The University of the State of New York

The State Education Department
State Review Officer

No. 07-073

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

Appearances:
John J. McGrath, Esq., attorney for petitioners

Lamb & Barnosky, LLP, attorney for respondent, Rita Fishman Sheena, Esq., of counsel

DECISION

Petitioners appeal from the decision of an impartial hearing officer which denied their request to be reimbursed for their son's tuition and transportation costs at the Sappo School (Sappo) for the 2006-07 school year. Respondent cross-appeals from the impartial hearing officer's determination that it failed to offer an appropriate educational program to the student for that year. The appeal must be sustained in part. The cross-appeal must be sustained in part.

Initially, a procedural matter must be addressed. In the instant case, the petition for review was served on respondent in excess of the timelines specified in the Regulations of the Commissioner of Education (see 8 NYCRR 279.2). An untimely petition may be excused for good cause shown and the reasons for the delay are to be set forth in the petition (8 NYCRR 279.13). Upon my review of the petition, I find that petitioners offered good cause for the late service of the petition. In the exercise of my discretion, I will excuse petitioners' delay based on the good cause asserted in the petition and decline to dismiss the petition for review on the grounds of untimely service (Application of a Child with a Disability, Appeal No. 05-043; Application of a Child with a Disability, 04-084; Application of a Child with a Disability, 04-003).

When the impartial hearing commenced on December 7, 2006, petitioners' son was 11 years old and attending sixth grade at Sappo (Tr. p. 643; Dist. Ex. I at p. 1). Sappo is a private school that has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (8 NYCRR 200.1[d], 200.7). I note that a previous decision was rendered regarding respondent's successful challenge to the impartial hearing officer's interim decision dated December 10, 2006 (Application of the Bd. of Educ., Appeal No. 07-006). The student's eligibility for special education services and classification as a

student with a hearing impairment (Dist. Ex. L at p. 1; see 8 NYCRR 200.1[zz][5]) are not in dispute in this appeal.

Turning to the student's educational history, a 2004 assessment report notes that the student's cognitive abilities are in the average range and that he has a hearing loss on the right side, and suggests that his current performance may have been affected by head injuries sustained at an early age (Dist. Ex. BB at pp. 1-2). The student has deficits in the areas of reading and writing, visual motor integration skills, social skills (Dist. Ex. DD at p. 5), and attending skills (Dist. Ex. BB at p. 4). On October 21, 2004 and November 22, 2004, the student was seen for a developmental neuropsychological evaluation (Dist. Ex. BB at p. 1). Administration of the Wechsler Intelligence Scale for Children - Third Edition (WISC - III) yielded a verbal IQ score of 108, a performance IQ score of 121, and a full scale IQ score of 116 (id. at pp. 1-2). The evaluation report noted that the student had sustained a serious head injury at age three and another head injury at age six (id. at p. 2). The report described the student as having a 65 percent hearing loss on the right side, for which he wears a hearing aid, a right-sided vision loss and a diagnosis of an attention deficit hyperactivity disorder (ADHD) (id.). Neuropsychological testing revealed mild to moderate attention processing deficits, especially related to analysis of visual and visual perceptual stimuli (id. at p. 3). Testing of executive functions revealed severe deficits related to processing and executive based inhibition skills, and revealed mild to moderate deficits in planning and problem solving abilities (id.). Additional learning related problems resulting in a diagnosis of a generalized learning disability (LD) were noted, but the evaluator opined that it was likely that the mechanism underlying the student's deficits was related to visual perceptual processing anomalies and recommended further evaluation for neurophysiological deficiencies (id. at p. 4). The evaluator recommended that the student receive academic intervention and accommodations related to dual diagnoses of ADHD and LD (id.). Occupational therapy and/or treatment by a neuro-optometrist were recommended to address the student's visual perceptual processing deficits (id.).

On December 1, 2004 when the student was in fourth grade, respondent conducted a psychological evaluation of the student as part of his triennial review (Dist. Ex. DD at pp. 1, 3). Administration of the Wechsler Intelligence Scale for Children - Fourth Edition (WISC-IV) yielded a verbal comprehension index composite score (percentile rank) (qualitative description) of 99 (47) (average), a perceptual reasoning index composite score of 121 (92) (superior), a working memory index composite score of 110 (75) (high average), a processing speed index of 112 (79) (high average), and a full scale IQ score of 114 (82) (high average) (id. at p. 1).

Administration of the Bender Visual-Motor Gestalt Test II yielded a standard score (SS) (percentile) (qualitative description) of 79 (8.8) (low) for the copy subtest and 93 (32.04) (average) for the recall subtest (Dist. Ex. DD at pp. 2, 4). The evaluation report stated that the student received full credit on motor and perceptual tasks, indicating little or no difficulty in these areas (id. at p. 4). The report also noted that when motor tasks were integrated with visual perception, the student demonstrated a great deal of difficulty with organization and structure (id.). The evaluation report indicated that the student appeared to attempt to compensate for some of his difficulty utilizing his auditory and visual strengths (id. at p. 5).

