The University of the State of New York

The State Education Department
State Review Officer

No. 07-051

Application of a CHILD WITH A DISABILITY, by his parent, for review of a determination of a hearing officer relating to the provision of educational services by the Board of Education of the Pleasantville Union Free School District

Appearances:
Asher, Gaughran, LLP attorney for petitioner, Rachel Asher, Esq., of counsel

Shaw, Perelson, May & Lambert, LLP, attorney for respondent, Garrett L. Silviera, Esq., of counsel

DECISION

Petitioner appeals from the decision of an impartial hearing officer which denied her request to be reimbursed for her son's tuition costs at the Little Sparrows School (Little Sparrows) for the 2006-07 school year in addition to the cost of a private psychological evaluation and a private speech-language evaluation. Respondent cross-appeals from those parts of the impartial hearing officer's decision where he determined that he had subject matter jurisdiction over issues not raised in petitioner's due process complaint notice. The appeal must be dismissed. The cross-appeal must be sustained.

At the outset, I must address three procedural issues. First, petitioner argues that the impartial hearing officer failed to balance conflicting points of view and make credibility determinations and findings of fact, and therefore, asserts that I should not accord any weight to his decision. She contends that facts enumerated in the decision were not "regularly made," and therefore should be disregarded. Upon my review of the record and the impartial hearing officer's decision in the instant case, I find no support for petitioner's contention. Petitioner does not cite to any specific examples of factual findings that she argues have not been regularly made and should be set aside, nor does she indicate where the impartial hearing officer failed to assess the credibility of the witnesses or balance conflicting points of view. The impartial hearing officer's determination is thorough and contains several citations and references to the testimony of witnesses from both parties. In forming his opinion, the impartial hearing officer gave consideration to

testimony of witnesses from both parties. Accordingly, I decline to set aside the impartial hearing officer's decision on this basis.

I will next consider petitioner's assertion that respondent's answer and cross-appeal were untimely. I disagree. Respondent's affidavit of service accompanying the answer and cross-appeal indicates that it was properly addressed to the office of petitioner's counsel and deposited in the mail on May 18, 2007 in accordance with the Commissioner of Education's regulations (see 8 NYCRR 279.5; 275.8[b]). Under the circumstances, petitioner's request to preclude respondent's answer and cross-appeal is denied.

Lastly, I will address respondent's cross-appeal. Respondent contends that the impartial hearing officer erred by entertaining evidence with respect to issues not raised in petitioner's due process complaint notice. I concur. Under the new amendments to the Individuals with Disabilities Education Act (IDEA), the party requesting an impartial hearing may not raise issues at the due process hearing that were not raised in its original due process request unless the original request is amended prior to the impartial hearing (20 U.S.C. § 1415[c][2][E]), or the other party otherwise agrees (20 U.S.C. § 1415[f][3][B]). The Senate Report pertaining to this new amendment to the IDEA noted that "the purpose of the sufficiency requirement is to ensure that the other party, which is generally the school district, will have an awareness and understanding of the issues forming the basis of the complaint" (S. Rep. 108-185, Individuals with Disabilities Education Act Senate Report No. 108-185, "Notice of Complaint," [November 3, 2003]). The Senate Committee reiterated that they assumed with the earlier 1997 amendments' notice requirement that it "would give school districts adequate notice to be able to defend their actions at due process hearings, or even to resolve the dispute without having to go to due process" (id.). In the instant case, a review of petitioner's due process complaint notice reveals that she specifically alleged ten substantive and procedural violations surrounding the child's June 2006 individualized education plan (IEP) (Dist. Ex. 36 at p. 5). Her due process complaint notice does not include any allegations pertaining to the appropriateness of the goals enumerated in the June 2006 IEP (id.). During the impartial hearing, counsel for petitioner questioned the propriety of the goals listed in the June 2006 IEP, at which time respondent's counsel objected, noting that the issue was not properly before the impartial hearing officer (Tr. pp. 721, 728). The impartial hearing officer allowed counsel for petitioner to question her witness on the appropriateness of the goals in the June 2006 IEP, and further determined that he had subject matter jurisdiction with respect to this issue, although it was not raised in petitioner's due process complaint notice. A review of the record also indicates that at no point during the impartial hearing did petitioner's counsel amend the due process complaint notice, nor did she make any request to do so. Under the circumstances, I agree with respondent that the impartial hearing officer should have confined his determination to issues raised in petitioner's due process complaint notice (see 8 NYCRR 200.5 [j][1][ii]; see Application of a Child with a Disability, Appeal No. 07-047; Application of a Child with a Disability, Appeal No. 06-139; Application of a Child with a Disability, Appeal No. 06-065; Application of a Child with a Disability, Appeal No. 04-019; Application of a Child with a Disability, Appeal No. 03-095; Application of a Child with a Disability, Appeal No. 02-024; Application of a Child with a Disability, Appeal No. 01-024; Application of a Child with a Disability, Appeal No. 99-060).

At the time of the commencement of the impartial hearing, the child was four years old and attending Little Sparrows on a half-day basis with special education itinerant teacher (SEIT) support from Theracare (Tr. pp. 787, 853-54, 861; Parent Ex. V at p. 1).[1] Little Sparrows is a "typical private kindergarten," located in Armonk, New York (Dist. Ex. 35). In addition, pursuant to the last-agreed upon IEP, the child was receiving through respondent's district, 12 hours of home-based SEIT services, three 45-minute sessions of individual speech-language therapy and one 45-minute session of speech-language therapy in a group (Dist. Ex. 36 at p. 2). He was also receiving four 45-minute sessions of occupational therapy (OT) in addition to one 45-minute session of individual physical therapy (PT) delivered at home as well as two 30-minute sessions of PT delivered in a separate location (id.). The Commissioner of Education has not approved Little Sparrows as a school with which school districts may contract to instruct students with disabilities (Tr. pp. 163-64; see 8 NYCRR 200.7, 200.1[d]). The child's classification and eligibility for special education services as a student with autism (see 8 NYCRR 200.1[zz][1]; Tr. p. 686; Dist. Ex. 36 at p. 2) are not in dispute in this appeal.

The record describes the child as a "sweet, bright" boy (Tr. p. 788). He has a diagnosis of a pervasive developmental disorder - not otherwise specified (PDD-NOS) as well as apraxia, hypotonia, and an expressive-receptive language disorder (Tr. p. 798; Dist. Ex. 31). He also has feeding and oral motor difficulties, and he reportedly has delays in large and fine motor skills (Tr. pp. 798, 1102, 1110; Dist. Ex. 31). The child is described as having limited conversational language and social skills and is reported to be sensitive to auditory stimuli (Tr. pp. 708, 1103).

In November 2002, when the child was a year old, he began receiving PT through early intervention (EI) (Dist. Ex. 42 at p. 1). At 19 months of age, the child received speech-language services to address his oral motor deficits and also received OT services (Tr. p. 795).[2] In January 2004, when the child was two years old, he began receiving home-based applied behavioral analysis (ABA) instruction through Tri-State Learning Center (Tri-State) (Tr. pp. 798-99, 1040; Dist. Ex. 42 at p. 1). At that time, he was also receiving OT, PT, and speech-language therapy (Tr. p. 799). By letter dated March 4, 2004, petitioner referred her son to respondent's Committee on Preschool Special Education (CPSE) for an evaluation (Dist. Ex. 31).

In spring 2004, a number of evaluations of the child were conducted in preparation for his transition from EI to respondent's CPSE (Dist. Ex. 13). A special education evaluation revealed that the child's attention was good, he was cooperative, and he attempted to try all tasks; however, he exhibited difficulty with articulation (id. at p. 2).

