



The University of the State of New York

The State Education Department State Review Officer

No. 07-015

Application of a CHILD WITH A DISABILITY, by her parent, 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: Hon. Michael A. Cardozo, Corporation Counsel, attorney for respondent, Steven D. Weber, Esq., of counsel

DECISION

Petitioner appeals from the decision of an impartial hearing officer, which found that respondent offered her daughter a free appropriate public education (FAPE)¹ for the 2006-07 school year and denied her request to be reimbursed for her daughter's tuition costs at the Seton Foundation for Learning (Seton) for the 2006-07 school year. The appeal must be sustained in part.

At the commencement of the impartial hearing on October 13, 2006, the student was 14 years old and attending Seton (see Tr. pp. 14-18, 25, 28). The Commissioner of Education has not approved Seton as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7). While attending Seton during the 2006-07 school year, the student received special education transportation, speech-language therapy and occupational therapy (OT) (Tr. pp. 14-15, 17-18; Parent Ex. J). The student is diagnosed with an

¹ 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.

autistic disorder and moderate mental retardation (Parent Ex. F at p. 4).² The student's most recent cognitive testing yielded a full scale IQ score of 40 (moderate mental retardation range) (*id.* at p. 2). The student's 2006-07 individualized education program (IEP) indicates that based upon teacher estimates, the student currently functions at the upper first to second grade level in math calculations and at the low first grade level in letter-word recognition (Parent Ex. D at p. 3). She exhibits significantly delayed receptive and expressive language skills, and she uses verbalizations, gestures and written language to communicate (Parent Exs. F at pp. 2-3; G at p. 1; Dist. Exs. 5, 8). Significant delays are also reported in all areas of the student's adaptive functioning, including communication, daily living and socialization domains (Parent Ex. F at p. 3). The student's classification and eligibility for special education services as a student with autism are not in dispute in this appeal (see 8 NYCRR 200.1[zz][8]; Tr. pp. 14, 28).

At the student's annual review on February 7, 2005, respondent's Committee on Special Education (CSE) developed her 2005-06 IEP, which noted the student's classification as a student with mental retardation (Parent Ex. C at p. 1). For the 2005-06 school year, the CSE recommended placement in a 12:1+1 special class in a community school with speech-language therapy, OT, adaptive physical education, and special education transportation (Tr. p. 18; Parent Ex. C at p. 1). The IEP noted that the student was easily distracted and could have difficulty following directions (Parent Ex. C at p. 3). In addition, the IEP indicated that she made progress academically, but still exhibited delays in multi-step problem solving, multiplication, division, and all areas of literacy, and required improvement in the areas of written language and listening comprehension (*id.*). To meet the student's academic management needs, the CSE recommended a small separate class that emphasized receptive and expressive language skill development; presenting new skills in a highly structured format; shortened assignments or breaking down assignments and tasks into smaller segments; clear, concise instructions provided in a multi-sensory approach; repetition and rephrasing; remediation for skills she had not yet mastered; and the opportunity to increase her vocabulary (*id.*).

With respect to the student's social and emotional performance, the 2005-06 IEP described her as a "well mannered, sweet girl" (*id.* at p. 5). The IEP noted that the student's language deficits affected her social and emotional development (*id.*). The CSE opined that the student's social and emotional needs could be met in a small classroom with a higher student-to-staff ratio (*id.*). The IEP also noted that the student's behavior "does not seriously interfere with instruction and can be addressed by the special education classroom teacher" (*id.*).

During the 2005-06 school year, the student's music teacher and science/mathematics teacher completed classroom evaluations dated January 23, 2006 (Dist. Ex. 10 at pp. 1-2). The music teacher rated the student's work habits and pre-vocational skills primarily in the "poor" range, with the exception of classroom test results, which she rated in the "fair" range (*id.* at p. 1). With respect to the student's social and emotional skills, the music teacher characterized the student as "sometimes" being defiant, cooperating with peers, and cooperating with authority figures (*id.*).

