The University of the State of New York

The State Education Department
State Review Officer

No. 07-090

Application of a CHILD WITH A DISABILITY, by her parents, for review of a determination of a hearing officer relating to the provision of educational services by the Board of Education of the East Ramapo Central School District

Appearances:
Kuntz, Spagnuolo & Murphy, P.C., attorney for petitioners, Leah L. Murphy, Esq., of counsel

Greenberg, Wanderman & Fromson, attorney for respondent, Carl L. Wanderman, 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 daughter for the 2005-06 school year was appropriate. The appeal must be sustained in part.

The child's cognitive functioning is in the intellectually deficient range with both verbal and nonverbal reasoning abilities significantly below normal limits (Parent Ex. L at p. 3). She has a diagnosis of Down syndrome and polyarthritis (Parent Exs. U at p. 1; W at pp. 1, 6). She also has asthma, aspiration syndrome and severe reactive airway disease (Dist. Ex. 2 at p. 9; Parent Ex. N at p. 1). The child exhibits attention and motor difficulties (Parent Ex. W at p. 6). Her classification and eligibility for special education programs and services as a student with mental retardation are not in dispute (8 NYCRR 200.1[zz][7]).

The child was initially classified by respondent's CSE in 2002 as having mental retardation (Parent Ex. A). For the 2002-03 school year, she was placed in a special class and received related services of occupational, physical and speech-language therapy (id.). In March 2003, the physical therapist who was providing services to the child at school indicated in a progress report that the child demonstrated gross motor skills commensurate with her cognitive age and that physical therapy as a related service was no longer recommended (Parent Ex. F). In a March 2003 occupational therapy progress report, the occupational therapist indicated that the child's functioning was commensurate with her cognitive abilities and that the child's placement in a

small, self-contained class with an educational model that was "strong in using manipulatives should be able to address her motor needs" (Parent Ex. G). Occupational therapy was not recommended for the 2003-04 school year (id.).

A subcommittee of the CSE recommended that the child receive extended school year services for summer 2003, including related services of individual occupational and physical therapies, and group speech-language therapy (Parent Ex. B at p. 2). It recommended that the child be placed in a special class with group and individual speech-language therapy for the 2003-04 school year commencing September 2003 (id. at p. 1).

The child attended the recommended summer program and attended respondent's school in fall 2003 (Tr. pp. 529-30, 531-37). In a January 2004 psychological evaluation, the evaluator indicated that the child's cognitive functioning was in the intellectually deficient range with both verbal and nonverbal reasoning abilities significantly below normal limits (Parent Ex. L). He further indicated that the child was unable to draw or write any structure other than scribble (id. at p. 3).

In May 2004, the child was diagnosed with polyarthritis (Parent Ex. N). In a letter dated May 17, 2004, the child's pediatrician indicated that the child had swelling and tenderness in the joints of her hands and feet, had difficulty holding a pencil, and tolerated only minimal assisted ambulation (id.). The pediatrician noted that the child began taking medications to treat the condition, but had not shown a response (id.). The pediatrician also indicated that the child was in need of "intensive physical and occupational therapy" to help decrease the consequences of the arthritis (id.).

In a letter dated May 19, 2004 to the CSE, the child's service coordinator requested a CSE meeting to discuss the appropriateness of the child's placement (Parent Ex. P). She expressed concerns about the child's safety and requested a smaller, self-contained environment that the child could physically negotiate and that would be more sensitive to and supportive of her medical needs (id.).

On June 24, 2004, a subcommittee of the CSE met for the student's annual review and to recommend a program for the 2004-05 school year (Parent Ex. C). It determined that the child continue to be classified as having mental retardation (id. at p. 1). The CSE subcommittee recommended extended school year services for summer 2004 including group speech-language therapy (id. at p. 2). It recommended that the child be placed in a special class with individual speech-language therapy twice per week for the 2004-05 school year commencing September 2004 (id.).