Results of a November 2004 administration of the Wechsler Individual Achievement Test - Second Edition (WIAT- II) were included in the psychological evaluation report (Dist. Ex. DD at p. 2). The student achieved a reading composite SS (percentile) of 84 (14), a math composite

SS of 113 (81), a written composite SS of 79 (8), an oral language composite SS of 98 (45), and a total composite SS of 89 (23) (id.).

On December 10, 2004 when the student was in fourth grade and was receiving consultant teacher direct services, respondent's Committee on Special Education (CSE) met to review recent reevaluation information (Dist. Ex. P at p. 4). The individualized education program (IEP) from the December 2004 meeting noted the student's significant strengths in nonverbal reasoning and his continued weakness in decoding and spelling (id.). The IEP also noted that the student's performance remained inconsistent (id.). As a result of the October 2004 diagnosis of ADHD, the CSE discussed changing the student's classification, but no consensus was reached (id.). The CSE determined that the student would continue to be eligible for special education services as a student with a hearing impairment (id. at pp. 1, 4). The CSE also determined the student to be ineligible for extended school year (ESY) services (id. at p. 1). To address the student's poor visual/motor abilities, the CSE recommended that a scribe be provided during essay tests and that an occupational therapist begin working on keyboarding with the student (id. at p. 4).

The December 10, 2004 CSE further recommended that the student continue in a regular education program and receive consultant teacher direct services five times per week for 45 minutes in an integrated location, individual hearing services one time per month for one hour, individual occupational therapy one time per week for 30 minutes, small group (5:1) occupational therapy one time per week for 30 minutes, and individual physical therapy one time per month for 30 minutes (Dist. Ex. P at pp. 1-2). The CSE also recommended that the student have access to an auditory trainer five times per week during instructional time in integrated locations (id. at p. 1). Various testing accommodations were also recommended (id. at pp. 1-2). Goals and objectives on the December 10, 2004 IEP addressed the student's needs in study skills, reading, writing, motor skills, basic cognitive/daily living skills, and listening skills (id. at pp. 5-7).

On March 18, 2005, respondent's CSE met for the student's annual review and to plan for the 2005-06 school year, when the student would be in fifth grade (Dist. Ex. N at pp. 1, 4). Notes on the student's March 2005 IEP indicate that academic progress and recommendations were discussed with the student's mother (id. at p. 4). A neuropsychological evaluation report was reviewed and assistive technology was discussed (id.). For the 2005-06 school year, the CSE recommended that the student be placed in a general education inclusion program with the support of a consultant teacher (id. at pp. 1, 2, 4). The CSE also recommended that the student's occupational therapy services be reduced to one time a week individually, that he receive the services of a hearing consultant bi-monthly for 60 minutes, and that he receive the support of a 1:1 aide for six hours per day, five days per week (id. at pp. 1, 4). Physical therapy services were discontinued (id. at p. 4). Preferential seating on the left side of the speaker was recommended, as was a modified curriculum in all subject areas (id. at pp. 1, 4). Goals and objectives on the March 18, 2005 IEP addressed the student's study skills, reading, writing, social/emotional/ behavioral, motor, and basic cognitive/daily living skills needs (id. at pp. 5-7). The CSE also recommended that the student's program and progress be reviewed within the first month of the 2005-06 school year (id. at p. 4). Notes on the March 18, 2005 IEP indicated that the student's mother was present and in agreement with the recommendations and testing modifications (id.).

On October 21, 2005, respondent's CSE reconvened to amend the student's IEP (Dist. Ex. L at pp. 1, 4). Notes on the October 21, 2005 IEP stated that the student continued to demonstrate weaknesses in word reading and decoding, and that the CSE amended and clarified his testing

modifications to indicate that reading comprehension skills tests would be read aloud by the student and that other content area tests, both standardized and classroom, would be read to him (id. at p. 4). Consistent with the March 18, 2005 IEP, the October 21, 2005 IEP indicated that testing modifications for the student were in effect except as prohibited by State Education Department policy (id.).

On June 21, 2006, respondent's CSE reconvened at petitioners' request to review the student's eligibility for ESY services for the 2006-07 school year and to review the results of a June 19, 2006 assistive technology evaluation (Dist. Ex. I at pp. 1, 5). The CSE determined that the assistive technology recommendations from the June 19, 2006 evaluation should be implemented, but that implementation should be in stages because of concerns regarding the inherent difficulties of transitioning the student to middle school (id. at p. 5). The CSE agreed to reconvene in December 2006 to review the student's progress in middle school, and to determine if the implementation of additional assistive technology recommendations should be initiated at that time (id.). In addition, the June 21, 2006 CSE reviewed New York State guidelines for eligibility for ESY services, examined work samples and test data presented by petitioners, and heard comments by respondent's psychologist and his classroom teacher indicating that regression had not been observed during school holidays (id.). The CSE determined that the student was not eligible for ESY services, but offered summer support in phonological based reading and in keyboard instruction (id.).