² I note that the record contains multiple duplicative exhibits. I remind the impartial hearing officer it is his responsibility to exclude evidence that he determines to be irrelevant, immaterial, unreliable or unduly repetitious (8 NYCRR 200.5[j][3][xii][c]).

She noted on the evaluation that the student "hardly ever" used "appropriate modes of communication to express her wants/needs" and "never" demonstrated "temper outbursts, explosive, [or] unpredictable behavior," and was "never" "restless" or "always up and on the go" (id.).

The student's science/mathematics teacher rated the student's work habits and pre-vocational skills primarily in the "fair" range, with the exception of her "ability to work independently," which he rated as "good," and her "classroom participation," which he rated as "poor" (id. at p. 2). With respect to the student's social and emotional skills, the science/mathematics teacher's ratings matched those of the music teacher, except that the science/mathematics teacher characterized the student as "never" using "appropriate modes of communication to express her wants/needs" and "hardly ever" being "inattentive" or "easily distracted" (id.). Both teachers commented on the student's lack of communication and increased refusal to "do anything," which she exhibited by shaking her head "no" (id. at pp. 1-2).

On January 25, 2006, the student's teacher of speech improvement (speech teacher) completed a progress report noting the student's continued receptive language, expressive language and social skills delays (Dist. Ex. 5). The speech teacher's report indicated that the student "is capable of using her voice" but often "refuses to communicate verbally in many settings" (id.). The speech teacher recommended continued speech-language therapy services for two 30 minute sessions per week in a 3:1 setting (id.).

On January 31, 2006, the student's occupational therapist completed a related service report summary which indicated that the student made "minimal" progress in OT and that her behavior had "dramatically changed from last year" (Dist. Ex. 6 at p. 1). The therapist recommended continued OT services for two 30 minute sessions per week in a 1:1 setting (id.).

On April 4, 2006, the student underwent a neuropsychological evaluation (Dist. Ex. 3 at p. 2). The evaluator administered the Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV) to the student, and petitioner provided information to the evaluator for the Vineland Adaptive Behavior Scales (Vineland) (id. at pp. 2, 4). The administration of the WISC-IV yielded the following composite scores (CS): verbal comprehension, CS 45 (<1st percentile); perceptual reasoning, CS 53 (<1st percentile); working memory, CS 50 (<1st percentile); processing speed, CS 50 (<1st percentile); and full scale, CS 40 (<1st percentile) (id. at pp. 3-4). The evaluator opined that the student's performance on the WISC-IV should be viewed with caution due to her limited verbalizations (id.). The evaluator described the student's overall performance as significantly delayed, although she performed "slightly" better on perceptual reasoning subtests and within the moderately delayed range in abstract, categorical reasoning ability and manipulating blocks into visuospatial configurations (id.).

The student's adaptive behavior as measured by the Vineland resulted in the following scaled scores (SS): communication domain, SS <20 (age equivalent 2 years, 7 months); daily living domain, SS <20 (age equivalent 3 years, 5 months); and socialization domain, SS 28 (age equivalent 2 years, 8 months) (id.). The evaluator noted that the student exhibited significant delays in all areas of adaptive functioning (id.). The evaluator recommended a small school setting with teachers experienced in dealing with autism and mental retardation, and supportive services such as OT and speech-language therapy, and she identified the need to address safety and

protection issues as well as social skills (id. at pp. 3-5). The evaluator commented that the student's social skill needs had not been adequately addressed and recommended participation in a social skills training group, or if a group was not available, then the social skills training should begin in an individual setting, in addition to parent training (id.).

On May 1, 2006, respondent's school psychologist interviewed petitioner to complete a social update (Dist. Ex. 12 at p. 1). The updated report noted that petitioner described her daughter as "increasingly isolated and avoidant" (id.).