The child attended an approved private school during summer 2004, but did not attend school when it began in fall 2004 (Tr. pp. 549-50, 553). On October 12, 2004, the child was referred to respondent's attendance office (Dist. Ex. 6 at p. 1). Respondent's "district-wide attendance social worker" (attendance social worker) conducted an investigation and in a report dated November 10, 2004, indicated that she had made contact with the child's mother on October 26, 2004 (id. at p. 2). The child's mother advised the attendance social worker that the child would not be attending school in the district and that she was in the process of enrolling the child in a

parochial school (id.). The child's mother also advised the attendance social worker that she was providing educational instruction to her daughter at home (id.). The attendance social worker explained the regulations governing home schooling and the child's mother submitted a letter of intent to home school her child on November 10, 2004 (id.). In her report, the attendance social worker indicated that respondent was required to make appropriate services available to the child in accordance with the approved individualized education program (IEP) and that home visits by the attendance social worker would discontinue (id.).

On November 23, 2004, the child's service coordinator requested a CSE meeting (Parent Ex. JJ) and a meeting was scheduled for December 17, 2004 (Parent Ex. KK). In a December 17, 2004 note to the CSE, one of respondent's school psychologists indicated that the child had not attended school during the 2004-05 school year (Dist. Ex. 2 at p. 33). He further indicated that in September 2004, the child's mother informed him that, due to her daughter's health conditions, she did not believe that public school was an appropriate setting for her daughter (id.). The school psychologist reported that he explained to the child's mother that the child needed to attend school or that she could apply for home instruction (id.). The student's mother indicated that she would apply for home instruction for her daughter (id.). The psychologist noted that he contacted the child's mother at the beginning of October 2004 and was told that the child was accepted by the same private school that the student had attended during summer 2004 at the recommendation of the June 2004 CSE subcommittee (id.). He also noted that when he contacted the child's mother again, he was advised that she did not place her daughter at the approved private school for the 2004-05 school year because the class in which her daughter would have been placed was moved to another floor (id.). The psychologist indicated that the child's mother advised him that she did not follow through on home instruction, but that she was working with her daughter at home and seeing progress (id.). She requested a CSE meeting to review her daughter's program (id.).

In a letter dated December 20, 2004, the attendance social worker advised the child's mother that the she had not received the home instruction plan which was due on December 12, 2004 (Parent Ex. LL). The attendance social worker further advised the child's mother that the child was of compulsory school age and that it was illegal for the child to remain at home (id.). The child began attending respondent's school on December 22, 2004 (Parent Ex. MMM).

In a letter dated January 12, 2005, the child's rheumatologist requested that the child be placed in a classroom setting where she could receive "physical and occupational therapy for her Down's syndrome (low-tone, hypomobility) and arthritis ([reduced] range of motion, joint contractions)" (Parent Exs. NN; NNN).

In a January 25, 2005 student progress narrative, the child's teacher indicated that the child entered her class on December 22, 2004 (Parent Ex. MMM). She reported that the child enjoyed and actively participated in all activities throughout the school day (id.). She further reported that the child was learning the classroom routine and that the child was working on letter and letter sound recognition, and number concepts 1-10 (id.). She indicated that the child worked very hard at writing her name (id.). The child's teacher further indicated that during both individual and group activities, the child required prompts to maintain attention, and that at times she refused to comply with teacher requests, but with encouragement and reinforcement was easily redirected (id.).

In a January 26, 2005 student progress narrative, the child's speech-language therapist indicated that she began providing speech-language services to the child on January 3, 2005 (Parent Ex. R). She reported that the child's muscle tone was weak and that the child was able to produce some vowels and some early developing consonants (id.). She noted that the majority of the child's utterances were unintelligible and more "jargon-like" in nature (id.). The speech-language therapist reported that when the child was shown action pictures, she correctly labeled something in the picture, and when "coaxed," she labeled the verb (id.). The speech-language therapist also reported that the child responded to simple yes/no questions through verbal response and was able to form a question as she raised her inflection appropriately (id.). She noted that the child was not often understood (id.).