The June 21, 2006 IEP described the student as having significant delays in reading, decoding, and spelling which affected his classroom performance (Dist. Ex. I at p. 3). Academically, the IEP noted that the student performed math applications on or above grade level and did not have difficulty grasping newly presented concepts in mathematics (id.). Although the student was able to understand concepts in other subjects, his deficits in reading and communication made it difficult for him to independently relay information in content areas (id.). The student was noted to perform below grade level in spelling, had poor decoding skills, and was performing below grade level in reading and in written expression (id.). The IEP indicated that the student required a multi-sensory instructional approach, particularly an approach that included auditory and tactile components (id.). Academic needs described on the IEP included improving decoding, communication, spelling, written expression, and writing mechanics (id.).

In the social and emotional domain, the June 21, 2006 IEP stated that the student displayed moderate delays in social skills with others and his behavior was sometimes inappropriate (Dist. Ex. I at p. 4). Identified needs were for the student to work cooperatively with others and to develop independent problem solving skills as well as self-reliance and self-worth, and independent problem solving skills (id.). In the physical domain, the IEP noted that the student's abilities were within age-appropriate expectations except for visual motor skills and eye hand coordination; he required eyeglasses and wore a hearing aide during instructional sessions, and he required occupational therapy (id.). The IEP also indicated that the student needed to develop his visual motor skills, eye hand coordination, and attending skills (id.). In the management domain, the IEP noted that the student required some subjects taught in a regular education environment with a small teacher-to-student ratio and minimal distractions (id.). He required additional time to complete language arts assignments, redirection to stay on task, and needed to learn to stay on task without assistance (id.). The IEP also indicated that a reward system to keep the student on task was beneficial (id.).

The June 21, 2006 CSE recommended the student participate in a general education program at respondent's middle school and receive the support of a consultant teacher five times per week for two hours and 40 minutes per day in an integrated location, consultant teacher services five times per week for 40 minutes in a non-integrated location, and small group resource room services five times per week for 40 minutes in a nonintegrated location (Dist. Ex. I at pp. 1, 3). The IEP noted that consultant teacher services would provide support in all language arts and reading instruction (id. at p. 1). The CSE also recommended that the student receive the services of a shared aide (2:1) five times per week for six hours, individual hearing services one time biweekly for one hour, and individual occupational therapy one time per week for 30 minutes (id.). Reflective of the student's identified needs, extensive program modifications, accommodations, and supplementary aids and services including assistive technology devices were also recommended (id. at p. 2). The CSE also recommended that a team meeting be convened one time per month for one hour to review the student's needs and that use of assistive technology be introduced gradually into the student's day (id.). Extensive testing accommodations were recommended and the IEP noted that use of these accommodations for district and statewide testing would be consistent with school district and State Education Department policy (id.).

Petitioners filed a due process complaint notice dated June 21, 2006 and requested an impartial hearing (Dist. Ex. A). On July 19, 2006, petitioners orally requested a pendency order (Dist. Ex. E p. 3). On August 4, 2006, the impartial hearing officer issued an interim order which found the student's pendency placement was based on the October 21, 2005 IEP, with the addition of the June 21, 2006 CSE's recommendation to implement a phonologically-based reading instruction program and a resource room, as set forth in the proposed 2006-07 IEP (Dist. Ex. E at p. 3; see IHO Decision at p. 3). On September 8, 2006, petitioners filed an amended due process complaint notice, alleging among other things, that respondent failed to recommend an appropriate special education program for the student for the 2006-07 school year and requesting reimbursement for the student's tuition at Sappo and transportation costs for the 2006-07 school year (Dist. Ex. F at pp. 9-10).

The impartial hearing convened on December 7, 2006 and ended on February 7, 2007, after seven days of testimony. By decision dated May 7, 2007, the impartial hearing officer found that respondent committed various procedural errors, that when taken together, deprived petitioners of the opportunity to meaningfully participate in the development of their son's IEP (IHO Decision at pp. 11-14). Specifically, the impartial hearing officer found that: 1) members of respondent's CSE did not have appropriate knowledge of respondent's programs and services (id. at pp. 11-12); 2) that the June 21, 2006 CSE included an inappropriate regular education teacher (id. at pp. 12-14); 3) that respondent delayed in providing an assistive technology evaluation of the student (id. at p. 14), and 4) that the administration of an English Language Arts (ELA) exam in 2004 posed a "serious distraction" at the June 21, 2006 CSE meeting (id.). With respect to the student's placement at Sappo, the impartial hearing officer found that petitioners did not meet their burden of proving the appropriateness of Sappo for their son and the impartial hearing officer determined that Sappo was an overly restrictive placement (id. at pp. 15-16). The impartial hearing officer ordered respondent to reconvene a CSE and denied petitioners' request for tuition reimbursement (id. at p. 16).

On appeal, petitioners assert that respondent failed to offer their son a free appropriate public education (FAPE)[1] for the 2006-07 school year and challenge the appropriateness of the June 21, 2006 IEP. Petitioners allege that the impartial hearing officer erred when he: 1) failed to address ESY services; 2) precluded petitioners from offering witness testimony to rebut the school psychologist's testimony concerning her observations of the student at Sappo; 3) found petitioners' unilateral placement of the student was inappropriate solely because it was not the least restrictive environment (LRE), which the impartial hearing officer determined was the placement recommended by the CSE for the 2005-06 school year; 4) failed to address equitable considerations; and 5) failed to address petitioners' request for transportation pursuant to Education Law § 4402(d)(4).

