



# The University of the State of New York

## The State Education Department State Review Officer

No. 07-054

### **Application of a CHILD WITH A DISABILITY, by his parents, for review of a determination by 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, Daniel J. Schneider, Esq., of counsel

#### **DECISION**

Petitioners appeal from the decision of an impartial hearing officer, which determined that the educational program respondent's Committee on Special Education (CSE) recommended for their son for the 2006-07 school year was appropriate and denied their request for an order directing that a specific instructional methodology be identified on the child's 2006-07 individualized education program (IEP). The appeal must be dismissed.

At the commencement of the impartial hearing on September 26, 2006, the child was five years old and receiving home-based special education programs and related services (Tr. pp. 341-42; Parent Exs. Y; Z; CC). The child's eligibility for special education programs and services and classification as a child with autism are not in dispute in this appeal (8 NYCRR 200.1[zz][1]).

The record indicates that the child was born prematurely and received early intervention services of speech therapy, occupational therapy (OT), physical therapy (PT), and feeding therapy from birth to three years of age (Tr. pp. 342-45; see Parent Exs. Q at p. 1; R at p. 1; T; U at pp. 1-2). When the child was "first identified as potentially autistic at 17 months" a neurologist recommended that the child receive applied behavior analysis (ABA) services (Tr. pp. 342-43). Initially, the child received ten hours per week of home-based ABA, which incorporated the use of a verbal behavior component (verbal behavior ABA), in addition to the already instituted speech therapy, OT, PT, and feeding therapy (Tr. pp. 342-44). The child continued to receive home-based verbal behavior ABA and related services until he transitioned from early intervention services into services provided through the Committee on Preschool Special Education (CPSE) in 2004 (Tr. pp. 342-46). The CPSE identified the child as a preschool student with a disability, prepared an IEP, and in September 2004, the child entered an 8:1:2 special preschool class in a specialized

school in respondent's district at P.S. 37 (Tr. pp. 345-48). Respondent created the special preschool class at P.S. 37 specifically for petitioners' child (Tr. pp. 346-47).

For the 2004-05 school year, the child attended the 8:1:2 special preschool class and also received 15 hours per week of home-based verbal behavior ABA; the CPSE included verbal behavior ABA on the child's 2004-05 IEP as the instructional methodology to be used in both the child's home-based program and in the preschool class (Tr. p. 348). During the 2004-05 school year, the child also received school-based related services of speech-language therapy, OT, PT, and feeding therapy, and home-based related services of speech-language therapy, OT, and counseling services (Tr. pp. 348-49). In his preschool class, the child had the assistance of a 1:1 full-time paraprofessional (Tr. p. 349). For the 2005-06 school year, the child received special education programs and related services identical to those received during the 2004-05 school year, and the CPSE included verbal behavior ABA on the child's 2005-06 IEP as the instructional methodology for both the home-based program and in the preschool class (Tr. pp. 350-54).

Prior to the CPSE's annual review on April 4, 2006, petitioners obtained numerous evaluations and progress reports from the child's service providers for input regarding the child's educational programming for the 2006-07 school year (Parent Exs. A-W). The evaluations and reports identified the child's present levels of performance, learning characteristics, health and physical development, academic management needs, social/emotional management needs, and offered recommendations for the child's 2006-07 educational programming (Parent Exs. I at pp. 4-5; K at pp. 2-3; L at pp. 1-7; M at pp. 1-2; N at pp. 7-8; see generally Parent Exs. A-W). In particular, the child's home-based ABA provider noted that he required 1:1 discrete trial teaching and verbal behavior ABA in both the school-based and home-based programs (Parent Ex. L at pp. 2, 5-7). Some of the service providers also drafted annual goals and short term objectives (Parent Exs. I at pp. 6-7; K at p. 9; L at pp. 8-20, 22-23; M at pp. 3-4).