On January 26, 2005, a subcommittee of the CSE met to review the child's program at the request of the child's mother who was seeking occupational and physical therapies and a change in class placement due to the child's medical conditions (Parent Ex. D at p. 5). The CSE subcommittee determined that new evaluations would be conducted, including an occupational therapy evaluation, and a new CSE meeting would be scheduled following receipt of the results of the evaluations, results of medical tests suggested by respondent's supervisor of health services, and reports from the child's physicians (id.).

In an April 2005 speech-language evaluation summary/progress report, the evaluator indicated that the child continued to evidence severely restricted receptive and expressive vocabulary/language skills for her age (Parent Ex. T). The evaluator recommended continuation of speech-language services with a focus on improving oral-motor skills and production of target sounds, improving attention to tasks and listening skills, improving functional academic vocabulary and morphology skills, and improving the use of the Picture Exchange Communication System (PECS) across all "listeners" and environments (id.).

An April 2005 pupil progress report indicated that the student was performing significantly below grade level objectives in English language arts and mathematics, and was rated as "Needs Improvement" in science and social studies (Parent Ex. S). In an April 22, 2005 progress report for IEP goals and objectives the child was marked as "In Progress" on all objectives (Parent Ex. QQ). Marking period comments were provided for speech-language objectives, and noted that the child had made progress with imitating a variety of oral-motor movements after a model was presented (id. at p. 4).

The CSE reconvened on May 19, 2005 (Parent Ex. E at p. 5). Comments indicated that a new CSE meeting would be scheduled after receipt of an occupational evaluation and various other evaluations including reports from the child's doctors "that delineate her health conditions and specify any services needed in school and limitations, if any, that would preclude her attending her current school program" (id. at p. 6).

A physical therapy evaluation of the child was conducted on June 7, 2005 (Parent Ex. U). The evaluator reported that the child had significant gross motor delays (id. at p. 5). He indicated that the child's weakness/low tone, arthritic joints and decreased cognition affected her gross motor functioning (id.). He also indicated that despite the child's deficits, she was ambulatory and

managed to negotiate the school environment (id.). The evaluator recommended physical therapy once per week to address the child's weaknesses and improve stair negotiation (id.).

In a letter dated August 3, 2005, the child's rheumatologist indicated that the child had been resistant to treatment for polyarthritis despite escalating strength and doses of medication (Parent Ex. V). He further indicated that the child's arthritis was severe and had resulted in significant reduction in range of motion and contractures (id.). He stated that the child required both physical and occupational therapy at least three times weekly for each (id.).

A subcommittee of the CSE met on August 10, 2005 for the child's annual review and to develop an IEP for the 2005-06 school year (Parent Ex. E at p. 5). It recommended that the child be placed in a special class and that she receive individual speech-language and physical therapy (id. at p. 2). Comments from the meeting indicated that the occupational therapy evaluation was to be scheduled and that additional services would be determined after receipt of the evaluation (id. at p. 5).

The student began attending the recommended placement in September 2005 (Parent Ex. SSS). An occupational therapy evaluation was conducted in September 2005 and the evaluator reported that the child's fine motor skills were scattered at the three year level with the exception of her ability to cut with scissors along a straight line which was at the five year level (Parent Ex. W). The evaluator noted that the child was able to roughly print her name (id. at p. 6). She indicated that the child's manipulation skills were at 41-42 months and her writing was at 38-39 months (id.). She further indicated that the child's scores were commensurate with her cognitive abilities and her placement in a small, self-contained class that provided individualized assistance with fine motor tasks as needed met the child's educational needs in the least restrictive environment (id.). The evaluator concluded that "occupational therapy is not indicated at this time as part of [the child's] curriculum and therefore not recommended" (id.).

In a letter dated December 8, 2005, the child's school physical therapist advised the child's mother that he was concerned about the child's limp and recommended that the child be seen by an orthopedic doctor (Parent Ex. XX). The physical therapist also recommended an orthotic assessment (id.). He indicated that his first session with the child had not taken place until December 8, 2005 because prior to that time, a prescription was not in place and the child was absent (id.). On January 5, 2006, the physical therapist noted that the child's gait had progressively worsened and that she was not bearing weight on her left leg properly (Parent Ex. OOO at p. 7). He asked the school psychologist to advise petitioners to have an orthopedic doctor examine the child's hip (id.). He indicated that physical activity in regard to physical therapy was on hold until an orthopedic report was completed (id.).