On May 1, 2006, respondent conducted a functional behavioral assessment (FBA) of the student (Dist. Ex. 4 at p. 1). The evaluator reported that the student exhibited the following: avoidant behavior (non-verbal behavior, unwillingness to interact with others, requiring constant prompting/prodding to complete classwork); self-stimulatory behavior (arm flailing, teeth tapping, smiling/grimacing behaviors); ritualistic behavior; and repetitive behavior (no specific examples provided, but characterized as consistent with obsessive compulsive disorders) (id.). The evaluator documented that the student's handwriting skills appeared to regress since sixth grade and that she had become "increasingly avoidant" with respect to classroom tasks (id.). The FBA report stated that the evaluator attempted standardized testing with the student "to no avail" (id.). It also noted that compared to the student's limited verbal interaction observed in a small group setting during the 2005-06 school year, the student currently did not interact at all (id.). The evaluator recommended a program with "high levels of supervision and protection" with a "strong behavioral management component consisting of a token economy" (id. at p. 2). The evaluator also noted that the student needed life skills development and social skills training (id.).

On May 1, 2006, respondent's CSE convened to develop the student's 2006-07 IEP (Parent Ex. D at p. 1). The CSE changed the student's classification from mental retardation to autism and recommended placement in a 6:1+1 special class in a specialized school for the 2006-07 school year (id.). The CSE continued the same recommendations for speech-language therapy, OT, adaptive physical education, and special education transportation as set forth in the student's 2005-06 IEP (compare Parent Ex. C at pp. 1, 18, with Parent Ex. D at pp. 1, 15). The IEP documented that the student's social skills and communication skills regressed during the 2005-06 school year (Parent Ex. D at pp. 3-5). With respect to the student's social and emotional performance, the IEP noted that student's "poor social skills" resulted in "social isolation, reluctance to communicate, and ritualistic behaviors" (id. at p. 5). The CSE opined that the student's management needs could be met in a "small, highly structured, supportive environment" and noted that her behavior required "highly intensive supervision" (id.). The IEP also noted that the student's "observed classroom functioning reflects higher potential than evidence in formalized testing" and with 1:1 assistance the student could produce "meaningful classwork" (id. at p. 3).

By letter dated July 20, 2006, respondent sent petitioner a Final Notice of Recommendation notifying petitioner of the proposed placement in a 6:1+1 special class in a specialized school (Parent Ex. B). By letter dated July 29, 2006, petitioner advised respondent that the proposed placement was not appropriate (Parent Ex. A at p. 1). Petitioner's letter requested an impartial hearing alleging that respondent failed to offer her daughter an appropriate placement and notified respondent of her decision to place her daughter at Seton beginning September 2006 (id. at pp. 1-2). Petitioner's letter also requested transportation and provision of her daughter's related services (id. at p. 2).

At the impartial hearing, petitioner testified on her own behalf, cross-examined respondent's witnesses, and presented documentary evidence to support her contention that respondent's recommended placement in a 6:1+1 special class in a specialized school did not constitute the student's least restrictive environment (LRE)³ (Tr. pp. 14-42, 75, 102-11, 134; Parent Exs. A-K). Petitioner testified that respondent recommended the change in placement because her daughter "does not benefit from interaction with mainstreamed peers in the school setting" (Tr. p. 18). She testified that respondent's recommended placement would completely deprive her daughter of interaction with her nondisabled peers (Tr. pp. 20, 41). In addition, petitioner testified that the proposed placement in a 6:1+1 special class in a specialized school was inappropriate because the students in that class had "severe social and emotional needs" and required "intent [sic] individual programming, continual adult supervision and usually a specific behavior management plan for aggressive self-abusive behavior" (Tr. pp. 20-21).⁴ Petitioner testified that her daughter does not exhibit aggressive or self-abusive behavior and she does not present a threat to herself or to her teachers (Tr. p. 20).

In her testimony, petitioner noted that although the April 2006 neuropsychological evaluation recommended social skills training, respondent failed to consider it and, to date, has not adequately addressed the student's social skills needs (Tr. p. 21). She also testified that for an entire school year respondent failed to provide counseling or any other special education programs or services to address the student's observed regression (Tr. p. 22).