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[1] Section 4410(1)(k) of the Education Law defines "special education itinerant services" as "an approved program provided by a certified special education teacher on an itinerant basis in accordance with the regulations of the commissioner, at a site determined by the board, including but not limited to an approved or licensed prekindergarten or head start program; the child's home; a hospital; a state facility; or a child care location as defined in [§4410(8)(a)]."

[2] The record does not specify the amount of hours of speech-language therapy or OT the child was receiving at that time.

An April 2004 psychological evaluation report indicated that the child's overall adaptive behavior as measured by the Vineland Adaptive Behavior Scales was at the first percentile (id.; Dist. Ex. 22 at p. 3). The evaluating psychologist observed that the child's difficulty with instructions hindered his performance, which suggested that his scores might be a minimal estimate of his intelligence (Dist. Exs. 13 at p. 2; 22 at p. 4). On April 27, 2004, a speech-language therapist conducted an evaluation of the child (Dist. Ex. 13 at p. 2). The speech-language therapist reported that the child had good attending skills, but engaged in minimal social interaction (id.). She further found that his responses were rote, repetitive and lacked connectedness (id.). Despite some progress, the evaluator noted delays in the child's pragmatic speech and also observed perseverative speech patterns (id.). A May 1, 2004 PT evaluation report noted that the child was cooperative, he maintained eye contact and he exhibited the ability to follow simple directions (id.) The evaluator concluded that the child was a "playful young boy" who presented with significant delays in his gross motor skills, and recommended that he would benefit from PT to address his limited range of motion, poor balance and coordination, as well as his weakness and delays in age appropriate gross motor skills (Dist. Ex. 29 at pp. 2-3). A May 13, 2004 OT evaluation report noted delays in the child's fine motor skills, grasping skills, and visual motor skills (Dist. Ex. 28 at p. 3). The evaluator further noted that the child exhibited difficulties in the following areas: auditory processing, vestibular processing, touch processing, multisensory processing, oral/sensory processing, sensory processing related to endurance/tone, modulation related to body position and movement, and modulation of sensory input affecting emotional responses (id.).

In September 2004, when the child was almost three years old, he began attending a two-year-old class at the Jewish Community Center (JCC) for the 2004-05 school year. Petitioner's son attended JCC two days per week, two and a half hours per day and received SEIT support from Tri-State (Tr. pp. 799-800, 1046). He was also receiving approximately 20 hours per week of home-based services (Tr. p. 802). While he was attending JCC, it was reported that the child demonstrated some significant behaviors related to transitioning and establishing a comfort level with his environment (Tr. p. 1047). By letter dated April 28, 2005 to respondent's CPSE, the child's developmental pediatrician recommended that his preschool program and extended school year (ESY) services include an individual ABA teacher's aide (TA) due to his anxiety and difficulty with transitions (Dist. Ex. 30). Without this support, she opined that the child would not make progress and would probably regress (id.).

On June 2, 2005, respondent's CPSE convened for the child's annual review and to develop his program for the 2005-06 school year (Dist. Ex. 7). For the 2005-06 school year, respondent's CPSE recommended a half-day 12:1+2 integrated class at the Fred S. Keller school (Keller) (id. at pp. 2-3, 7). The resultant IEP also noted that the child would have a 1:1 aide to assist him at Keller (id.). Related service recommendations included six hours of individual home-based SEIT instruction per week through Tri-State, in addition to one individual 90-minute session with a SEIT at home or at school during alternate months (id. at p. 2). The June 2005 CPSE also recommended one individual 45-minute session of family training to take place at home or at school (id.). With respect to OT, the June 2005 CPSE proposed two individual home-based sessions of OT per week as well as two individual sessions of OT to take place at Westchester Center for Educational and

Emotional Development (WCEED) (id.). The June 2005 CPSE recommended two 30-minute individual sessions of PT to be held at WCEED in addition to one 45-minute session of individual home-based PT per week (id. at p. 3). PT and OT consultations were also recommended on an individual basis every other month at the child's home and at WCEED (id.). Five 30-minute sessions of speech-language therapy to be delivered in a special location was also recommended (id.).

Additionally, the June 2005 CPSE determined that the child was eligible for ESY services for summer 2005 (id. at p. 7). During summer 2005, the child continued his program at JCC and received related services through respondent's CPSE (Tr. p. 802). For summer 2005, the June 2005 CPSE proposed that the child receive six hours of 1:1 home-based SEIT services per week, in addition to eight hours of 1:1 home-based SEIT services per month (Dist. Ex. 7 at pp. 3, 7). The June 2005 CPSE also recommended that the child be provided with a 1:1 TA at home for 19 hours per week, in addition to 12 hours per month with a 1:1 TA at home (id. at pp. 4, 7). Related service recommendations included two weekly 45-minute individual sessions of OT to be conducted at a facility, two 45-minute 1:1 home-based sessions of OT per week, one 45-minute 1:1 home-based session of PT per week, two 30-minute weekly sessions of PT to be held at a facility, in addition to four 45-minute sessions of home-based 1:1 speech-language therapy (id. at pp. 3-4, 7). The June 2005 IEP also provided for 90-minute related service consultations to take place in alternate months (id. at p. 7). Goals and objectives were developed in the following areas: speech-language skills, social/emotional/behavioral skills, motor skills and basic cognitive/daily living skills (id. at pp. 7-17). CPSE meeting notes indicated that petitioner agreed with the CPSE's recommendations (id. at p. 7).

In October 2005, petitioner removed the child from Keller and privately placed him at the Pleasantville Children's Center (PCC) for two mornings per week where he received SEIT support from Developmental Delay Rehabilitation Services (DDRS) (Tr. pp. 812-13; Dist. Ex. 5 at p. 6). Petitioner reportedly determined that Keller was an overly restrictive environment for her son (Tr. p. 67; Parent Ex. Z at p. 1). On November 17, 2005, respondent's CPSE convened to review the goals listed on the child's IEP and discuss modifications to his program (Dist. Ex. 5 at p. 6). CPSE meeting notes indicated that the CPSE planned to provide two 45-minute sessions of speech-language therapy to the child at PCC and further recommended that he continue with his home-based program (id.). The November 2005 CPSE further recommended an additional hour of family training, in addition to one 60-minute session of SEIT consultation per month (id. at pp. 1, 6).

On February 1, 2006, Tri-State's director of clinical services completed an educational progress report (Dist. Ex. 23). The report described the child's various programs and his current level of performance in each program (id.). The report indicated that the child demonstrated the ability to learn, maintain and generalize skills across domains; quickly learned receptive and expressive skills that he used with a variety of individuals across a number of settings; and was developing the ability to learn indirectly from his environment (id. at p. 1). The child exhibited scripting and echolalic behaviors that the team addressed by redirecting and prompting the child to use appropriate language (id.). The director of clinical services recommended that the child continue with his current program and that he receive ESY services (id. at p. 3).

By letter dated February 9, 2006 to the CPSE Chairperson, petitioner requested that a CPSE meeting be scheduled as soon as possible so she would have an opportunity to visit potential placements while the programs were still in session (Parent Ex. H). She further requested that respondent fund a private comprehensive psychoeducational evaluation of her son, in light of his "processing problems and emotional issues" (id.).