The child did not return to school after January 11, 2006 (Parent Ex. UUU). On January 19, 2006, the child was referred to respondent's attendance office (Parent Ex. LLL). A school administrator contacted the child's mother who indicated that the child was unable to walk and was able to move around only by crawling (id.). The child's mother also indicated that the child had been seen by several doctors (id.).

In a January 2006 letter, the child's pediatrician noted that despite medication, the child's condition had continued to worsen since she was diagnosed with polyarthritis in May 2004 (Parent Ex. YY). She indicated that results of a scanogram did not show leg length discrepancy and that the there was no physical or radiologic evidence of hip dysplasia (id.). The child's pediatrician further indicated that the child needed to continue to receive physical and occupational therapy at least three times per week (id.). She indicated that there were no limitations with therapy and the child could continue as tolerated (id.).

In a January 26, 2006 speech-language student progress narrative, the evaluator reported that the child had been receiving individual speech-language therapy two times per week for 30 minutes, but had been seen only one time in January 2006 due to snow days, holidays, lateness and absences (Parent Ex. FFF). The evaluator indicated that the child's therapy routine included oral motor exercises, repetition of syllables, nonsense words, and real words, as well as language training specific to sentence structures, vocabulary, response to directives, distinction of he/she, and the use of PECS (id. at p. 1). The evaluator further indicated that the student was "doing well" with imitating strings of consonant-vowels for improved sound production and co-articulation, and that she could "be encouraged" to use simple sentences when cues and models were provided for her as models (id.). Jargon-like utterances were described as "essentially unintelligible" (id.). The child was noted to have "shown the most improvement" with the use of PECS, as she demonstrated ability to independently initiate language by forming a two-picture sentence on a sentence strip and handing it to the "listener" (id.). With the support of the pictures, the child was described as being able to articulate more clearly (id.). A video fluoroscopy swallow study was requested, as well as medical clearance for foods/liquids to be used in school to encourage improved oral-motor skills and to facilitate improved speech clarity (id. at p. 2).

On February 2, 2006, respondent's attendance social worker contacted the child's mother who indicated that the child was in pain and unable to walk, and therefore unable to attend school (Parent Ex. LLL). Respondent's coordinator of health services was advised that the child's doctor recommended that the child receive homebound instruction (id.). The child was authorized for homebound instruction on February 2, 2006 until further notice (Parent Ex. PPP at p. 5). The child's homebound instructor reported that she attempted to schedule homebound instruction sessions on February 8 and 14, 2006 (Parent Ex. HHH). The child's mother advised the homebound instructor that the late afternoon instructional times that she offered were not convenient (id.).

In a February 14, 2006 physical therapy observation, the physical therapist reported that therapy began on December 8, 2005 and continued until January 5, 2006 after which the child stopped attending school (Parent Exs. EEE; KKK). He indicated that during that time, there was a progressive worsening of the child's gait and decreased weight bearing on her left leg (id.).

On February 15, 2006, a subcommittee of the CSE met at the child's mother's request (Parent Ex. CCCC). It recommended that the student be placed on homebound instruction with a projected start date of February 27, 2006 (id. at p. 1). Comments from the meeting indicated that the child's mother was provided with a letter requesting specific physical therapy directions from an orthopedic physician (Parent Exs. CCCC at p. 6; III). The child's mother was provided with a letter from respondent's coordinator of health services requesting that specific information be

included in the report generated from the February 23, 2006 evaluation (Tr. pp. 689, 691; Parent Ex. JJJ).

On March 9, 2006 the child was seen by an orthopedic doctor who referred her for an orthosis for her lower limb (Parent Ex. DDD at p. 3). In a letter dated March 9, 2006 to respondent's coordinator of health services, the child's rheumatologist described the child's condition and treatment (Parent Ex. BBB). He indicated that the child required both occupational and physical therapy services "to participate in an educational setting, to facilitate fine motor function because of the involvement of her wrists and small joint on her fingers and physical therapy to improve and maintain functional ambulation, posture and strength of her lower extremities" (id.).