With respect to the unilateral placement at Seton, petitioner testified that her daughter now enjoys going to school and completes her homework without being asked (Tr. pp. 25-26). Seton is located on the grounds of a general education school (Tr. pp. 25, 33). Petitioner noted that her daughter has the opportunity to interact with her nondisabled peers on a daily basis at Seton in a "structured environment," as well as in the cafeteria, school trips, and sports (Tr. pp. 25, 41-42). Finally, petitioner testified that she has not made any tuition payments to Seton, nor has she applied for a loan through Seton to cover her daughter's tuition costs (Tr. pp. 26-27).

Respondent presented testimonial and documentary evidence at the impartial hearing (Tr. pp. 48-75, 76-124, 125-34; Dist. Exs. 1-12). Respondent's special education teacher testified that she taught the student during her sixth, seventh and eighth grade years in a 12:1+1 special class designated as a speech and language impaired program (Tr. pp. 49-50). She described her students as having severely delayed receptive and expressive language and functioning at a "high second

³ The least restrictive environment (LRE) under the Individuals with Disabilities Education Improvement Act of 2004 requires, in general, that

[t]o the maximum appropriate, children with disabilities, . . . , are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

(20 U.S.C. § 1412[a][5][A]; see 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.6[a][1]).

⁴ See 8 NYCRR 200.6[g][4][ii][a].

grade level" (Tr. p. 49). In 2005-06, the special education teacher's classroom contained "mostly 8th grade" students, including petitioner's daughter (Tr. p. 50).

The special education teacher observed a decline in the student's verbalization toward the end of her seventh grade year, as well as a decline in her grades and classwork (Tr. pp. 51-52). When she noticed the changes, she spoke to petitioner to determine whether any household issues were affecting the student's "communication skills, with her focusing on her classwork, her homework" (Tr. p. 52). Petitioner reported no changes in the student's household or family environment (*id.*). When the student returned to her classroom in September 2005 for eighth grade, the special education teacher testified that she "just kept an eye on her" and remained in close contact with petitioner (*id.*). During eighth grade, the special education teacher attempted to keep the student with "her friends" in an effort to provide her with peer tutoring (*id.*). She testified that the paraprofessionals in her classroom also provided assistance to the student (Tr. pp. 52-54). The special education teacher observed that the student was often "in her own world," would not focus on lessons, and required assistance to copy class notes (Tr. p. 54).

The special education teacher also testified that despite the observed changes in the student, she did not consider a "different program" for her during eighth grade because "she was going to be graduating in June" (Tr. p. 55). The special education teacher did, however, discuss with petitioner the option of a different program for high school throughout the 2005-06 school year, because she did not believe that the "high schools that were slotted for [the student]" would benefit her (Tr. pp. 55, 66-67, 72-73). Specifically, the special education teacher testified that the two high schools offering programs for students pursuing IEP diplomas were too large and that the student required a "more controlled, smaller" environment (Tr. pp. 56-58). She also testified that for high school, the option of a 15:1 classroom was not appropriate for the student because "[the student] does not benefit from interaction with mainstream peers in the school setting," which she based upon her observations of the student in her classroom (Tr. p. 59). She opined that the student needed to learn more "living skills" as opposed to academics, in order to "go on after high school" (Tr. p. 69).

In his decision, the impartial hearing officer found that respondent offered the student a FAPE for the 2006-07 school year, the student's 2006-07 IEP contained appropriate and meaningful recommendations, and the recommended placement in a 6:1+1 special class in a specialized school appropriately met the student's needs (IHO Decision at p. 11). The impartial hearing officer also found that petitioner did not fulfill her "equitable responsibilities" because she failed to visit the recommended placement in a timely manner (*id.*). Based upon these findings, the impartial hearing officer denied petitioner's request to be reimbursed for her daughter's tuition costs at Seton for the 2006-07 school year (*id.*).