On April 4, 2006, the CPSE convened to conduct the child's annual review (Parent Ex. BB at p. 1). The CPSE continued to identify the child as a preschool student with a disability and made a dual recommendation for special education programs and related services to be delivered in both a school-based and a home-based setting through August 31, 2006 (Parent Ex. BB at pp. 1-2, 58-60). The CPSE recommended placement in the 8:1:2 special class at P.S. 37 with the assistance of a 1:1 full-time paraprofessional (id. at pp. 1, 58). The recommendations for school-based related services included: individual speech-language therapy five times per week for 30 minutes per session; individual PT five times per week for 30 minutes per session; individual counseling two times per week for 30 minutes per session; and individual OT five times per week for 30 minutes per session (id. at p. 59). The recommendations for home-based related services included: individual speech/feeding therapy four times per week for 30 minutes per session; individual speech-language therapy five times per week for 45 minutes per session; individual OT two times per week for 30 minutes per session; and counseling once per week for 60 minutes per session (id. at p. 60). In addition to the home-based related services, the CPSE recommended 15 hours per week of home-based special education itinerant teacher (SEIT) services (id. at pp. 1, 58).

The CPSE directly incorporated the child's present levels of performance, learning characteristics, and health and physical development needs from the descriptions provided by the child's service providers (compare Parent Ex. BB at pp. 3, 4, 6, with, Parent Exs. B at p. 1; I at p. 4; K at p. 2). Under academic management needs, the child's IEP noted that he required instruction through the verbal behavior ABA methodology and that the SEIT program would be provided

using the verbal behavior ABA methodology (id. at p. 3). The IEP also noted that sensory diet activities would be incorporated into the child's daily schedule (id. at p. 9). For the child's annual goals and short term objectives, the CPSE directly incorporated those as drafted by the child's service providers into the 2006-07 IEP (compare Parent Ex. BB at pp. 15-16, 19-34, 35-37, with, Parent Exs. I at pp. 6-7; K at p. 9; L at pp. 8-20, 22-23, 32; M at pp. 3-4).

Six days later on April 10, 2006, respondent's CSE convened to conduct the child's "turning 5" conference in anticipation of the child transitioning from preschool to kindergarten and to prepare the child's IEP for the 2006-07 school year (Tr. pp. 487-89, 768; Parent Ex. DD at p. 1; see Parent Ex. A at p. 1). On the first day, the CSE participants included petitioners, respondent's school psychologist who also acted as the district representative, the child's preschool teacher, a speech-language therapist, an occupational therapist, the child's home-based ABA provider, a parent member, and another adult as parent support (Parent Ex. DD at p. 2). During testimony at the impartial hearing, respondent's school psychologist who attended the CSE meetings indicated that petitioners provided the CSE with approximately 90 pages of material to review, including psychological evaluations, medical evaluations, speech-language evaluations, and reports from the child's home-based providers (Tr. p. 768). In addition to the materials from petitioners, respondent's school psychologist testified that he also had materials from the child's teachers and school-based service providers to review and that he had observed the child on his own (id.). The CSE met for approximately 4 1/2 hours on April 10, 2006, and reconvened on the following day for approximately one hour to complete the discussions about the child's 2006-07 IEP (Tr. pp. 378-79; Parent Ex. DD at pp. 2-3).

The CSE classified the child as a student with autism and similar to the CPSE's 2006-07 IEP, made a dual recommendation for the delivery of special education programs and services through both a school-based and a home-based program (Parent Ex. DD at pp. 1-2, 53-54). The school-based program included placement in a 6:1:1 special class in a specialized school with related services, a 12-month program, special education transportation, and adapted physical education (id. at p. 1). The CSE recommended the following school-based related services: individual speech-language therapy three times per week for 30 minutes per session; group speech-language therapy two times per week for 30 minutes per session; individual OT five times per week for 30 minutes per session; individual PT three times per week for 30 minutes per session; individual counseling two times per week for 30 minutes per session; and the assistance of a 1:1 full-time health services paraprofessional while at school (id. at p. 53). For the home-based program, the CSE recommended 15 hours per week of special education teacher support services (SETSS) and related services of individual speech-language therapy five times per week for 30 minutes per session, individual OT two times per week for 30 minutes per session, individual counseling once per week for 60 minutes per session, and group speech-language therapy two times per week for 30 minutes per session (id. at p. 54).