In a March 10, 2006 report, the child's homebound instructor detailed the child's progress in reading, writing, alphabet, and numbers, after approximately 15 hours of contact (Parent Ex. CCC at p. 1). She indicated that the child demonstrated ability and progress in identifying the numbers 1-10 correctly by verbally expressing responses and pointing, but was unable to correctly identify the alphabet (id.). She further indicated that the child was able to read her phone number (id.). The child's homebound instructor noted that the child demonstrated great difficulty in being able to hold a pencil correctly and write semi-legibly on her own (id. at pp. 1-2). She also noted that the child required assistance in tracing letters or numbers (id. at p. 1). The homebound instructor noted that the child's actual abilities were inconsistent with the information that she received from the child's school teacher who indicated that the child was able to accomplish assignments involving very limited sight reading (id.). The homebound instructor also indicated that the child appeared to have made significant progress in terms of her mobility, in that she was able to walk semi-independently from room to room in her home, sometimes leaning on the walls for support (id.).

On March 22, 2006, the child was seen by a physician from a children's hospital who indicated that the child should be placed in a school where physical therapy, occupational therapy and speech therapy could be provided three times per week (Parent Exs. AAA; GGGG). The physician included a list of therapy objectives that encompassed range of motion of upper and lower extremities, balance responses, gait, safety during ambulation, fine motor skills and hand coordination, graphomotor skills and use of writing implements, self-care skills including use of eating utensils, receptive and expressive language, and oral motor skills (id.).

In a letter dated March 24 2006, the child's pediatrician indicated that the child was unable to ambulate any significant distance without assistance and was in a fair amount of discomfort (Parent Ex. ZZ). She further indicated that the child had made some improvement with the medication and the physical therapy she was receiving at home. She advised that the child would continue to remain at home and receive "home-schooling" (id. at p. 2).

A subcommittee of the CSE convened on March 24, 2006 for a program review and recommended that the child be placed in a special class with related services (Dist. Ex. 1). Comments from the meeting indicated that options were discussed to address concerns regarding the child's ability to sustain a full school day (id. at p. 7). The child's mother raised concerns that the child required more therapy than the CSE subcommittee was recommending (id.). The CSE

subcommittee offered to conduct another occupational therapy evaluation when the child returned to school and the child's mother rejected the offer (id.). Comments noted that the child's mother did not agree with the recommendation and was asked what type of program would be more suitable for the child (id.). The child's mother indicated that she would keep her daughter at home (id.).

Petitioners requested an impartial hearing on April 4, 2006 challenging respondent's recommendations for their daughter for the 2005-06 school year (IHO Ex. 3). They requested a comprehensive evaluation and an out-of-district placement with trained personnel and equipment to properly address their daughter's unique needs (id.).

The impartial hearing began on June 29, 2006. The impartial hearing officer adjourned the hearing for the purposes of obtaining an independent psychoeducational evaluation and an occupational therapy evaluation (IHO Decision at p. 1). The evaluations were completed on October 26, 2006 (id. at p. 2). The impartial hearing resumed on November 16, 2006 and concluded on March 27, 2007, after eight days of testimony. The impartial hearing officer rendered his decision on June 27, 2007. He determined that respondent offered an appropriate placement, an appropriate program and appropriate services to the child for the 2005-06 school year (id. at p. 28). He found that respondent provided a free appropriate public education (FAPE)[1] to the child and consequently, he denied petitioners' request for additional services for the 2005-06 school year (id.). However, in response to petitioners' request for an order requiring an immediate CSE meeting, the impartial hearing officer ordered, among other things, an occupational therapy evaluation to be completed by July 31, 2007 and the CSE to reconvene to review the evaluations and reports that he had ordered (id.).