Petitioner appeals the impartial hearing officer's decision denying her request to be reimbursed for the costs of her daughter's tuition at Seton for the 2006-07 school year. Petitioner asserts that respondent's recommended placement in a 6:1+1 special class in a specialized school does not offer her daughter an appropriate program in the LRE. Petitioner argues that respondent's recommended placement denies her daughter any opportunity to interact with her nondisabled peers, her daughter's needs do not require placement in a classroom for aggressive or self-abusive behaviors, and Seton offers her daughter an appropriate program in the LRE.

Respondent contends that the impartial hearing officer's decision should be upheld in its entirety.

The central purpose of the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) is to ensure that students with disabilities have available to them a FAPE (20 U.S.C. § 1400[d][1][A]; see Schaffer v. Weast, 546 U.S. 49, ___, 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 (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). The student's recommended program must also be provided in the 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 v. Fla. Union Free Sch. Dist., 142 F.3d 119, 132 [2d Cir. 1998]). 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]). 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 board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the 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; see 20 U.S.C. § 1412[a][10][C][ii]; 34 C.F.R. § 300.148[c]).

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

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.

377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if a procedural violation is alleged, an administrative officer may find that a 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]; 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]).

The IDEA "expresses a strong preference for children with disabilities to be educated 'to the maximum extent appropriate,' together with their nondisabled peers" (Walczak, 142 F.3d at 122). A FAPE must be provided to a child with disabilities in the "least restrictive setting consistent with the child's needs" (see Perricelli, 2007 WL 465211 at *1, citing Walczak, 142 F.3d at 122, 132). In addition, federal and state regulations require that districts ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services (34 C.F.R. § 300.115[a]; see 8 NYCRR 200.6[a][1]).

In determining an appropriate placement in the LRE, the IDEA requires that children with disabilities be educated to the maximum extent appropriate with children who are not disabled and that special classes, separate schooling or other removal of children with disabilities from the regular educational environment may occur only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily (20 U.S.C. § 1412[a][5][A]; see 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.6[a][1]; see also Bay Shore Union Free Sch. Dist. v. T., 405 F. Supp. 2d 230, 239-40 [E.D.N.Y. 2005]; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 144 [N.D.N.Y. 2004]; Walczak, 142 F.3d at 122). The Court in Walczak further noted that even when mainstreaming is not a "feasible alternative, the statutory preference for a least restrictive placement applies" (Walczak, 142 F.3d at 132, citing Sherri A.D. v. Kirby, 975 F.2d 193, 206 [5th Cir. 1992]). The placement of an individual student in the LRE shall "(1) provide the special education needed by the student; (2) provide for education of the student to the maximum extent appropriate to the needs of the student with other students who do not have disabilities; and (3) be as close as possible to the student's home" (8 NYCRR 200.1[cc]; see 34 C.F.R. § 300.116). Further, both state and federal regulations require that when considering a placement in the LRE, school districts place the child as close to his home as possible, unless the IEP requires some other arrangement (34 C.F.R. § 300.116[b][3],[c]; 8 NYCRR 200.4[d][4][ii][b]). Consideration is also given to any potential harmful effect on the child or on the quality of services that he or she needs (34 C.F.R. § 300.116[d]; 8 NYCRR 200.4[d][4][ii][c]). Federal and state regulations also require that school districts ensure that a continuum of alternative placements be available to meet the needs of children with disabilities for special education and related services (34 C.F.R. § 300.115; 8 NYCRR 200.6). The continuum of alternative placement includes instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions; and the continuum makes provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement (34 C.F.R. § 300.115[b]).

After reviewing the record, I disagree with the impartial hearing officer's conclusion that respondent offered the student a FAPE for the 2006-07 school year because the CSE's

recommended placement in a 6:1+1 special class in a specialized school does not offer the student an appropriate program in the LRE. For the reasons set forth more fully below, the record establishes that the CSE failed to consider whether the student's academic, social, emotional, and behavior needs could be met in a less restrictive environment than the recommended 6:1+1 special class in a specialized school and failed to consider the continuum of alternative placements and services in making its recommendation for the 2006-07 school year. I also find that respondent relied upon inadequate evaluative information to support its recommendation that the student required a 6:1+1 special class in a specialized school or that a more restrictive setting would appropriately address the student's needs. In addition, the student's 2006-07 IEP failed to address the student's identified social skills and communication needs and failed to provide for parent counseling and training in accord with the regulations of the Commissioner of Education pertaining to students with autism.