Respondent cross-appeals from that part of the impartial hearing officer's decision which found that: 1) respondent's June 21, 2006 CSE members did not have appropriate knowledge of respondent's programs and services; 2) petitioners were distracted from meaningful discussion regarding their son's assistive technology needs at respondent's June 21, 2006 CSE meeting; and 3) irregularities in the administration of the ELA exam to the student during the 2004-05 school year seriously distracted petitioners at the June 21, 2006 CSE meeting. Respondent also alleges that the June 21, 2006 CSE was properly composed and that the assistive technology evaluation was timely. In addition, respondent asserts that the 2006-07 IEP is both procedurally and substantively sound, petitioners are not entitled to transportation to Sappo as a matter of law, and that Sappo is not an appropriate placement for petitioners' son. Respondent requests that a State Review Officer deny petitioners' requests for ESY services, transportation to and from Sappo, and reimbursement for transportation costs to and from Sappo.

The central purpose of the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) is to ensure that students with disabilities have available to them a free appropriate public education (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];[2] see 20 U.S.C. § 1414[d]; 34 C.F.R. § 300.320).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a child by his or her parents, if the services offered by the

---

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

> (A) have been provided at public expense, under public supervision and direction, and without charge;
> (B) meet the standards of the State educational agency;
> (C) include an appropriate preschool, elementary, 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]).

[2] 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. For convenience, citations in this decision refer to the regulations as amended because the regulations have been reorganized and renumbered.

board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359 [1985]; Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (Burlington, 471 U.S. at 370-71; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the child a FAPE (id.; see 20 U.S.C. § 1412[a][10][C][ii]; 34 C.F.R. § 300.148).

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

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 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]).

Respondent asserts on cross-appeal that the impartial hearing officer erred in concluding that respondent's June 21, 2006 IEP contained numerous procedural errors that rose to the level of a denial of a FAPE. For the reasons set forth below, I find that petitioners failed to demonstrate that procedural errors impeded their son's right to a FAPE, significantly impeded their opportunity to participate in the decision making process surrounding the provision of a FAPE to their son, or caused a deprivation of educational benefits (see 20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; Matrejek, 471 F. Supp. 2d at 419).

There is no showing that any procedural error impeded petitioners from participating in the formulation of their son's IEP. The IDEA sets forth procedural safeguards that include providing parents an opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child" (20 U.S.C. § 1415[b][1]). Federal and state regulations governing parental participation require that school districts take steps to ensure that parents are present at their child's IEP meetings or are afforded the opportunity to participate (34 C.F.R. § 300.322; 8 NYCRR 200.5[d]). In deciding whether parents were afforded an opportunity to participate in the development of their child's IEP, courts have considered the extent of the participation (Cerra, 427 F.3d at 193 [finding meaningful parental participation when the student's mother attended numerous CSE meetings and a CSE meeting transcript reflected that she "participated actively" in the development of her daughter's IEP and was "frequently consulted for input about the CSE's proposed plan"]; Perricelli, 2007 WL 465211, at*14-15 [finding no denial of a meaningful opportunity to participate when the student's mother was in "frequent contact" with teachers and school officials, "active[ly] participat[ed]" at her daughter's CSE meetings, and questioned the CSE about documents that she did not understand]; Viola, 414 F. Supp. 2d. at 378-79 [finding that the school district's failure at the time of the CSE meeting to have completed an annual report concerning the student's progress toward goals and objectives did not deprive the parents of meaningful participation where the parents attended the CSE meeting and admitted that they were informed of the information to be contained in the report]; see also Paolella v. District of Columbia, 2006 WL 3697318, at *1 [D.C. Cir. Dec. 6, 2006] [finding no denial of a meaningful opportunity to participate when the parents were involved in the development of the IEP, had a "special education representative," and visited the school recommended by the school district]; A.E. v. Westport Bd. of Educ., 463 F. Supp. 2d 208 [D. Conn. 2006]).

The record in the instant case reveals that petitioners actively participated in the formulation of their son's IEP (Tr. pp. 318, 320, 351, 468, 470, 503; 1395, 1400; Dist. Ex. I at pp. 5-6; see Cerra, 427 F.3d at 193; Perricelli, 2007 WL 465211, at *14-*15). Respondent's assistant to the superintendent for special education and pupil personnel services testified that the student's mother was a very involved parent (Tr. p. 727).

Additionally, the impartial hearing officer found that respondent's June 21, 2006 CSE was improperly composed because it lacked a regular education teacher who would be responsible for

implementing the student's IEP and was qualified to teach the exact grade that the student would be attending at Sappo (IHO Decision at pp. 13-14).[3] Respondent asserts that the impartial hearing officer confused the student's fifth grade inclusion teacher with the fifth grade regular education teacher who attended and fully participated in the June 21, 2006 CSE meeting, conducted while the 2005-06 school year was still in session (Resp't Mem. of Law at p. 15).