Petitioners appeal from the impartial hearing officer's decision. They assert that the impartial hearing officer erred in finding that respondent appropriately assessed their daughter's needs and in finding that respondent's recommendations for their daughter for the 2005-06 school year were appropriate. Petitioners also assert that the impartial hearing officer was biased, that he erred in finding that they joined in a motion to limit the impartial hearing to the issues regarding the 2005-06 school year and that he did not cite to evidence to support the factual determinations

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[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].

in his decision.[2] They seek an order requiring respondent to arrange for "compensatory and/or equitable services."

I will first consider petitioners' allegation of bias. Petitioners challenge the impartial hearing officer's impartiality based upon his determination that there was a religious and cultural basis for petitioners' demand for a placement out of the school district. They argue that there is no support in the record for such determination.

An impartial hearing officer must be fair and impartial and must avoid even the appearance of impropriety or prejudice (see Application of a Child with a Disability, Appeal No. 06-039; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 04-010; Application of a Child Suspected of Having a Disability, Appeal No. 03-071), and must render a decision based on the hearing record (see Application of a Child with a Disability, Appeal No. 00-063; Application of a Child Suspected of Having a Disability, Appeal No. 00-036; Application of a Child with a Disability, Appeal No. 98-55). A hearing officer, like a judge, must be patient, dignified and courteous in dealings with litigants and others with whom the hearing officer interacts in an official capacity and must perform all duties without bias or prejudice against or in favor of any person, and shall not, by words or conduct, manifest bias or prejudice, according each party the right to be heard (Application of a Child with a Disability, Appeal No. 04-046; Application of a Child Suspected of Having a Disability, Appeal No. 01-021; see 8 NYCRR 200.1[x]; see also 22 NYCRR 100.3[B]).

Upon careful review of the hearing record, I do not agree with petitioners' contentions that the impartial hearing officer demonstrated bias. While his decision included references to petitioners' interest in a parochial school, the decision also noted that the information was anecdotal and that the child's mother did not express such interest at the impartial hearing (IHO Decision at p. 25).

Petitioners also assert that they did not join in a motion to limit the issues to the 2005-06 school year and that the impartial hearing officer should have considered the evaluations he ordered on the first day of the hearing in making his determination. In their request for an impartial hearing, petitioners stated that they were seeking an impartial hearing to challenge respondent's recommendation for the 2005-06 school year (IHO Ex. 3). The impartial hearing officer appropriately reviewed the information that was available to the CSE at the meetings during which the IEPs were developed for that school year (see Antonaccio v. Bd. of Educ., 281 F. Supp. 2d 710, 724-25 [S.D.N.Y. 2003]). Therefore, I disagree with petitioners' contention.

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[2] Petitioners argue that the impartial hearing officer failed to cite to any evidence in the hearing record to support his factual determinations, and that there were no citations to the record, exhibits or law to support his decision. The Regulations of the Commissioner of Education provide in relevant part that "[t]he decision of the impartial hearing officer shall be based solely upon the record of the proceeding before the impartial hearing officer, and shall set forth the reasons and the factual basis for the determination. The decision shall reference the hearing record to support the findings of fact" (8 NYCRR 200.5[j][5][v]). The impartial hearing officer is reminded to comply with state regulations and cite to relevant facts in the hearing record.

I now turn to whether respondent offered a FAPE to the child during the 2005-06 school year. The central purpose of the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) is to ensure that students with disabilities have available to them a FAPE (20 U.S.C. § 1400[d][1][A]; see Schaffer v. Weast, 546 U.S. 49, 51 [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]; see 20 U.S.C. § 1414[d]; 34 C.F.R. § 300.320).[3] The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.6[a][1]; see Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 132 [2d Cir. 1998]). The burden of persuasion in an administrative hearing challenging an IEP is on the party seeking relief (see Schaffer, 546 U.S. at 59-62 [finding it improper under the IDEA to assume that every IEP is invalid until the school district demonstrates that it is not]).

An appropriate educational program begins with an IEP 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).