The 2006-07 IEP developed by respondent's CSE mirrored the 2006-07 IEP developed by the CPSE (compare Parent Ex. BB, with Parent Ex. DD). Although the CSE's IEP directly incorporated several pages of the CPSE's IEP, the CSE included additional information about the child's academic performance and learning characteristics, social/ emotional performance and needs, and health and physical development (see Parent Ex. DD at pp. 5-8, 10-11, 13, 15, 16). The CSE also added more annual goals and short term objectives (id. at pp. 41-42, 49-50). The CSE removed, however, the CPSE's single reference to verbal behavior ABA as the instructional methodology and did not refer to a specific instructional methodology in the child's 2006-07 IEP

(compare Parent Ex. BB at p. 3, with, Parent Ex. DD at p. 4). With regard to the newly added information which the CSE gleaned from the materials provided by petitioners, the CSE did not carry over the providers' references to verbal behavior ABA into the child's IEP (compare Parent Ex. DD at pp. 6-8, 13, 15, with, Parent Exs. L at pp. 5-7; N at pp. 7-8).

By Final Notice of Recommendation (FNR) dated June 19, 2006, respondent offered the child a placement in a 6:1:1 special class in a specialized school with related services and a 1:1 full-time paraprofessional located at P.S. 37, in addition to the special education programs and related services to be delivered through the home-based program (Dist. Ex. 3).

By due process complaint notice dated August 11, 2006, petitioners requested an impartial hearing alleging that the child's proposed IEP for the 2006-07 school year failed to offer a free appropriate public education (FAPE)<sup>1</sup> or an educational benefit because it did not 'provide a "[s]cientific [r]esearch [b]ased instructional practices based on peer reviewed research"' (Parent Ex. RR at pp. 2, 5-6). In particular, petitioners asserted that the IEP needed to include verbal behavior ABA as the child's instructional methodology (id.). In addition to requesting the inclusion of a specific instructional methodology on the child's IEP, petitioners also sought to include the following: parent and staff training, preparation time for the SEIT lead teacher, monthly team meetings for all providers, provision of a Board Certified Behavior Analyst (BCBA) to the child's school, use of token economies and the picture exchange communication system (PECS), three hours per day of 1:1 verbal behavior ABA with discrete trial teaching, additional training for the child's 1:1 paraprofessional, and a BCBA to provide direct supervision of the child's teacher and paraprofessional (id. at pp. 3, 6). As a proposed solution, petitioners requested that respondent provide either 40 hours per week of home-based verbal behavior ABA with discrete trial teaching and all of the related services set forth in the proposed 2006-07 IEP, or that respondent offer a school-based program that could provide a verbal behavior ABA classroom using the Assessment of Basic Language and Learning Skills (ABLLS) "curriculum"<sup>2</sup> and three hours per day of 1:1 verbal behavior ABA with discrete trial teaching for their child (id.).

The impartial hearing commenced on September 26, 2006, and after six days of testimony concluded on March 16, 2007 (Tr. pp. 1, 916). On the first day of testimony, the impartial hearing officer entertained a lengthy discussion in order to understand, define and clarify the issues presented by petitioners (Tr. pp. 8-9, 45-67). Both parties presented documentary and testimonial evidence (Tr. pp. 1-1009; Parent Exs. A-SS; Dist. Exs. 1-8). Petitioners elicited testimony from the child's various home-based providers, who opined that the child required verbal behavior ABA

---

<sup>1</sup> 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][D]).

<sup>2</sup> Petitioners mistakenly characterize ABLLS as a "curriculum" (Parent Ex. RR at pp. 3, 6). ABLLS is a comprehensive assessment tool used to assess the behavior of children with autism or other developmental disabilities in 26 domains. Results from the administration of the assessment provide guidance in designing an intervention curriculum.

as an instructional methodology and that he made progress using this approach (Tr. pp. 90, 92-106, 110-13, 201-05, 209, 287, 289-90, 324-26). Respondent asserted at the impartial hearing that it offered the child a FAPE and that the inclusion of a specific instructional methodology on the child's IEP would "hinder the teacher[s]" and compel them to use a particular methodology to the exclusion of other methodologies (Tr. pp. 495, 557-58, 786-87, 791-93, 859-61, 946-51).

In a decision dated April 10, 2007, the impartial hearing officer concluded that petitioners' claim that respondent failed to offer their son a FAPE for the 2006-07 school year fell into three categories:

the claimed defect in the IEP due to its omission of a scientific research-based instructional practice, ABA utilizing Verbal Behavior; second, is the claimed defect in the IEP due to the omission of a Behavioral Intervention Plan; and third is the claimed inappropriateness of the proposed kindergarten placement at PS 37, which utilizes an eclectic approach to teaching children with autism

(IHO Decision at pp. 35-36). The impartial hearing officer noted that petitioners did not dispute the appropriateness of a 6:1:1 special class subject to the methodology used in the classroom, or the level of related services offered in the 2006-07 IEP (id. at p. 36). The impartial hearing officer accurately set forth the proper legal authority applicable to the analysis of the issues presented during the impartial hearing (id. at pp. 36-38).