Over the course of three days beginning on February 20, 2006, a speech-language pathologist conducted a private speech-language evaluation of the child (Dist. Ex. 16). The private speech-language pathologist reported that the child required prompts to respond to questions, occasionally exhibited echolalic responses and demonstrated difficulty with transitions between tasks (id. at p. 2). The child's oral mechanism was determined to be adequate for speech and feeding purposes, and although he exhibited low volume and mumbled speech at times, his overall speech intelligibility was adequate (id. at p. 3). Administration of the Preschool Language Assessment Instrument-2 (PLAI-2) yielded a receptive language score in the 9th percentile, an expressive language score in the 25th percentile and a discourse ability score in the 12th percentile (id.). The private speech-language pathologist reported that the child achieved a Test of Auditory Processing Skills-3 auditory comprehension subtest score in the 9th percentile, an Expressive One Word Picture Vocabulary Test score in the 68th percentile and a Peabody Picture Vocabulary Test-3A score in the 47th percentile (id. at pp. 3-4). She indicated that the child's length of utterance, language concepts, grammatical features and attention problems limited his comprehension (id. at pp. 9-10). His communication skills were also compromised by his echolalic and perseverative behaviors and by his need for redirection and repetition (id. at p. 10). At times, the child conversed with an adult on a topic of interest, but required maximum prompting (id.).

The evaluation report further indicated that the child's play skills were largely self-directed and that he did not exhibit interest in joint play (Dist. Ex. 16 at p. 7). He did not initiate imaginative play or demonstrate symbolic play skills (id.). The private speech-language pathologist reported that, during an observation of the child in his classroom, he appeared to enjoy the presence of other children but he did not initiate any contact with his peers (id. at p. 8). He did not participate in a singing activity, required cues from his SEIT to maintain his seat and exhibited self-stimulatory behaviors during the class's morning meeting time (id.). The speech-language pathologist reported that the child followed classroom routines only with constant cueing from the SEIT, and with her help, he imitated the routines of his peers; however, he did not socially interact with them (id. at p. 9). She opined that although the child was old enough to enter kindergarten, placement in a kindergarten class would be a "disservice" because of the prerequisite growth he required (id. at p. 10). Her report contained recommendations that included placement in a daily, part-time special education communication/language-based preschool program comprised of six to eight children for the upcoming 2006-07 school year (id.). She also recommended that the child receive SEIT services and group speech-language therapy at least three times per week in addition to individual speech-language therapy sessions (id.).

In March 2006, the child's home-based and WCEED occupational therapists completed annual review progress reports (Dist. Exs. 8; 9). The home-based occupational therapist reported that petitioner's completion of a sensory assessment indicated that the

child exhibited "probable differences" in the areas of auditory, visual, vestibular, touch, multisensory and oral-sensory processing, and a "definite difference" in his modulation of sensory input that affected emotional responses (Dist. Ex. 9 at p. 1). Although it was reported that the child made "good gains" in therapy, he continued to exhibit deficits in sensory processing, fine motor and visual perceptual skills (id. at p. 2). The home-based occupational therapist recommended that the child continue to receive OT at the current frequency and duration and ESY OT services, but that he receive OT at a center-based facility rather than at home (id. at pp. 2-3). WCEED's occupational therapist reported that the focus of therapy was on improving the child's fine motor, visual-motor and bilateral coordination skills and sensory processing abilities (Dist. Ex. 8 at p. 1). Reportedly, the child made good progress toward the fine motor goals on his IEP, but based upon the results of a modified administration of the Peabody Developmental Motor Scales-2 (PDMS-2), he continued to demonstrate poor fine motor skills (id. at pp. 1-2). WCEED's occupational therapist recommended that the child receive "intensive" OT and ESY OT services (id. at pp. 3-4).

In March 2006, the child's home-based and WCEED physical therapists completed PT annual review progress reports (Dist. Exs. 10; 11). Administration of the PDMS-2 by both the home-based and WCEED physical therapists yielded stationary, locomotion and object manipulation subtest scores in the 5th percentile and an overall percentile rank of one (Dist. Exs. 10 at pp. 1-2; 11 at p. 2). The home-based physical therapist reported that although the child's gross motor skills improved from the previous year, he continued to exhibit significant delays (Dist. Ex. 10 at p. 2). Recommendations included that the child be supervised while on the stairs to ensure safety and that PT services continue (id.). WCEED's physical therapist reported that the child's tolerance of sensory and gross motor movement activities, coordination skills, muscle strength, ability to move through developmental positions and to maintain a stable posture had improved but that the child was functioning "severely below his age level" (Dist. Ex. 11 at pp. 1-3). Continued PT was recommended for summer 2006 ESY and for the upcoming 2006-07 school year (id. at pp. 3-4). Annual PT goals were attached to the home-based and WCEED's physical therapists' reports (Dist. Exs. 10 at p. 3; 11 at pp. 5-7).

Over the course of three days in March 2006, a private psychologist conducted a psychological evaluation of the child (Dist. Ex. 4). The evaluation consisted of a classroom observation, standardized assessments, rating scales and parent/teacher interviews (id. at p. 2). During the classroom observation, the private psychologist reported that the child exhibited decreased attention for class activities and did not interact with peers despite prompts from his SEIT (id. at pp. 2-3). The private psychologist stated that the child also demonstrated limited focus and attention during formal testing, which had a significant impact on his ability to respond (id. at pp. 3-4). Administration of the Wechsler Preschool and Primary Scale of Intelligence-Third Edition (WPPSI-III) yielded a verbal composite score of 108 (Average), a performance composite score of 73 (Borderline) and a full scale composite score of 86 (Low Average) (id. at p. 12). Due to the 35-point difference between the child's verbal and performance scores, the private psychologist reported that the full scale score had "little meaning" (id. at pp. 4-5). The child's WPPSI-III verbal composite score reflected his good vocabulary knowledge, strong retention of learned information and emerging capacity to reason with words (id. at p. 10). His performance composite score

indicated that he had significant difficulties with nonverbal reasoning, perceptual organization and visual motor skills (id.). The private psychologist reported that the child's performance on visual processing and visual motor tasks was well below age expectations (id. at p. 6).

Administration of selected subtests of the Wechsler Individual Achievement Test-Second Edition (WIAT-II) and informal assessments revealed the child's advanced decoding skills and features of hyperlexia with an emerging capacity to read for meaning (id.).[3] He demonstrated mastery of many early math skills, but had difficulty with questions that required him to reason with pictures or follow subtle/complex directions (id. at p. 7). The child's early written expression skills were impeded by difficulties with handwriting and organization of written work on a page (id.). Petitioner completed the Adaptive Behavior Assessment System-Second Edition (ABAS-II) which indicated the child's adaptive skills were in the Extremely Low range, and substantially lower than his cognitive abilities (id.). Assessments of the child's attention skills revealed significant problems with focus and concentration (id. at p. 8). Based upon test results, observations, questionnaires and information obtained from the child's mother and teachers, the private psychologist reported that the child was extremely delayed in fundamental areas of day-to-day functioning and social development (id. at pp. 8, 10). She described him as a "somewhat anxious and shy child" who had great difficulty interacting with peers in an age appropriate manner (id. at p. 10). Completion of the Childhood Autism Rating Scale by the private psychologist indicated that the child exhibited a "few symptoms or a mild degree of autism," and she reported that her diagnostic impression of him was that he exhibited a mild autistic spectrum disorder (id. at pp. 9-10). The private psychologist's report provided a number of recommendations, including that for the 2006-07 school year, the child attend a small, integrated kindergarten program for a shorter school day and be accompanied by an individual aide (id. at p. 11). She also recommended the development of specific social emotional goals, language, motor and educational interventions and parent training (id.).

