CSE, I agree with the impartial hearing officer's conclusion that petitioners have not shown that their son required after school ABA or special education teacher services in order to receive meaningful educational benefit in his kindergarten program. While such services would have provided petitioners' son with additional benefit (see Parent Ex. K), the record does not show that but for such services the child would not have received meaningful educational benefit in the kindergarten program recommended by respondent.

Finally, I concur with the impartial hearing officer that respondent's CSE recommended a program for petitioners' son at its May 10, 2006 CSE meeting (see IHO Decision at p. 15; Parent Ex. B at p. 1). I note here that petitioners attended that CSE meeting (Parent Ex. B at p. 2) and participated in it (Tr. pp. 98-99, 110, 116, 117). The record indicates that during the CSE meeting the "type of placement" for the child was discussed; that individual locations were not; that petitioners asked about the location the CSE was recommending for their child; that petitioners were advised that they would have a booklet, and an opportunity to look at different schools; that

feedback about program site was desired; and that petitioners were given a CSE member name and telephone number to call to further discuss their son's placement (Tr. pp. 98, 99, 116, 117, 146). After the CSE meeting petitioners were given the opportunity to see suggested specific sites and a site was offered to them (see IHO Decision at p. 15; Tr. pp. 103, 103-05, 106). I note further that petitioners agreed with respondent's representative at the impartial hearing that subsequent to the May 10, 2006 CSE meeting, petitioners "received two site offers with specific names of schools" for their son (Tr. p. 148). In particular, the record shows that respondent advised petitioners in writing of an initial recommended site, petitioners visited that location and rejected it, and thereafter respondent wrote petitioners and suggested another, different site location (see Tr. pp. 102-03, 105-06, 148-49; see Parent Ex. X). While petitioners obtained information regarding the second proffered program site by telephone, and on that basis concluded that it was inadequate for their son (Tr. pp. 104, 148, 105-07, 150-51), the record does not show that petitioners communicated their conclusion regarding this site, or any concerns about it, to respondent. Moreover, as the impartial hearing officer pointed out, petitioners could have requested a CSE meeting to discuss their concerns relating to the recommended placement location (see 8 NYCRR 200.4[e][4]). The record does not indicate that they did so. Based on these facts, and contrary to petitioners' claim, I find that they have not shown that they were deprived of an opportunity for meaningful parental participation in the development of the May 10, 2006 IEP (see Cerra, 427 F.3d at 192-94; Perricelli, 2007 WL 465211, at *10-*15).

Having so determined, the necessary inquiry is at an end with respect to petitioners' claim for tuition reimbursement and other relief with respect to the 2006-07 school year and there is no need to reach the issue of whether the Rebecca School was an appropriate placement and whether that program should be appropriately supplemented by additional SEIT and speech-language therapy (see M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d. Cir. 2000]; Walczak, 142 F.3d at 134; Application of a Child with a Disability, Appeal No. 03-058).

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

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the impartial hearing officer's decision is annulled to the extent that it found that parent counseling and training need not have been expressly included in the child's IEP.

Dated: **Albany, New York**
April 2, 2007

PAUL F. KELLY
STATE REVIEW OFFICER