The IDEA and its implementing regulations require that the CSE include "at least one regular education teacher of such child (if the child is, or may be, participating in the regular education environment)" (20 U.S.C. § 1414[d][1][B][ii]; see 34 C.F.R. § 300.321[a][2]; 8 NYCRR 200.3[a][1][ii]; Application of a Child with a Disability, Appeal No. 04-027). The regular education teacher member should be a teacher who is, or may be, responsible for implementing a portion of the IEP (see Matrejek, 471 F. Supp. 2d at 427). The regular education teacher member "shall, to the extent appropriate, participate in the development of the IEP of the child, including the determination of appropriate behavioral interventions and strategies and the determination of supplementary aids and services, program modifications, and support for school personnel" (20 U.S.C. § 1414[d][3][C]; see Arlington Cent. Sch. Dist. v. D.K., 2002 WL 31521158, at * 7 [S.D.N.Y. Nov. 14, 2002]; 34 C.F.R. § 300.324[a][3]; 8 NYCRR 200.3[d]). The regular education teacher must also participate in any review and revision of the IEP to the extent appropriate (20 U.S.C. § 1414[d][4][B]; 34 C.F.R. § 300.324[b][3]; 8 NYCRR 200.3[d]).

In the case before me, respondent's CSE held three meetings to develop the student's 2006-07 IEP: March 8, 2006, June 7, 2006, and June 21, 2006 (Tr. pp. 1636-38; Dist. Ex. I at pp. 5-6). The student's then current fifth grade regular education teacher participated in all three meetings held during the student's fifth grade year (Tr. pp. 1597-98, 1636-38; Dist. Ex. I at p. 5). Therefore, consistent with federal and state law, a regular education teacher of the student participated as a member of the team that formulated the student's June 21, 2006 IEP for the 2006-07 school year. In addition, the record reflects that the regular education teacher participated appropriately in the formulation of the IEP as required, including the determination of appropriate behavioral interventions and strategies and the determination of supplementary aids and services, program modifications, and support for school personnel (see 34 C.F.R. § 300. 324[a][3]). As such, I find that the regular education teacher who participated in the June 21, 2006 CSE meeting was qualified under the relevant statutes (20 U.S.C. § 1414[d][1][B][ii]; see 34 C.F.R. § 300.321[a][2]; 8 NYCRR 200.3[a][1][ii]).

Additionally, a review of the hearing record does not support the impartial hearing officer's finding that the June 2006 CSE failed to include CSE members who possessed appropriate knowledge of respondent's programs and services and could offer petitioners information about options for educating their son. In addition to petitioners and their family members, the following people attended the June 2006 CSE meeting (Dist. Ex. I at p. 5): the middle school representative and CSE Chairperson (Resp't Mem. of Law at p. 15), the assistant superintendent for special education and pupil personnel services (Tr. p. 707), the school psychologist (Tr. pp. 782, 785), the special education teacher for reading (Tr. pp. 1665-67), the fifth grade regular education teacher

[3] I note that the impartial hearing officer erred in finding that the law requires that a teacher who is qualified to teach the exact grade the student will be attending in the upcoming school year attend an IEP meeting. In doing so, the impartial hearing officer misread several prior State Review Officer decisions and his conclusion of law on this point was unsound.

(Tr. pp. 1597-98), the fourth grade one-to-one special education teacher, the fourth grade regular education teacher (Tr. p. 1531), the speech therapist, the occupational therapist, the assistive technology evaluator, the elementary school principal (Tr. pp. 884, 886), and the additional parent member (Dist. Ex. I at p. 5). The record does not indicate that the above members of the June 21, 2006 IEP team lacked appropriate knowledge of respondent's programs and services. As to the regular education teacher, I note that she collaborated with respondent's other two fifth grade teachers and the fifth grade inclusion teacher on a regular basis throughout the school year (Tr. pp. 1608, 1652). During these meetings, the teachers would discuss the student's progress and concerns (Tr. p. 1608). Every four to five weeks inclusion meetings were held, at which time discussions regarding the student's progress took place in greater depth (id.). The regular education teacher also collaborated with the student's other teachers regarding the comments included in the student's report card, in order to best express their classroom observations of the student (Tr. p. 1610). Moreover, the regular education teacher was responsible for implementing a portion of the student's IEP through the provision of accommodations and modifications in an inclusion class with a one-to-one aide for the student (Tr. pp. 1600, 1601, 1602, 1604-06, 1608, 1626-28, 1653-54, 1656-57). The student's regular education teacher brought all of the above knowledge to the CSE meetings. Based on the foregoing, I do not agree with the impartial hearing officer's finding that members of the June 21, 2006 CSE lacked appropriate knowledge of respondent's programs and services.