On March 13, 2006, the CPSE's speech-language pathologist completed an annual progress report based on the child's performance in her two individual and one group per week therapy sessions (Tr. p. 63; Dist. Ex. 15). Analysis of a language sample of the child revealed that his mean length of utterance (MLU) was reduced for his age and he demonstrated significant difficulties with attention, language comprehension and expression (Dist. Ex. 15 at p. 2). He responded to questions and nonverbal prompts, but rarely initiated conversational exchanges (id.). The child was reported to exhibit a narrow repertoire of play skills that roughly corresponded to skills typical of an 18-month old child (id.). She further reported that the child demonstrated "precocious" print recognition skills, but appeared to have poor print comprehension, suggestive of hyperlexia (id.). Overall, the speech-language pathologist reported that the child's communication skills had improved, but remained variable from day to day and activity to activity (id. at p. 4). He demonstrated improvement in his ability to respond to questions and directions, comment

[3] Hyperlexia was defined in the record as a precocious ability to read words, usually accompanied by difficulties with language comprehension and communication (Dist. Ex. 4 at p. 6).

on objects and events and maintain a conversational exchange for three or more turns (id.). The progress report also indicated that in conversation the child was often non-responsive, used echolalic or scripted speech and required many prompts to elicit optimal communication skills (id.). The speech-language pathologist recommended that the child continue to receive speech-language therapy services in accordance with his IEP (id.).

In a March 17, 2006 progress report, the speech-language pathologist who provided the child's group social skills intervention service reported that he demonstrated progress in his ability to use more spontaneous language and increase his volume in the group setting (Dist. Ex. 17). Although the child did not recognize social cues or behaviors modeled by other children in the group, he used social greetings/farewells and requested items from peers when prompted (id.). The social skills group speech-language pathologist opined that the child was not socially or emotionally ready for kindergarten and that retaining him for a year would increase his success with peers (id.). She further recommended that he continue to participate in social skills groups (id.).

By letter dated March 20, 2006, Tri-State's director of clinical services reported that the child made considerable progress when his services were delivered on a consistent basis but that regression was noted during service disruption (Dist. Ex. 22). By report, gaps in service resulted in a decrease in focus and attention, difficulty with transitions between activities, an increase in perseverative behaviors, a decrease in functional use of language and skills, and an extreme increase in rigidity across environments which led to an increase in tantrum behaviors (id.). The director of clinical services stated that significant time was taken to recoup lost skills and opined that it was essential that the child receive ESY services (id.).

On March 23, 2006, respondent's CPSE convened to transition the child to the Committee on Special Education (CSE) and to develop his program for the 2006-07 school year (kindergarten) (Dist. Ex. 6). Petitioner, her attorney, and a number of the child's private service providers were in attendance (id. at p. 4). The child was deemed eligible for special education services as a child with autism (id. at p. 1). The CPSE recommended a 5:1+1 full-day integrated kindergarten class for the child at the Bedford Road School (BRS) with one 30-minute period of resource room per day (id. at p. 1). The proposed IEP noted that the recommended classroom would be staffed with one regular education teacher, one regular education kindergarten aide, one special education teacher and one special education aide (id.). Related service recommendations included one 30-minute session of counseling per week in a group of five, one monthly 60-minute session of family training, three 30-minute individual sessions of OT per week, one 30-minute session of OT per week in a group of five, three 30-minute sessions per week of speech-language therapy in a group of two, and two individual 30-minute sessions of speech-language therapy (id.). The March 2006 IEP also provided for related services consultations on a weekly basis (id.). Program modifications included the use of a slant board, pencil grip, weighted vest and wiggle seat, on an as needed basis (id. at p. 2). The March 2006 CPSE reviewed the child's progress in PT, OT and speech-language therapy as well as progress reports from his home program (id. at pp. 5-6). CPSE meeting notes also indicated that the March 2006 CPSE reviewed the child's goals with respect to PT, OT, in the areas of pre-writing skills, strength, endurance, auditory regulation and processing (id. at p. 5). Goals proposed by

Tri-State were also reviewed (id. at p. 6). Lastly, the March 2006 CPSE reviewed various program options available to the child, including a full-day special education program and a half-day preschool program with special education support (id. at pp. 6-7).

By letter dated April 7, 2006, petitioner consented to an additional updated psychological evaluation, provided that she be advised in advance which tests would be used (Dist. Ex. 38). Her letter listed the tests conducted during the March 2006 private psychological evaluation, which petitioner noted did "not need to be repeated" (id.). Petitioner also granted consent to respondent's school psychologist to speak with the psychologist who conducted the March 2006 private evaluation and she agreed to a classroom observation (id.).

On April 15, 2006, Tri-State's director of clinical services developed a draft functional behavioral assessment (FBA) and behavioral intervention plan (BIP) for the child (Dist. Ex. 20). The report stated that the child's family and therapy team noted an increase in tantrums related to transitions and change in routine, and a resistance to flexibility, all of which affected his ability to participate in family and community activities (id. at p. 1). The child would cry, yell, kick, throw himself on the floor and would exhibit extreme resistance to being picked up accompanied by loud verbal protests (id.). Reportedly, these behaviors occurred "virtually every time" the child was presented with a transition outside the home, or in the home when petitioner or others would leave (id. at pp. 1-2). The report indicated that the behaviors lasted from several seconds to a half hour in duration (id. at p. 2). The behaviors occurred primarily when the child transitioned from one environment to another, or when he transitioned away from familiar adults (id.). The report provided short-term proactive strategies, such as the use of visual schedules, verbal warnings, timers, familiar songs, opportunities to practice transitioning, identification of strategies to "calm" the child and reinforcement of successful transitions (id.). Long-term proactive strategies and intervention strategies were also recommended (id. at pp. 2-3). The plan further recommended that data collection occur for all occurrences of the target behavior and be monitored on an ongoing basis (id. at p. 3). The director of clinical services provided recommendations including provision of family/team training and support, provision of easier transition opportunities to reinforce positive experiences and ongoing review of data to ensure the intervention plan's success (id.).

On April 25, 2006, petitioner placed a deposit at Little Sparrows in order to reserve a spot for her son for the upcoming school year (Tr. pp. 860, 879; Parent Ex. Q).

On May 24, 2006, a psychological evaluation and preschool classroom observation of the child was completed by respondent's school psychologist (Dist. Ex. 3). During the classroom observation, the child was observed to engage in a variety of appropriate activities and toys with his SEIT's direction (id. at p. 7). The school psychologist reported that the child's weakness in the school environment was his ability to interact and initiate play with peers, as he engaged in frequent parallel play rather than direct interaction with peers (id.). Although reportedly easily distracted, the child was successfully redirected by either a verbal or physical prompt (id.). Administration of selected subtests of a Developmental Neuropsychological Assessment (NEPSY) yielded subtest scaled scores in the following percentiles: phonological processing (75th percentile), visual attention (50th

percentile), comprehension of instructions (50th percentile), narrative memory (9th percentile), and statue (ability to inhibit motion) (2nd percentile) (id. at pp. 5-6, 8). Two subtests of the Woodcock-Johnson III Tests of Achievement were administered to assess the child's reading skills (id. at p. 6). His performance on the letter-word and passage comprehension subtests was beyond the 99th percentile and characterized by the school psychologist as exceeding age level expectations (id.). The school psychologist concluded that the child demonstrated strong beginning level reading skills, proficiency at phonological processing, segmentation and adequate ability to comprehend orally presented directions (id. at p. 7). She reported that the child struggled with activities that provided directions and required him to independently execute the directions to complete a less structured task (id.). The school psychologist opined that the child needed a highly structured educational setting, the opportunity to take frequent breaks, and assignments broken into smaller steps (id.). She stated that he needed an environment "rich" in social interactions and one that provided numerous opportunities for structured social interaction within small groups of children (id.). An additional testing session was scheduled for the child; however, it was cancelled because the child's grandmother could not coax him inside the school for the testing (Tr. pp. 843-44; Dist. Ex. 3 at p. 5).