Prior to setting forth her conclusions, the impartial hearing officer noted one particular finding of fact: the evidence clearly established that the child made progress and derived "a meaningful educational benefit from the use of ABA as a teaching methodology, whether it [fell] under the rubric of Verbal Behavior or discreet (sic) trial teaching or any other form of behavior modification" (IHO Decision at p. 38). The impartial hearing officer went on to state that "no one who testified has suggested that those providing the student with educational instruction, including the classroom teacher, SETSS providers, or related services therapists, are precluded from using ABA as a teaching methodology" (id.). As respondent's CSE Chairperson testified, ABA terminology was referenced in the IEP as a means of mastery of the child's goals and objectives (id.). The impartial hearing officer found that it would be "disingenuous to suggest that unless a methodology is included in the IEP that the teachers would not know what methodology should be used" (id. at pp. 38-39). Furthermore, as the proposed kindergarten teacher testified, she was trained in both ABA and verbal behavior ABA instruction, and she was willing and able to use the ABA methodology in the 1:1 sessions and throughout the day in general (id. at p. 39). Thus, the impartial hearing officer determined that petitioners' argument that the "CSE precluded the use of ABA as a teaching methodology" by not including a specific teaching methodology in the child's IEP was without merit (id.).

The impartial hearing officer then went on to analyze and determine whether respondent failed to offer petitioners' son a FAPE for the 2006-07 school year according to the three categories defined earlier in the decision (IHO Decision at pp. 39-44).

First, the impartial hearing officer determined that petitioners failed to sustain their burden to establish that the omission of a specific teaching methodology on the child's April 10, 2006 IEP denied their son a FAPE (IHO Decision at pp. 39-40). The impartial hearing officer determined

that the evidence supported the conclusions that a properly composed CSE completed the IEP, that "the members were allowed meaningful participation as evidenced particularly by the extensive incorporation of materials," and that "[a]ll opinions were solicited and the parent, above all, was actively and forcefully involved" in the development of the child's IEP (*id.* at p. 39). The impartial hearing officer concluded that although respondent's CSE Chairperson made the "final determination that the inclusion of a specific teaching methodology was too restrictive and, thereby, should be omitted from the final draft of the IEP," this decision "in no way impeded the student's right to a FAPE; significantly impeded the mother's opportunity to participate in the decision making process regarding the provision of FAPE, her position of non-negotiability on the issue notwithstanding; or caused a deprivation of educational benefits for the student" (*id.*). She continued to reason that she could find no legal authority "for the proposition that every element of the IEP be included based on a unanimous agreement, majority vote, or overall consensus, especially here where such an element is not mandated by law and interferes with a teacher's ability to properly teach the student" (*id.*). The impartial hearing officer concluded that the child's preschool teacher's testimony indicated that the child responded "to the best practices used in the classroom which stressed the structure or organization of the classroom, visual supports, using prompting and fading, one to one instruction, [and] generalizing skills," and that the child also responded well to teachers who did not use the verbal behavior ABA approach (*id.* at p. 40).

Although the evidence supported that the child learned from the verbal behavior ABA approach, the evidence did not establish that the child "only learns from the use of ABA, let alone, the more specific ABA Verbal Behavior" (IHO Decision at p. 40). The impartial hearing officer concluded that the commentary within the Federal Register cited by petitioners did not mandate the inclusion of a specific teaching methodology in an IEP and did not provide a "convincing basis for doing so in this case" (*id.*; *see* Statement of Special Education and Related Services, 71 Fed. Reg. 46664-65 [Aug. 14, 2006]).<sup>3</sup> She found that based upon the evidence in this case, "a statement of teaching methodology [was] inappropriate for inclusion in this student's IEP and [was] a matter to be left to the teacher" (IHO Decision at p. 40). The impartial hearing officer concluded that the "CSE's decision to not designate a specific teaching methodology in the IEP [did] not render the IEP inappropriate or result in a denial of FAPE" (*id.*).