Respondent cross-appeals from the impartial hearing officer's finding that the timing of the assistive technology evaluation acted as a distraction to petitioners thus rendering them incapable of participating meaningfully in the June 21, 2006 IEP. The student's mother testified that petitioners first requested an assistive technology evaluation for their son from respondent at the March 8, 2006 CSE meeting (Tr. p. 497; Dist. Ex. I at p. 6). At respondent's June 7, 2006 CSE meeting, petitioners requested that the completion of the assistive technology evaluation be expedited (Tr. p. 496; Dist. Ex. I at p. 5). The assistive technology evaluation was completed on June 13, 2006 (Dist. Ex. I at p. 6). At respondent's June 21, 2006 CSE meeting, the assistive technology evaluator recommended assistive technology support, and the CSE discussed the most appropriate manner in which to introduce such support (id. at p. 5). Notes from the June 21, 2006 committee meeting information section of the IEP indicated that a CSE meeting would be scheduled to reconvene in December 2006 to review the student's progress (id.). The record demonstrates that the results of the assistive technology evaluation were available and discussed at the June 21, 2006 CSE meeting. Therefore, I find that petitioners were not sufficiently distracted from participating meaningfully in the June 21, 2006 CSE meeting.

Respondent further cross-appeals from the impartial hearing officer's finding that irregularities in the administration of the ELA exam resulted in petitioners being distracted at the June 21, 2006 CSE meeting such that they were denied meaningful participation. The record does not support a finding that petitioners' concerns about the administration of the ELA significantly impeded their opportunity to participate in the decision-making process regarding the provision of a FAPE to their son.

With respect to petitioners' assertion that respondent's June 21, 2006 CSE failed to offer an appropriate IEP and placement to petitioners' son, I first note that the student's June 21, 2006 IEP included CSE meeting information from the student's 2006-07 annual review meeting that convened on March 8, 2006, and from a follow-up meeting that occurred on June 7, 2006 (Dist. Ex. I at p. 5). Consistent with formal evaluation data, the CSE identified the student's educational

deficits and special education needs (Dist. Exs. BB; DD; I at pp. 3-4; X; Y; Z). The assistive technology evaluation conducted on June 13, 2006 was presented for review at the June 21, 2006 CSE meeting (Dist. Exs. I at p. 6; U).

The student's June 21, 2006 IEP identified the student's needs and incorporated his learning strengths into strategies for success (Dist. Ex. I at p. 1). The IEP described the student as having significant delays in reading, decoding, and spelling which affected his classroom performance and indicated that he required a multi-sensory instructional approach that included auditory and tactile components (id. at p. 3). Identified academic needs to improve decoding, communication, spelling, written expression, and writing mechanics reflected formal test results (id. at pp. 3, 4). The June 21, 2006 IEP also adequately described the student's needs in the social/emotional, physical, and management domains (id. at p. 4).

To address the student's academic, social and emotional, physical and management needs in respondent's middle school, the June 21, 2006 CSE recommended adding 2 hours 40 minutes of consultant teacher services five times per week in an integrated location to support all language arts and reading activities (Dist. Ex. I at p. 1). This was in addition to the consultant teacher support he would receive five times per week for 40 minutes in a non-integrated location (id.). The CSE also added resource room support five times per week for 40 minutes in a non-integrated location with a student-to-teacher ratio of 5:1 (id.). The student would also receive support through a shared aide (2:1) five times per week for six hours, individual hearing services for one hour on a bi-monthly basis, and weekly individual contact with the occupational therapist for 30 minutes (id.).

Program modifications/accommodations/supplementary aids and services on the June 21, 2006 IEP specifically identified the student's need for a modified curriculum, additional time to complete tasks, and a positive reinforcement plan to remain on task (Dist. Ex. I at p. 2). Consistent with recommendations in the June 2006 assistive technology evaluation report (Dist. Ex. U), the June 2006 CSE recommended that extensive assistive technology support be introduced in stages as the student adjusted to the middle school environment (Dist. Ex. I at pp. 5, 6). The CSE further recommended that another CSE be scheduled in December 2006 to review the student's progress, and to determine the appropriateness of increasing additional assistive technology services at that time (Dist. Ex. I at pp. 5, 6).

Testing accommodations in the June 21, 2006 IEP comprehensively addressed the student's needs, and included clearly stated information regarding the conditions/specifications of each accommodation (Dist. Ex. I at pp. 2-3). I note that the CSE recommended that the student be given a separate location to take a test so he could read aloud directions and test items for tests of reading comprehension to offset his weakness in visual processing and memory (id.).

Annual goals in the June 21, 2006 IEP reflected the student's needs in the areas of study skills, reading, writing, social/emotional/behavioral, and motor skills, and were behaviorally specific and measurable (Dist. Ex. I at pp. 6-9). Academic goals and objectives for 2005-06 were skill-based, whereas the academic goals for 2006-07 emphasized the student's need to use acquired skills on a more mature level when he entered respondent's middle school (Dist. Exs. I; N). For example, in middle school the student would be required to self-check all schoolwork for completeness, accuracy, and writing errors (Dist. Ex. I at p. 6); use the strategy of orally summarizing important information after reading content area materials (id. at p. 6); assume

responsibility for how he uses his time during test taking (id. at p. 7); attend to a task without distraction for 30 minutes or more during classroom lessons (id.); use factual materials to answer comprehension questions (id.); and predict the outcome of a story and verbally identify the author's purpose for writing it (id.). Social/emotional/behavioral goals addressed behaviors that the student would need to display in a middle school environment (id. at p. 8). Motor goals continued to address the student's need to improve his ability to write, but also addressed his need for keyboarding skills as recommended in the assistive technology evaluation report (Dist. Exs. I at p. 9; U at p. 2).