On June 5, 2006, respondent's CSE reconvened for a program review of the child's program for the 2006-07 school year (Dist. Ex. 2).[4] Petitioner, her attorney and the child's private service providers were in attendance, as well as the special education teacher recommended to teach the proposed collaborative kindergarten class (id. at p. 5). The CSE recommended the same program that was proposed for the child in March 2006 (id. at p. 1). The child's preschool teacher reported that he had made progress, and that she had not observed the tantrum behaviors observed by his providers at Tri-State (id. at pp. 7-8). The CSE also reviewed the results of the private psychological testing conducted in March 2006, as well as the testing conducted by respondent's school psychologist (id. at p. 8). Goals and objectives were also reviewed, and goals were updated and added (id. at p. 9). Lastly, the special education teacher of the collaborative class described the recommended program to petitioner (id.). She indicated that the teaching method to be utilized would be a direct instruction method similar to ABA, but without discrete trials (id.). The teacher explained that a daily communication log would be established between home and school and that monthly meetings would be scheduled with petitioner and the child's special education teacher (id.). The committee advised petitioner that the child could begin the school year with an abbreviated school day to as short of a time as needed by the child, in order to ease his transition to full-day kindergarten (Tr. pp. 286, 288; Dist. Ex. 2 at p. 9). Petitioner objected to respondent's recommendations at the meeting (Dist. Ex. 2 at p. 9). Petitioner did not suggest Little Sparrows as a potential program option for her son, nor did she provide respondent's CSE with any information regarding the program she had selected for her son (Tr. p. 880).

[4] For purposes of this decision, the committee that convened on June 5, 2006 will herein be referred to as the "CSE," although the record refers to it as the CPSE, because the purpose of this meeting was to finalize the child's transition from the CPSE's jurisdiction to the CSE's jurisdiction.

By letter dated August 7, 2006 to the CSE Chairperson, petitioner rejected the program proposed at the June 2006 CSE meeting (Dist Ex. 35). Petitioner asserted that her son was not ready to attend a full-day kindergarten program and that he was unable to attend a "school of any kind without the 1:1 support of a SEIT or TA to facilitate social interaction and learning and to ensure his safety" (id.). She further stated that there was no reason to terminate his home ABA program and she objected to the reduction of his OT and PT hours, contending that the evaluations did not support this action (id.). Petitioner advised the CSE Chairperson that she planned to place her son in Little Sparrows, a "typical private kindergarten" located in Armonk, New York on a part-time basis (id.). She requested that a SEIT or TA attend school with him and noted that she planned to seek reimbursement for her son's tuition at Little Sparrows (id.).

By due process complaint notice dated August 7, 2006, petitioner requested an impartial hearing (Dist. Ex. 36). Petitioner alleged that the June 2006 IEP contained procedural and substantive deficiencies, thereby arguing that the challenged IEP denied her son a free appropriate public education (FAPE) (id. at p. 5). She contended, among other things, that her son's program was predetermined, and that she was denied full and meaningful participation in developing his IEP (id.).

By contract dated August 11, 2006, petitioner enrolled her son in Little Sparrows for the upcoming school year (Tr. pp. 859-60; Parent Ex. Q).

An impartial hearing commenced on October 18, 2006 and after six days of testimony concluded on January 25, 2007. By decision dated April 4, 2007, the impartial hearing officer determined that petitioner did not sustain her burden of proving that the challenged June 2006 IEP failed to offer her son a FAPE, and accordingly, denied her request for tuition reimbursement (see IHO Decision at pp. 64-69). He also denied petitioner's request for reimbursement for the private evaluations (id. at p. 68). Specifically, the impartial hearing officer found, among other things, that petitioner failed to prove that her son's program was predetermined and that respondent failed to consider a continuum of placements in recommending a program for the 2006-07 school year (id. at pp. 50-51). With respect to goals listed in the June 2006 IEP, the impartial hearing officer found that goals were reviewed, added and updated during the June 2006 CSE meeting (id. at p. 49). He found that respondent's CSE reviewed progress on goals and that there was specific detail itemized in the June 2006 IEP pertaining to discussions on goals and review of the child's progress to refute petitioner's claims (id. at p. 50). Next, the impartial hearing officer determined that petitioner failed to prove that the June 2006 IEP would likely result in regression (id. at p. 56). He also concluded that petitioner did not establish that the proposed program was not the least restrictive environment (LRE) for the child (id. at p. 61). Lastly, he found that petitioner failed to demonstrate that the length of the child's school day was inappropriate (id. at p. 58).

This appeal ensued. Petitioner asserts that the impartial hearing officer erred in finding that she failed to establish that the June 2006 IEP denied her son a FAPE. She further maintains that the June 2006 CSE impermissibly predetermined the child's program. In addition, petitioner asserts that the June 2006 CSE meeting was improperly composed. She also alleges that in developing the June 2006 IEP, respondent acted in bad faith, by

violating her right to confidentiality during the June 2006 meeting and by violating her rights guaranteed by the Family Educational Rights and Privacy Act (FERPA) (see 20 U.S.C. § 1232g). With respect to goals listed in the June 2006 IEP, petitioner asserts that the June 2006 CPSE failed to review progress on the child's goals, and that testimony at the impartial hearing established that new goals for the 2006-07 school year were not collaboratively created at the June 2006 CSE meeting. In addition, petitioner contends that the June 2006 IEP was likely to cause regression, not progress, and was therefore inappropriate to meet her son's special education needs. Next, she argues that the program proposed in the June 2006 IEP was not the LRE for the child, based on the manner in which his day would be scheduled and the nature of his disabilities. Petitioner noted that given her son's need "to be shielded from so many realities of the full-day kindergarten," the proposed full-day integrated placement was inappropriate. Respondent submitted an answer and cross-appeal, requesting that the petition be denied and dismissed in its entirety.

The central purpose of the IDEA (20 U.S.C. §§ 1400-1482)[5] 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, 458 U.S. 176, 179-81, 200-01 [1982]; Frank G. v. Bd. of Educ., 459 F.3d 356, 371 [2d Cir. 2006]). A FAPE includes special education and related services designed to meet the student's unique needs, provided in conformity with a written IEP (20 U.S.C. § 1401[9][D]; 34 C.F.R. § 300.17[d];[6] see 20 U.S.C. § 1414[d]; 34 C.F.R. § 300.320).[7]

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

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[5] On December 3, 2004, 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]). 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.

[6] The Code of Federal Regulations (34 C.F.R. Parts 300 and 301) has been amended to implement changes made to the IDEA, 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, citations herein refer to the regulations as amended because the regulations have been reorganized and renumbered.

[7] The term "free appropriate public education" means special education and related services that--

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

(20 U.S.C. § 1401[9]).

educational benefits (Rowley, 458 U.S. at 206-07; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). While school districts are required to comply with all IDEA procedures, not all procedural errors render an IEP legally inadequate under the IDEA (Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if a procedural violation is alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the child, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp.2d 415 at 419 [S.D.N.Y. Jan. 9, 2007]).

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs, establishes annual goals related to those needs, and provides for the use of appropriate special education services (Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

The IDEA directs that, in general, an impartial hearing officer's decision must be made on substantive grounds based on a determination of whether the child received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 130 [2d Cir. 1998]; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). 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, 142 F.3d at 132). The LRE is defined as "one that, to the greatest extent possible, satisfactorily educates disabled children together with children who are not disabled, in the same school the disabled child would attend if the child were not disabled" (Carlisle Area Sch. v. Scott P., 62 F.3d 520, 535 [3d Cir.1995]).

In determining an appropriate placement in the LRE, the IDEA requires that children with disabilities be educated to the maximum extent appropriate with children who are not disabled and that special classes, separate schooling or other removal of children with disabilities from the regular educational environment may occur only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily (20 U.S.C. § 1412[a][5][A]; see 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.6[a][1]; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 144 [N.D.N.Y. 2004]; Mavis v. Sobel, 839 F. Supp. 968 at 982 [N.D.N.Y 1993]). 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]).