The impartial hearing officer also determined that petitioners failed to sustain their burden to establish that the omission of a behavioral intervention plan (BIP) denied him a FAPE, and that petitioners failed to sustain their burden to establish that the recommended placement in a kindergarten classroom at P.S. 37, which utilized an eclectic approach to teaching, denied their

---

<sup>3</sup> The portion of the Federal Register, which petitioners argue supports their contention to include a specific methodology in their son's IEP, is as follows:

There is nothing in the Act that requires an IEP to include specific instructional methodologies. Therefore, consistent with section 614(d)(1)(A)(ii)(I) of the Act, we cannot interpret section 614 of the Act to require that all elements of a program provided to a child be included in an IEP. The Department's longstanding position on including instructional methodologies in a child's IEP is that it is an IEP Team's decision. Therefore, if an IEP Team determines that specific instructional methods are necessary for the child to receive FAPE, the instructional methods may be addressed in the IEP.

(Statement of Special Education and Related Services, 71 Fed. Reg. 46664-65 [Aug. 14, 2006]).

son a FAPE (IHO Decision at pp. 40-44). With regard to the BIP, the impartial hearing officer noted that although it was a serious oversight, the evidence indicated that the child had been "thoroughly evaluated for his behavioral issues" and had "appropriate behavior plans and interventions in place to address them" (*id.* at pp. 40-42). The impartial hearing officer noted that "an integral aspect of conducting [a Functional Behavior Assessment (FBA) was] determining how a child's behavior relate[d] to the environment in which it occurs" (*id.* at p. 42). She reasoned that the child's proposed kindergarten teacher credibly testified that she "would have to observe a student to understand what causes the interfering behavior before she [could] recommend" an intervention (*id.*). The evidence also indicated that proper interventions had already been put into place in the child's home-based program, that the child's 1:1 full-time paraprofessional's services in school were used to address the child's behavior, and that the CSE included goals and objectives to address the child's behaviors (*id.*). Based upon the foregoing, the impartial hearing officer determined that the omission of a BIP did not rise to the level of a denial of FAPE, and furthermore, since the child did not attend the proposed placement in respondent's P.S. 37, the issue of a BIP was "either premature, or for the current school year, moot (*id.*).

Finally, the impartial hearing officer addressed the issue of whether petitioners sustained their burden to establish that respondent's recommended placement in a special class at P.S. 37, which utilized an eclectic approach to teaching, denied the child a FAPE (IHO Decision at pp. 43-44). The impartial hearing officer found that the child's proposed kindergarten teacher credibly explained that "eclectic means doing whatever it takes for the student to learn" (*id.* at p. 43). The impartial hearing officer noted that eclectic was an approach to teaching, not a methodology, and that the child's proposed kindergarten teacher testified that she "uses all methodologies in her class," including ABA, verbal behavior ABA, and PECS, "depending on [the students'] needs and assessments, although ABA [was] the predominant methodology" (*id.*). The kindergarten teacher also testified that she used Treatment and Education of Autistic and Communication Handicapped Children (TEACCH) to organize her classroom, which "relies on prompts to help the student understand transition and avoid confusion" (*id.*). The impartial hearing officer noted that petitioners specifically rejected the proposed placement at P.S. 37 because of the methodology used in the classroom (*id.*). Based upon the evidence, the impartial hearing officer determined that petitioners failed to sustain their burden to establish that the proposed placement at P.S. 37 denied their son a FAPE (*id.* at p. 44).

The impartial hearing officer's decision concluded that petitioners failed to sustain their burden under prong I of the Burlington/Carter analysis to establish that the April 10, 2006 IEP, and the proposed placement at P.S. 37 were inappropriate and denied the child a FAPE (IHO Decision at p. 44).

On appeal, petitioners assert the impartial hearing officer erred when she determined that the omission of verbal behavior ABA as the specific instructional methodology on the child's IEP did not rise to the level of a denial of FAPE and that the teaching methodology is a matter to be left to the teacher. Petitioners argue that they were denied meaningful participation at the CSE meeting because the determination to not designate a specific instructional methodology on their son's IEP was solely made by respondent's CSE Chairperson based upon a predisposed policy or practice. Petitioners also argue that their son's IEP did not contain a BIP, which denied him a FAPE. Petitioners seek to annul the impartial hearing officer's decision and to reinstate 1:1 verbal behavior ABA as their son's instructional methodology on his IEP, as well as 40 hours of 1:1 ABA by a qualified special education teacher.