The record reveals that, over time, respondent's CSE has carefully monitored the student's performance and addressed his complex needs as those needs were identified. Respondent's CSE convened in December 2004 to review results of evaluations conducted in October and November 2004 and amended the student's IEP to reflect recommendations from these evaluation reports (Dist. Exs. P; BB; DD; EE). The CSE convened for the student's annual review in March 2005 and, reflective of his continued academic struggles, increased the services provided, then reconvened in October 2005 to again review his status and amend testing modifications recommended in March (Dist. Exs. N; P). Although there was some delay in obtaining an assistive technology evaluation for the student, it was reviewed at the June 21, 2006 CSE meeting, and recommendations from the evaluation report were incorporated into the student's 2006-07 IEP (Dist. Exs. I; U). At the June 21, 2006 CSE meeting, the CSE recommended convening again in December to review the student's progress (Dist. Ex. I at p. 5). After examination of the actions taken by the CSE to evaluate the student, convene additional meetings to review evaluation results, and increase recommended services and supports consistent with evaluation results, I find that respondent has consistently demonstrated that its CSE is responsive to the student's needs, and that it offered an appropriate program for the 2006-07 school year.

Supporting this conclusion, I also find that the teachers and other service providers who worked with the student have consistently provided instruction in a comprehensive and coordinated manner. The teacher of the deaf who provided consultation services to the student began working with him when he was in first grade and was able to serve as a consistent resource because of her long time association with the child (Tr. pp. 972-74). This teacher would have maintained that consistency by providing services to the student at respondent's middle school in 2006-07 (Tr. p. 978). The student's fifth grade regular education teacher for language arts and social studies testified that she reviewed each student's IEP at the beginning of the school year and discussed its implementation with the special education collaborative teacher (Tr. pp. 1597, 1607). As discussed above, she also regularly collaborated with the student's other teachers on matters related to the student's needs (Tr. pp. 1608-14). The student's special education consultant teacher described how she worked collaboratively with the student's general education teachers and his aide and engaged in "a lot of interactive discussion" to develop strategies to meet his needs (Tr. p. 1104). To ensure consistency and continuity of services when the student articulated to middle school in 2006-07, teachers at the sending and receiving schools met at the end of the school year (Tr. pp. 812-13). The student's regular education teacher opined that the student would have been successful in the middle school program recommended in 2006-07 (Tr. p. 1619). Based on the above, I find that the June 21, 2006 IEP accurately reflected the results of evaluations which identified the student's needs, established annual goals related to those needs, and provided 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 final program-related issue presented is whether ESY services should have been provided to petitioners' son for the 2006-07 school year. Petitioners assert that the impartial hearing officer erred when he failed to address respondent's denial of ESY services for their son. Respondent requests that ESY services for petitioners' son be denied because petitioners have not proved their son's need for ESY services to prevent substantial regression.

Students shall be considered for ESY services and/or programs if they exhibit the need for a service and/or program provided in a structured learning environment of up to 12 months duration in order to prevent substantial regression as determined by the CSE (8 NYCRR 200.6[j][1][v]). "Substantial regression" is further defined as "a student's inability to maintain developmental levels due to a loss of skill or knowledge during the months of July and August of such severity as to require an inordinate period of review at the beginning of the school year to reestablish and maintain IEP goals and objectives mastered at the end of the previous school year" (8 NYCRR 200.1[aaa]).

The record shows that a discussion took place at the June 21, 2006 IEP about whether ESY services should be awarded to the student for summer 2006 (Dist. Ex. I at p. 5). The June 21, 2006 CSE reviewed state guidelines regarding ESY services (Tr. pp. 712-13; Dist. Ex. EEE), along with work samples and test data from both parties, prior to determining that petitioners' son was not eligible for ESY services (Dist. Ex. I at p. 5).

Petitioners' private evaluator testified that the student required ESY services because these services were needed in order for him to "keep pace with his classmates" (Tr. p. 584). When asked if petitioners' son met the standard for ESY services because he was at risk for regression, the private evaluator stated, "I don't think there's any way to know if he would or would not regress" (Tr. p. 596). The private evaluator testified that he had not observed the student in school or communicated with the student's teachers, who testified persuasively regarding the likelihood of regression based upon their observations of the student's performance throughout the 2005-06 school year (Tr. p. 598). The student's special education teacher testified regarding her understanding of the criteria for determining a need for ESY services and stated that the student would not require longer than eight weeks to relearn skills after a summer break (Tr. pp. 1075-77). She further testified that she had not observed regression when the student returned from school vacations (Tr. p. 1115). The fifth grade regular education teacher confirmed the special education teacher's observations, stating that she did not observe regression when he came to her class in September or after the Christmas holiday, and noting that she had confirmed her observations in collaborations with her colleagues (Tr. p. 1638). The fifth grade regular education teacher had been present at the CSE meetings at which the student's 2006-07 IEP was developed, and at those meetings she reviewed her observations regarding the student's performance after holidays and breaks (Tr. pp. 842-44). Based on the above, the record does not demonstrate that the student required ESY services to prevent substantial regression (8 NYCRR 200.6[j][1][v]).