As described in the record, the student's special education providers observed regression in the student's academic, behavioral and social skills toward the end of seventh grade (Tr. pp. 22, 29, 32, 51-52, 54, 56-57, 72; Dist. Ex. 6; see Parent Ex. G at p. 1). According to the student's 2005-06 IEP developed in February 2005, the student's teachers described her as cooperative and eager to do work and noted that she displayed effort in the classroom (Parent Ex. C at pp. 4-6). The 2005-06 IEP indicated that the student articulated "well" when prompted and responded to positive reinforcement in the classroom (id. at pp. 4-5). At that time, the IEP noted that the student's behavior did not seriously interfere with instruction and could be addressed by the special education teacher (id. at p. 5). In February 2005, teacher observations characterized the student's academic level of performance in computation to be at a beginning third grade level and her decoding skills, as measured by class activities, at a second grade level (id. at p. 3).

In comparison to the 2005-06 IEP, the student's 2006-07 IEP reported that the student refused to communicate verbally in many settings, refused to follow directions and required adult assistance in order to complete even "minimal work" (Parent Ex. D at pp. 3-5). The 2006-07 IEP noted that the student demonstrated a regression in her social skills within the past year, which made her "very difficult to reach" (id. at p. 5). As of May 2006, the student required "highly intensive supervision" due to her behavior (id.). It was reported that efforts to assess the student's academic functioning were "futile" because of her anxiety and resistance to complete any tasks (id. at p. 3). Based upon teacher estimates, the IEP reported the student's calculation skills in the upper first grade to second grade level and her "letter-word" skills in the low first grade level, representing a decline in both academic areas from the levels reported in the 2005-06 IEP (compare Parent Ex. C at p. 3, with Parent Ex. D at p. 3).

The record indicates that in June 2005 the student's special education teacher observed changes in her ability to communicate, to focus on classwork and to complete work independently, as well as noticing a decline in the student's grades, and that these changes continued during the 2005-06 school year (Tr. pp. 51-52, 54). In January 2006, four of respondent's professional staff documented examples of the student's refusal to participate in instruction (Dist. Exs. 5, 6, 10). The record reflects that respondent did not consider any changes to the student's special education program and services during the 2005-06 school year (Tr. pp. 66-67). Aside from the use of peer tutors and additional assistance from paraprofessionals, the record is devoid of information regarding specific strategies or methods employed by the student's service providers during the 2005-06 school year to address her behavior so that she could benefit from instruction (Tr. pp. 52-

54). Notably absent from the record is any evidence that the CSE considered whether the student's academic, social, emotional, and behavior needs could be met in an environment less restrictive than the recommended 6:1+1 special class in a specialized school or whether the CSE considered the continuum of alternative placements and services before making its recommendation for the 2006-07 school year.

The record also indicates that respondent conducted a social history update and an FBA on May 1, 2006--the same day as the student's annual review to develop her 2006-07 IEP--in an effort to address the student's behaviors (Dist. Exs. 4, 12; see also Tr. p. 29). A review of the FBA report provides little, if any, meaningful information to identify the cause of the student's decline in performance or to provide sufficient guidance to develop a behavioral intervention plan (BIP) to address the student's special education needs.

An FBA is defined as "the process of determining why a student engages in behaviors that impede learning and how the student's behavior relates to the environment" (8 NYCRR 200.1[r]). An FBA includes, but is not limited to, "the identification of the problem behavior, the definition of the behavior in concrete terms, the identification of the contextual factors that contribute to the behavior (including cognitive and affective factors) and the formulation of a hypothesis regarding the general conditions under which a behavior usually occurs and probable consequences that serve to maintain it" (id.).