The burden of persuasion in an administrative hearing challenging an IEP is on the party seeking relief (see Schaffer, 126 S. Ct. at 531, 536-37 [finding it improper under the IDEA to assume that every IEP is invalid until the school district demonstrates that it is not]).

Turning first to the procedural claims raised in the instant case, I agree with the impartial hearing officer's conclusion that the record does not support petitioner's argument that respondent committed various procedural errors that rose to the level of a denial of a FAPE. For the reasons set forth below, I find that petitioner failed to demonstrate that any procedural error impeded her son's right to a FAPE, significantly impeded her opportunity to participate in the decision making process surrounding the provision of a FAPE to her son, or caused a deprivation of educational benefits.

Petitioner claims that the program recommended in the June 2006 IEP was impermissibly predetermined, and as a result, she was denied meaningful parent participation in the development of her son's IEP. I agree with the impartial hearing officer's finding that respondent did not predetermine its recommendations for the child. Conversations about possible recommendations for a child, prior to a CSE meeting, are not prohibited as long as the discussions take place with the understanding that changes may occur at the CSE meeting (see, e.g., Application of a Child with a Disability, Appeal No. 05-110; Application of a Child with a Disability, Appeal No. 05-076). It is well-settled

that predetermination is not synonymous with preparation (Nack v. Orange City School District, 454 F.3d 604, 610 [6th Cir. 2006]). Additionally, a school district is not prohibited from suggesting a public school placement before testing is complete (see W.S. v. Rye City School District, 2006 WL 2771867 [S.D.N.Y. 2006]). In the instant case, the record reveals that the June 2006 CSE developed its recommendations after two meetings, at which petitioner, her attorney, and a number of the child's private service providers were in attendance (Dist. Exs. 2 at p. 5; 6 at p. 4). Meeting notes contained in the March 2006 and June 2006 IEPs indicated that the CSEs considered other program options for the child (Dist. Exs. 2 at p. 10; 6 at p. 7). The record shows that in addition to the full-day collaborative class that was ultimately recommended for the child for the 2006-07 school year, the June 2006 CSE considered a full-day special education class, which was rejected because it was deemed to be an overly restrictive placement for the child (Tr. p. 508; Dist. Ex. 2 at p. 10). A half-day preschool program with special education support was another option discussed by the June 2006 CSE; however, this potential placement was also rejected because the child was five years old and was transitioning to the CSE (Dist. Ex. 2 at p. 10). Moreover, the June 2006 CSE rejected this option because the CSE determined that "a full-day integrated class with related services all delivered within the same building would provide a more cohesive special education program to meet [the child's] unique needs" (id.). The CSE Chairperson testified that she specifically requested suggestions from petitioner and petitioner's private psychologist regarding placements they considered suitable, but that no placement options were offered (Tr. pp. 162-63). She also stated that she had no objection to sending packets to the Board of Cooperative Education Services (BOCES) placements for the child; however, BOCES did not have the type of program that anyone was requesting for the child, because BOCES programs were comprised only of special education students, as opposed to typically developing peers (Tr. pp. 284-85). The record also shows that the CSE Chairperson spoke to a BOCES representative regarding a potential program for the child, who also agreed that BOCES programs were more restrictive than self-contained classrooms, which had already been deemed too restrictive for him (Tr. pp. 284, 508).

Given the record and the testimony adduced in the instant case, there is no indication that respondent would not be flexible in its recommendations for the child's program. For example, the record reflects that respondent's CSE took committee member concerns into consideration by adding a resource room period for the child, and by being open to suggestions on how to improve the collaborative class and how to make it more appropriate for the child (Tr. pp. 508-09). With respect to petitioner's request that her son be provided with a 1:1 aide, respondent's CSE advised her that he would be provided with individual instruction if he needed it (Tr. p. 590; Dist. Ex. 2 at p. 7). Lastly, June 2006 CSE meeting notes indicated that respondent proposed that the child could begin the 2006-07 school year on an abbreviated schedule in order to ease his transition to full-day kindergarten (Tr. pp. 121, 286, 288). Under the circumstances presented herein, although the record indicates that petitioner did not accept the recommended program, it does not support her claim that the child's program for the 2006-07 school year was impermissibly predetermined, resulting in a denial of meaningful parent participation. Although school districts must provide an opportunity for parents to participate in the development of their child's IEP, mere parental disagreement with a school district's proposed IEP and placement recommendation does not amount to a denial of meaningful participation (see

Sch. for Language and Communication Development v. New York State Dep't of Edu., 2006 WL 2792754, at *7 [E.D.N.Y. Sept. 26, 2006] ["Meaningful participation does not require deferral to parent choice"]; Paolella v. District of Columbia, 210 Fed. Appx. 1, 2006 WL 3697318 [C.A.D.C. Dec. 6, 2006]). The IDEA guarantees an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Tucker, 873 F.2d at 567 [internal quotation omitted]; see Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132).

Next, I will address petitioner's contention that the June 2006 CSE meeting was improperly constituted due to the absence of a regular education teacher. Petitioner's due process complaint notice does not address or raise this issue, and a review of the record reveals that she did not raise this issue at the impartial hearing, nor did she amend her due process complaint notice or make any request to do so (Dist. Ex. 36). Accordingly, I find that the issue of the June 2006 CSE composition is beyond the scope of my review because it was not properly raised below. (Application of a Child with a Disability, Appeal No. 07-008; Application of a Child with a Disability, Appeal No. 06-046; Application of a Child with a Disability, Appeal No. 06-039; Application of a Child with a Disability, Appeal No. 05-080; Application of a Child with a Disability, Appeal No. 04-043; Application of a Child with a Disability, Appeal No. 04-019; Application of the Bd. of Educ., Appeal No. 02-024). Even if I were to find that the issue of the June 2006 CSE composition had been properly raised, I would find petitioner's claim unpersuasive. The record reflects that the regular education teacher who attended the meeting was scheduled to be appointed one of the kindergarten collaborative teachers, despite not being one the teachers ultimately hired for the position (Tr. pp. 60, 370; Dist. Ex. 2 at p. 5).[8] Regardless, the record does not indicate that respondent failed to provide petitioner with an opportunity to explore the recommended program. The child's special education teacher advised petitioner during the June 2006 meeting that the program would be developed from the "ground up" to specifically meet each child's needs (Dist. Ex. 2 at p. 9). The CSE Chairperson invited the child's special education teacher to the June 2006 meeting so that petitioner could ask her specific questions about the proposed program (Tr. p. 273). She described the teaching method that would be utilized in the classroom, and further noted that a daily communication log would be established between school and the child's home (Dist. Ex. 2 at p. 9). The child's special education teacher also agreed to arrange monthly meetings with petitioner (id.). Moreover, in August 2006, the child and his mother also visited the proposed classroom, and once the classroom was created, petitioner visited it in October 2006 (Tr. pp. 563, 945). Under the circumstances presented herein, the record does not support petitioner's claim that the absence of the child's regular education teacher at the June 2006 CSE meeting seriously infringed upon the creation of her son's 2006-07 IEP, or denied her a meaningful opportunity to take part in the development of the June 2006 IEP.