Respondent asserts in its answer that petitioners failed to prove that the omission of a verbal behavior ABA in the child's IEP denied their child a FAPE, that the CSE was properly composed, that petitioners meaningfully participated in the development of their son's IEP, and respondent was not required to include a specific instructional methodology on the child's IEP. Respondent requests that the impartial hearing officer's decision be upheld in its entirety and that petitioners' appeal be dismissed.

The central purpose of the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482)<sup>4</sup> 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];<sup>5</sup> see 20 U.S.C. § 1414[d]; 34 C.F.R. § 300.320).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). While school districts are required to comply with all IDEA procedures, not all procedural errors render an IEP legally inadequate under the IDEA (Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at \*10 [S.D.N.Y. Feb. 9, 2007]). 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 education benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; see Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007]).

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 ensure an "appropriate" education, "not one that provides everything that might be thought desirable by

---

<sup>4</sup> Congress amended the IDEA, effective July 1, 2005 (see Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647 [2004] [codified as amended at 20 U.S.C. § 1400, et. seq.]). Since the relevant events at issue in this appeal occurred after the effective date of the 2004 amendments, the new provisions of the IDEA apply and citations contained in this decision are to the IDEA 2004, unless otherwise specified.

<sup>5</sup> 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.

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).

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 Bd. of Educ., Appeal No. 07-028; 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).

Although an IEP must provide for specialized instruction in the child's areas of need, a CSE is not required to specify methodology on an IEP and the precise teaching methodology to be used by a child's teacher is generally a matter to be left to the teacher (Application of a Child with a Disability, Appeal No. 06-022; Application of a Child with a Disability, Appeal No. 05-053; Application of a Child with a Disability, Appeal No. 94-26; Application of a Child with a Disability, Appeal No. 93-46; Matter of a Handicapped Child, 23 Ed. Dept. Rep. 269).

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]).

After carefully reviewing the entire record, I find that the impartial hearing officer, in a thorough, well-reasoned, and well-supported 48 page decision, correctly held that petitioners failed to sustain their burden to establish that the April 10, 2006 IEP failed to offer their son a FAPE for the 2006-07 school year (IHO Decision at pp. 35-44). The impartial hearing officer applied the proper legal analysis in determining whether the child was offered a FAPE, whether the omission of verbal behavior ABA as the instructional methodology on the child's IEP denied him a FAPE, whether the omission of a BIP denied him a FAPE,<sup>6</sup> and whether respondent's proposed placement in a kindergarten class at P.S. 37, which utilized an eclectic teaching approach, denied the child a FAPE. The decision shows that the impartial hearing officer carefully considered and weighed all of the testimony and exhibits from both parties. The record amply supports the impartial hearing officer's conclusion that the child was provided with a program that was appropriate to his special education needs. In short, based upon my review of the entire hearing record, I find that the hearing

---

<sup>6</sup> I note that petitioners did not raise the issue of the omission of the BIP from their son's 2006-07 IEP as a basis for the denial of FAPE in the due process complaint notice (see generally Parent Ex. RR). I remind the impartial hearing officer and both parties that under the Federal Regulations, effective October 13, 2006, "the party requesting the due process hearing may not raise issue at the due process hearing that were not raised in the due process complaint file under § 300.508(b), unless the other party agrees otherwise" (34 C.F.R. § 300.511[d]).

was conducted in a manner consistent with the requirements of due process and that there is no need to modify the findings of fact or conclusions of law as determined by the impartial hearing officer (34 C.F.R. § 300.514[b][2]; N.Y. Educ. Law § 4404[2]). I, therefore, adopt the findings of fact and conclusions of law of the impartial hearing officer (see Application of a Child with a Disability, Appeal No. 05-095; Application of the Bd. of Educ., Appeal No. 03-085; Application of a Child with a Disability, Appeal No. 02-096).

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

**THE APPEAL IS DISMISSED.**

**Dated:**            **Albany, New York**  
                         **July 11, 2007**

\_\_\_\_\_  
**PAUL F. KELLY**  
**STATE REVIEW OFFICER**