Based upon the information before me, I find that the program proposed in the June 21, 2006 IEP, at the time it was formulated, was reasonably calculated to enable the student to receive

educational benefit (Viola, 414 F. Supp. 2d at 382 [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). I find that petitioners did not meet their burden to establish that respondent failed to offer the student a FAPE for the 2006-07 school year. Accordingly, petitioners' request for reimbursement of tuition costs for Sappo for the 2006-07 school year is denied.

Lastly, with regard to petitioners' transportation claim, I find, for the reasons discussed below, that petitioners established that their son was entitled to receive transportation to Sappo pursuant to the provisions of Section 4402(4)(d) of the Education Law.

Here, respondent asserts general denials of petitioners' transportation claim pursuant to Education Law §4402 and contends that the matter was previously addressed in the course of respondent's interlocutory appeal (Application of the Bd. of Educ., Appeal No. 07-006). However, the annulment of impartial hearing officer's second pendency order dated December 10, 2006 did not address the merits of petitioners' contentions with regard to transportation (see Application of the Bd. of Educ., Appeal No. 07-006), and, consequently, respondent's argument that the matter was resolved is unpersuasive. The little evidence in the record on this issue shows that the crux of respondent's position in September 2006 was that petitioner failed to timely request transportation for the student and did not offer a reasonable excuse for the delay (Dist. Ex. MM), which suggests that respondent was relying solely on Education Law § 3635. However, the essence of petitioners' argument, which remains largely unaddressed by respondent, is that they are entitled to seek transportation for a student with a disability under Education Law § 4402[4][d]). Education Law § 4402 provides that a board of education:

> shall provide suitable transportation up to a distance of fifty miles to and from a nonpublic school which a child with a handicapping condition attends if such child has been so identified by the local committee on special education and such child attends such school for the purpose of receiving services or programs similar to special educational programs recommended for such child by the local committee on special education

(Educ. Law § 4402[4][d]).

Turning to petitioners' arguments, a review of the record reveals that petitioner has satisfied the provisions of Education Law § 4402[4][d]. I note that the student's identification by the CSE as a student who is eligible for special education and related services is not disputed by respondent. The student's mother testified that she requested transportation at the same time that petitioners elected to place their son at Sappo (Tr. pp. 87-88). By letter dated September 8, 2006, respondent denied petitioners' son transportation services to and from Sappo (Dist. Ex. MM). The record also indicates that Sappo falls within the 50 mile limit afforded under the statute, a point which respondent has not attempted to refute (Tr. p. 97; see Educ. Law 4402[4][d]).

Next, I must consider whether petitioners' son attends Sappo for the purpose of receiving services or programs similar to the special educational programs recommended by respondent's

CSE. (Educ. Law § 4402[4][d]). Testimony elicited from the Sappo teachers shows that Sappo provided petitioners' son with Orton-Gillingham and Phonics First (Tr. pp. 659, 684-85), which are phonologically-based reading programs (Tr. pp. 561, 684-85), resource room services (Tr. p. 702), occupational therapy services (Tr. p. 632) and accommodations (Tr. pp. 703-05). I also note that while at Sappo, petitioners' son was in a math class with seven students, and English and health classes with five students (Tr. pp. 633, 694, 698), thereby mitigating the need for a consultant teacher in reading language arts and a shared aide recommended for the CSE. Under the circumstances presented in this case, I find that the services and programs that were provided to petitioners' son at Sappo for the 2006-07 school year, while distinguishable, were similar to the services and program recommended by respondent's CSE. Accordingly, I find that petitioners established that the student was entitled to transportation to a non-public school as a student with a disability (Educ. Law § 4402[4][d]). Consequently, petitioners are also entitled to reimbursement of the costs they incurred when transporting their son to and from Sappo during the 2006-07 school year (see Application of a Child with a Disability, Appeal No. 99-59; Application of the Bd. of Educ., Appeal No. 94-34), and, under the circumstances in this case, I am not persuaded by respondent's arguments.

In light of my determination that petitioners did not meet their burden to establish that respondent failed to offer the student a FAPE for the 2006-07 school year, it is not necessary for me to address respondent's other contentions. I have also considered petitioners' remaining contentions and find them to be without merit.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED

IT IS ORDERED that the impartial hearing officer's decision is hereby annulled to the extent that it found that respondent had failed to offer an appropriate educational program to petitioners' son for the 2006-07 school year; and

IT IS FURTHER ORDERED that respondent reimburse petitioners for the cost of their son's transportation to and from Sappo for the 2006-07 school year, upon proof of payment.

Dated: **Albany, New York**
August 15, 2007

PAUL F. KELLY
STATE REVIEW OFFICER