Petitioner also claims that respondent acted in bad faith by violating her rights to confidentiality by inviting the child's special education teacher to the June 2006 CSE meeting, because she had not been officially hired by respondent's district to teach the

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[8] The record also shows that at the time of the June 2006 CSE meeting, the proposed collaborative class had not been created yet (Tr. p. 258).

proposed collaborative kindergarten class. Petitioner did not raise this issue in her due process complaint notice, and she did not raise this issue at the impartial hearing, nor did she amend her due process complaint notice or make any request to do so (Dist. Ex. 36). In fact, the impartial hearing officer acknowledged during the impartial hearing that petitioner's confidentiality claims were outside the scope of his jurisdiction and he noted that said claims were not enumerated in petitioner's due process complaint notice (Tr. pp. 279-80). Accordingly, I find that the issue of the confidentiality is beyond the scope of my review because it was not properly raised below. (Application of a Child with a Disability, Appeal No. 07-008; Application of a Child with a Disability, Appeal No. 06-046; Application of a Child with a Disability, Appeal No. 06-039; Application of a Child with a Disability, Appeal No. 05-080; Application of a Child with a Disability, Appeal No. 04-043; Application of a Child with a Disability, Appeal No. 04-019; Application of the Bd. of Educ., Appeal No. 02-024). In addition, the record reveals that attorneys from both parties attended the June 2006 CSE meeting and neither attorney objected to the presence of the special education teacher (Tr. pp. 272, 276). Under the circumstances presented herein, I find that petitioner failed to raise any objection to confidentiality due to the special education teacher's attendance at the CSE meeting; accordingly, such claims are waived, and for this additional reason, I decline to review petitioner's claim with respect to the special education teacher's attendance at the CSE meeting (Tr. p. 323).

Lastly, petitioner claims that respondent violated her rights protected by FERPA. Petitioner does not specify how respondent violated her rights under FERPA. I note that petitioner's claims with respect to violations of FERPA are not contained in her due process complaint notice and were not raised during the impartial hearing. Accordingly, they are not properly before me and I do not review them. To the extent that petitioner makes reference to FERPA in her petition and memorandum of law, I refer her to the procedures set forth under that statute's implementing regulations (34 C.F.R.§§ 99.20-99.22).

With respect to goals listed in the June 2006 IEP, petitioner asserts that the June 2006 CPSE failed to review progress on the child's goals, and that testimony at the impartial hearing established that new goals for the 2006-07 school year were not collaboratively created at the June 2006 CSE meeting.

In consideration of petitioner's assertion, I have carefully reviewed the three IEPs in the record, dated November 17, 2005, March 23, 2006 and June 5, 2006 (Dist. Exs. 2; 5; 6). Each IEP contains extensive information about the child and also includes very specific meeting notes reflecting the process by which respondent's CPSE and CSE collaborated with petitioner and with petitioner's private providers to develop the goals and objectives that were ultimately included on the June 2006 IEP.

The record shows that the November 17, 2006 IEP contained 36 goals and 130 corresponding objectives (Dist Ex. 5 at pp. 7-18). Meeting notes from November 2005 IEP indicate that the CPSE convened on that date to review the child's goals and objectives, and that meeting participants agreed that the number of goals and objectives was excessive (id. at pp. 5-6). Meeting notes included an observation from the Tri-State director of clinical services that the child had mastered only 14.7% of the objectives on the November 2005 IEP (id. at p. 6).

The March 23, 2006 CSE developed an IEP based on review of ten progress reports from the child's current providers (Dist. Ex. 6 at pp. 6-7). The child's private providers were in attendance at the March 2006 CSE meeting and his preschool teacher participated by telephone (id. at p. 4). Meeting notes in the March 2006 IEP indicated that current providers reviewed progress in their sessions with the child (id. at pp. 5-6). Meeting notes specifically stated that PT, OT and socialization goals were reviewed, and that the child's progress toward speech-language and academic goals was discussed in detail (id.). Furthermore, meeting notes also stated that goals developed by providers at Tri-State for 2006-07 were reviewed by the CSE (id. at p. 6). The IEP that resulted from the March 2006 IEP contained 34 goals (id. at pp. 7-12). A review of the record shows that nine goals were carried over directly from the November 2005 IEP, with changes in levels of mastery or mastery criteria, and seven goals were comparable to November 2005 goals but were revised and modified, in some cases expanded and in some cases reduced, to reflect the child's functioning at the time the goals were reviewed and revised (id.). Eleven goals expanded on goals from the November 2005 IEP and reflected the child's progress in those areas (id.). The March 2006 IEP also contained eight new goals that were reflective of the progress reports available to the CSE at the time the IEP was developed (id.).

When the CSE reconvened on June 5, 2006, it had access to the March 2006 evaluation and progress reports as well as a June 2, 2006 teacher report, a March 24, 2006 psychological evaluation report and classroom observation, an April 18, 2006 kindergarten screening report, an April 15, 2006 BIP and a March 31, 2006 private psychological evaluation report and classroom observation (Dist. Ex. 2 at pp. 9-10). Current and anticipated providers were present at the June 2006 meeting, and meeting notes indicated that those providers participated, as did the private psychologist who conducted the March 2006 evaluation and observation (id. at pp. 5-6). The meeting notes are extensive, and reflect a thorough and comprehensive collaboration of current and recommended providers (id. at pp. 6-9). Consistent with the information in these meeting notes, the record reflects that the June 2006 IEP contains specific and detailed descriptions of the child's progress and needs in each domain.

Meeting notes also stated that the child's annual goals were reviewed and that goals were updated and added (id. at p. 9). The resulting document contains 38 goals (id. at pp. 10-16). Twenty-nine goals on the June 2006 IEP were carried over from the March 2006 IEP and one new goal was added (id.). Two goals were revised from the March 2006 IEP and five goals from the November 2005 IEP were expanded (id.). In light of the foregoing, the record does not afford a basis for petitioner's assertion that respondent's CSE failed to review progress on the child's goals, nor do I find that new goals were not collaboratively created during the June 2006 CSE meeting.

A comparison of the November 2005 IEP, the March 2006 IEP and the June 2006 IEP confirms both the information in the meeting notes and testimony by district staff regarding petitioner's assertion that goals were neither reviewed nor developed collaboratively. Testimony adduced at the impartial hearing revealed that the June 2006 CSE, in developing the goals contained in the IEP, gave consideration to the child's private providers (see Tr. pp. 155, 159, 173). Accordingly, as expressed in greater detail below, I find that the information in the June 2006 IEP, represented a careful and comprehensive

review and analysis of available reports, supplemented by verbal reports from service providers and specialists who were present at the June 2006 meeting. The record shows that the child's present performance levels were exhaustively described, his needs were comprehensively articulated, and goals and objectives reflected those needs (Dist. Ex. 2). A review of the record also reveals that the only area which does not appear to have been addressed in a collaborative manner was the recommended placement for the child. Respondent's CSE Chairperson testified that, while particular care had been given to developing an individualized program to meet the child's needs in the LRE, the CSE had been open to recommendations from petitioner as well as the child's private service providers regarding other placement options, yet none were offered (Tr. pp. 118, 162-63, 232-33, 522-23).

I now turn to petitioner's assertion that the challenged June 2006 IEP was likely to cause regression, not progress and therefore was inappropriate to meet her son's special education needs. Despite her contention, petitioner fails to cite any examples from the record to show that the June 2006 IEP was likely to result in regression, nor did she explain how the proposed program would cause her son to regress. According to the child's developmental pediatrician, without the support of a 1:1 aide, the child would likely regress but the pediatrician offered no basis for that opinion, nor did she explain the nature of the anticipated regression and how it would be related to provision of a 1:1 aide (Dist. Ex. 30 at p. 2). Although the June 2006 IEP does not furnish the child with a 1:1 aide, respondent's special education teacher stated that if he needed 1:1 instruction, he would receive it (Tr. p. 590). Under the circumstances presented herein, petitioner failed to establish during the impartial hearing that the challenged IEP was likely to result in regression, not progress, and therefore, was not reasonably calculated to meet her son's special education needs (see Cerra, 427 F.3d at 195).