In this case, the FBA conducted by respondent characterized the student's behaviors as avoidant, self-stimulatory, ritualistic, and repetitive. The FBA report does not, however, identify the contextual factors that contribute to the behaviors, nor does it provide a hypothesis regarding the conditions under which the behaviors occur or the probable consequences that serve to maintain the behaviors. As acknowledged by the special education teacher, the student underwent "big changes" during eighth grade but did not "know what was going on, why this change happened" (Tr. pp. 56-57).

Without the appropriate information, the FBA does not provide a sufficient basis to support respondent's recommendation to place the student in a more restrictive setting. Respondent also was obligated to conduct an FBA when it became aware that the student's behavior impeded her learning, and therefore, respondent failed to conduct the FBA in a timely manner. In addition, respondent failed to adequately "consider the use of positive behavioral interventions and supports, and other strategies" to address the student's behaviors that interfered with her ability to obtain educational benefit from her special education program and services (34 C.F.R. § 300.324[a][2][i]; see also 8 NYCRR 200.4[d][3][i]) and failed to revise the student's IEP in a timely manner given the student's lack of expected progress toward her IEP goals (34 CFR § 300.324[b][1][ii][A]; 8 NYCRR 200.4[f]).

With respect to the student's communication skills, the student's special education teacher testified that the student's communication skills were "depressed" (Tr. p. 56). The student's speech teacher reported in January 2006 that although the student was observed to verbalize in other settings, she did not do so during speech-language therapy sessions (Dist. Ex. 5). The speech teacher recommended a "complete evaluation" of the student (id.). The record does not indicate whether the recommended speech-language evaluation occurred, and I find that due to the observed regression in her communication skills, a full speech-language evaluation is appropriate.

In the absence of adequate consideration of positive behavioral interventions and supports, an appropriate FBA, and a full speech-language evaluation, I find that respondent's CSE had neither sufficient nor appropriate information to support the conclusion that the student required a more restrictive placement for the upcoming school year.

In addition respondent's 2006-07 IEP failed to address the student's identified social skills needs. The April 2006 neuropsychological evaluation reported that the student's social skills needs had "not been adequately addressed" and recommended that the student participate in a social skills training group (Dist. Ex. 3 at p. 5). Although the 2006-07 IEP documents a regression in the student's social skills during the 2005-06 school year, the IEP does not specify how the student's social skill deficits will be addressed, nor does it contain annual goals or short-term objectives to meet this identified need (Parent Ex. D at p. 5).

Based upon the record, I also find that the proposed 6:1+1 special class would not adequately meet the student's communication skills and social skills needs. While it is noted that the special education teacher of the proposed 6:1+1 special class testified that her class participated in weekly outings to community restaurants and stores, she also testified that her daily classroom schedule did not include social skills instruction, except to the extent that she worked on the students' social skills for the weekly outings (Tr. pp. 80-84, 90-93). In addition, the special education teacher testified that her class contained six non-verbal students (Tr. pp. 77, 80-81). Due to the noted regression in the student's social skills and communication skills, I find that neither the 2006-07 IEP nor the proposed placement offered appropriate services to address the student's needs in these areas.

The student's 2006-07 IEP also failed to contain information regarding the provision of parent counseling and training. The April 2006 neuropsychological evaluation report recommended that petitioner receive parent training (Dist. Ex. 3 at p. 5). At the May 1, 2006 CSE meeting, respondent's CSE changed the student's classification from a student with mental retardation to a student with autism (compare Parent Ex. C at p. 1, with Parent Ex. D at p. 1). State regulations describe educational programs for students with autism, which include "parent counseling and training as defined in section 200.1[kk] of this Part for the purpose of enabling parents to perform appropriate follow-up intervention activities at home" (8 NYCRR 200.13[d]). The student's 2006-07 IEP does not include a provision for parent training and counseling, nor does the record reflect that the CSE discussed or recommended parent training and counseling. Based on the record, parent counseling and training were appropriate services for this parent and should have been recommended on the 2006-07 IEP.

Based upon the foregoing, I find that respondent did not offer the student an appropriate program in the LRE for the 2006-07 school year.

Having determined that the first criterion of the Burlington analysis supports petitioner's claim for tuition reimbursement, I now turn to the second criterion of the Burlington analysis to consider whether petitioner satisfied her burden of proving that Seton was appropriate to meet her daughter's special education needs for the 2006-07 school year (Burlington, 471 U.S. 359; Frank G., 459 F.3d at 363; Application of the Bd. of Educ., Appeal No. 03-062; Application of a Child with a Disability, Appeal No. 02-080). In order to meet that burden, the parent must show that the services provided were "proper under the Act" (Carter, 510 U.S. at 12, 15; see also Burlington,

471 U.S. at 370), i.e., that "the private education services obtained by the parents were appropriate to the child's needs" (Walczak, 142 F.3d at 129; see also Frank G., 459 F.3d at 363; Cerra, 427 F.3d at 192; Application of a Child with a Disability, Appeal No. 06-138; Application of a Child with a Disability, Appeal No. 06-035; Application of a Child with a Disability, Appeal No. 04-108; Application of a Child with a Disability, Appeal No. 01-010). Parents are not held as strictly to the standard of placement in the LRE as school districts are; however, the restrictiveness of the parental placement may be considered in determining whether the parents are entitled to an award of tuition reimbursement (Rafferty v. Cranston Pub. Sch. Comm., 315 F.3d 21 [1st Cir. 2002]; M.S. v. Bd. of Educ., 231 F.3d 96, 105 [2d Cir. 2000], cert. denied, 532 U.S. 942 [2001]). A parent's failure to select a program approved by the state in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. 7; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-105).

Although the impartial hearing officer's decision did not address this issue because he determined that respondent offered the student a FAPE, I find that petitioner did not meet her burden to establish that the student's program at Seton during the 2006-07 school year was appropriate. The record reflects that petitioner proffered little, if any, testimony or documentary evidence to demonstrate that Seton provided her daughter with an appropriate program to meet her academic, social, emotional, behavioral or special education needs. The record describes Seton as a private school located on the campus of a general education high school that provides opportunities for petitioner's daughter to interact with her nondisabled peers during the day and during extra activities (Tr. pp. 25, 40-42). Petitioner testified that she observed a "drastic" change in her daughter since September 2006: she completes her homework without prompting and looks forward to attending school (Tr. pp. 25-26). Petitioner opined that Seton's after-school activities were "more appropriate" for her daughter, but she failed to describe or identify the after-school activities or how the after-school activities were "more appropriate" for her daughter (Tr. p. 37). Because petitioner failed to present sufficient evidence to describe the student's program at Seton and how it addressed the student's academic, social, emotional, and behavioral needs, she failed to meet her burden to establish the appropriateness of the student's program at Seton.

In light of the evidence in the record, I am constrained to concur with the impartial hearing officer's ultimate decision denying petitioner's request to be reimbursed for the costs of her daughter's tuition at Seton because petitioner failed to meet her burden under the second criterion of the Burlington analysis for tuition reimbursement. Therefore, I need not reach the issue of whether equitable considerations support petitioner's claim for reimbursement, the third criterion of the Burlington analysis, and the necessary inquiry is at an end (Application of a Child with a Disability, Appeal No. 06-055; Application of a Child with a Disability, Appeal No. 05-119).

Finally, I find nothing in the record that shows the student could not be educated in a public school. I will direct that respondent conduct complete evaluations of the student's speech-language and social skills needs, identify appropriate parent counseling and training services, and reconvene a CSE to determine if the student is eligible for extended school year services and develop and recommend an appropriate program for the student in the LRE.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED, unless the parties otherwise agree, that within 45 days from the date of this decision respondent shall conduct a complete speech-language evaluation, evaluate the student's social skills needs, identify appropriate parent counseling and training services, and reconvene a CSE to determine if the student is eligible for extended school year services for summer 2007 and recommend an appropriate program for the student in the LRE for the 2007-08 school year.

Dated **Albany, New York**
 March 16, 2007

PAUL F. KELLY
STATE REVIEW OFFICER