Petitioner next argues that the program proposed in the June 2006 IEP is not the LRE for her son. The record does not support her assertion. What the record does reveal is that respondent's CSE determined that the child was "too high functioning" to participate in the 8:1+1 self-contained class offered at BRS and that he benefited from integration opportunities (Tr. pp. 111-12, 117). The June 2006 CSE also deemed BOCES programs to be inappropriate to meet the child's special education needs because opportunities for integration were limited in that setting, and meeting participants concurred that he benefited from interaction with typically developing peers (Tr. pp. 113-14). As a final note, although the record indicates that the child has experienced difficulty with transitions (Tr. pp. 557-58), the CSE Chairperson testified that the proposed program required fewer transitions for him, as all of his special education needs would be met within the same building offering him what she described as "much more integrated holistic approach, that he could be eased into as he was ready for it" (Tr. pp. 171-72; see Dist. Ex. 2). Under the circumstances presented herein, the record demonstrates that respondent offered the child a program tailored to meet his special education needs in the LRE.

Lastly, petitioner maintains that in light of her son's need "to be shielded from so many realities of the full-day kindergarten," the proposed full-day integrated placement was inappropriate. Having conducted an independent review of the record, I disagree. First, the CSE Chairperson testified that there was no reason to believe that the child was

not academically ready for kindergarten (Tr. p. 342). With respect to the child's stamina, respondent's school psychologist indicated that she did not observe difficulty in that area (Tr. p. 489). Nevertheless, the CSE Chairperson testified that because the child requires OT and PT, he would be provided with support in those areas as part of his school day (Tr. pp. 343-44). She acknowledged that the child's fine and gross motor skills were not on par with most typically developing kindergarten students, but stated that his deficits were not "so extreme" that he would not receive an educational benefit from the proposed program (Tr. p. 344). Moreover, given petitioner's concerns with respect to her son's ability to withstand a full-day kindergarten, respondent was willing to offer him an abbreviated school day (Tr. pp. 237, 286, 288, 455). Lastly, the record demonstrates that at the time of the impartial hearing, given the amount of related services with which he was provided on a daily basis, the child already had a full-day schedule, and respondent's program could offer him a shorter day (Tr. pp. 286, 454, 605). In light of the foregoing, the record reflects that the child was ready for full-day kindergarten, and further shows that respondent was willing to accommodate him in making the transition to the proposed full-day integrated kindergarten placement.

Based upon the information before me, I find that the program proposed in the June 2006 IEP, at the time it was formulated, was reasonably calculated to enable the child to receive educational benefit (Viola v. Arlington Central School District, 414 F. Supp. 2d 366 at 382 [S.D.N.Y. 2006] [citing to J.R. v. Bd. of Educ. of the City of Rye Sch. Dist., 345 F. Supp. 2d 386, 395 n.13 [S.D.N.Y. 2004]; see Cerra, 427 F.3d at 195; see also Mrs. B., 103 F.3d at 1120; Application of a Child with a Disability, Appeal No. 06-112; Application of a Child with a Disability, Appeal No. 06-071; Application of the Bd. of Educ., Appeal No. 06-010; Application of a Child with a Disability, Appeal No. 05-021). In light of the foregoing, I find, for the reasons set forth above, that respondent offered the child an appropriate program in the LRE. Having determined that the challenged June 2006 IEP offered the child a FAPE, I need not reach the issue of whether Little Sparrows was appropriate for the 2006-07 school year, and the necessary inquiry is at an end (Mrs. C., 226 F.3d at 66); Walczak, 142 F.3d at 134; Application of a Child with a Disability, Appeal No. 05-038; Application of a Child with a Disability, Appeal No. 03-058).

I must now consider petitioner's request for reimbursement for the private psychological evaluation and the private speech-language evaluation conducted in spring 2006. As set forth in greater detail below, I decline to do so. State regulations provide that a parent has the right to an independent educational evaluation (IEE) at public expense if the parent disagrees with an evaluation obtained by the school district. If a parent requests an IEE at public expense, the school district must, without unnecessary delay, ensure either an IEE is provided at public expense or initiate an impartial hearing to show that its evaluation is appropriate or that the evaluation obtained by the parent does not meet the school district criteria. If the impartial hearing officer finds that a school district's evaluation is appropriate, a parent may not obtain an IEE at public expense (34 C.F.R. § 300.502; 8 NYCRR 200.5[g]; Application of the Bd. of Educ., Appeal No. 05-009; Application of a Child with a Disability, Appeal No. 04-082; Application of a Child with a Disability, Appeal No. 04-027). In the instant case, there is nothing in the record that demonstrates that petitioner disagreed with a district evaluation. I note that respondent made an effort to conduct its own psychological evaluation of the child; however, petitioner

requested that a number of psychological tests not be repeated from the private evaluation (Tr. pp. 442, 452, 529; Dist. Ex. 38). Respondent began its own testing of the child to supplement the test results obtained from the private psychological evaluation, but on the second day of testing, the child was unable to come inside the building to complete the testing (Tr. pp. 210, 216, 297). While the record reflects that respondent reviewed the private psychological evaluation report and the private speech-language evaluation report in forming its recommendations for the child's 2006-07 school year, it also reveals that the private psychological evaluation report did not provide the CSE with any new information regarding the child's educational needs (Tr. pp. 160-61, 488; see Dist. Exs. 2; 6). Moreover, the CSE Chairperson testified that nothing in the report would have changed the CSE's program recommendation (Tr. p. 161). Having reviewed respondent's school psychologist's evaluation report as well as the private psychologist's report, I note a number of similarities. For example, I note that both evaluating psychologists observed the child and described the child's attentional deficits requiring redirection from the SEIT (Dist. Exs. 3 at p. 1; 4 at p. 2). Both described his socialization deficits and his SEIT's efforts to engage the child in interactions with other children (Dist. Exs. 3 at p. 3; 4 at pp. 2, 9). Neither evaluator observed separation anxiety when the child's mother left the testing room (Dist. Exs. 3 at p. 3; 4 at p. 2). Both evaluators reported recognition of letters and words as an area of strength for the child (Dist. Exs. 3 at pp. 4-5; 4 at p. 6). Both evaluators recommended kindergarten classrooms with opportunities for social interaction and both recommended accommodations to address the child's limited stamina (Dist. Exs. 3 at p. 7; 4 at p. 11).

With respect to petitioner's request for reimbursement for the private speech-language evaluation, I have reviewed both speech-language evaluations contained in the record. The record shows that both evaluators described the child's deficits in conversational use of language, his need for prompts in use of his expressive and receptive language skills, and his attentional deficits (Dist. Exs. 15; 16). Both evaluators recommended continued support of the child's expressive and receptive language skills and his socialization needs (Dist. Exs. 15 at p. 4; 16 at p. 10). I note that, although her test results suggested that the child's communication skills were at age level, the CPSE's speech-language pathologist used reports from petitioner and his current providers to identify his areas of need (Dist. Ex. 15 at p. 1). Under the circumstances presented herein, the record reflects that respondent's evaluator provided the CSE with sufficient information regarding the child's performance levels and his needs in order to develop appropriate language goals and objectives for the child (see Dist. Ex. 15). In light of the foregoing, although respondent considered input from the child's private evaluators in making its recommendations, the record shows that the June 2006 CSE ultimately did not accept their recommendations. Accordingly, I decline to award reimbursement for the cost of either private evaluation.

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

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS SUSTAINED.

IT IS ORDERED, that the impartial hearing officer's decision is annulled to the extent that he found that he had jurisdiction over issues not raised in the due process complaint notice.

Dated: **Albany, New York**
June 27, 2007

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PAUL F. KELLY
STATE REVIEW OFFICER