In conducting the evaluation, school districts must gather relevant functional and developmental information about the child, including information provided by the parent, that may assist in determining the content of the child's IEP (34 C.F.R. § 300.304[b]). The evaluation must be sufficiently comprehensive to identify all of the child's special education and related service needs (34 C.F.R. § 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]).

Petitioners assert that respondent did not properly assess their daughter. The record shows that in May 2004 the child was diagnosed with polyarthritis (Parent Ex. N). Subsequently, by letter dated May 17, 2004, the child's pediatrician described the child's condition and treatment, and indicated that the child was in need of occupational and physical therapy (id.). On May 19, 2004, the child's service coordinator wrote to the CSE expressing concerns about the child's safety and requested a smaller, self-contained environment that the child could negotiate and that would be more sensitive and supportive to the child's needs (Parent Ex. P).

As noted above, a subcommittee of the CSE convened in January 2005 at the request of the child's mother (Parent Exs. D at p. 5; FFFF at p. 5). Among other documents, the CSE

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[3] The Code of Federal Regulations (34 C.F.R. Parts 300 and 301) has been amended to implement changes made to the Individuals with Disabilities Education Act (IDEA), as amended by the Individuals with Disabilities Education Improvement Act of 2004. The amended regulations became effective October 13, 2006. For convenience, and unless otherwise specified, citations herein refer to the regulations as amended because the regulations have been reorganized and renumbered.

subcommittee reviewed the May 17, 2004 letter from the child's pediatrician as well as the January 12, 2005 letter from the child's rheumatologist which recommended that the child be placed in a classroom setting where she could receive physical and occupational therapy for her Down syndrome and arthritis (Parent Exs. NN; NNN). The January 2005 IEP provided that the child's physical levels would be determined after the occupational and physical therapy evaluations were conducted (Parent Exs. D at p. 4; FFFF at p. 5).

The CSE reconvened in May 2005 and the child's mother again requested occupational therapy and physical therapy for her daughter (Parent Ex. E at p. 6). Notes from the meeting indicated that consent for new occupational and physical therapy evaluations had been signed (id. at p. 6). Notes further indicated that following the results of the evaluations and tests recommended by respondent's health service coordinator, a new CSE meeting would be scheduled (id.). The physical therapy evaluation was conducted in June 2005 (Parent Ex. U). Respondent's coordinator of occupational and physical therapy first offered to conduct the occupational therapy evaluation during summer 2005, but the child's mother was not available (Tr. p. 321).

A subcommittee of the CSE convened again in August 2005 to develop the child's IEP for the 2005-06 school year (Parent Ex. E). Among other documents, the CSE subcommittee reviewed the results of the June 2005 physical therapy evaluation and the August 3, 2005 letter from the child's rheumatologist indicating that the child's arthritis was severe and had resulted in significant reduction in range of motion and contractures (Parent Ex. V). The letter also indicated that the child required physical and occupational therapy (id.). The August 2005 IEP noted that the child demonstrated significant motor delays and that improvement was needed in the areas of fine motor and gross motor development (id. at pp. 3, 4). The August 2005 IEP provided for individual physical therapy once per week for 30 minutes and indicated that an occupational therapy evaluation would be conducted when the child returned to school (id. at pp. 2, 5).

With respect to an assessment of the child's need for occupational therapy services, the record shows that when the CSE subcommittee met in August 2005, respondent had not conducted an occupational therapy evaluation despite having knowledge of the child's needs as early as May 2004 (Parent Ex. P). The May 2004 IEP included a notation that improvement was needed in the areas of fine motor and gross motor development (Parent Ex. C). The January 2005 IEP recommendations were based upon letters from the child's physicians describing the child's condition and stating the need for occupational therapy (Parent Exs. D at p. 5; FFFF at p. 6). It provided that the child's physical levels would be determined after the occupational therapy evaluation was conducted (Parent Exs. D at p. 4; FFFF at p. 5). However, when the CSE subcommittee convened four months later in May 2005, an occupational therapy evaluation had not been conducted. When the CSE subcommittee reconvened in August 2005, it reviewed yet another letter from the child's rheumatologist indicating that the child's arthritis was severe, had resulted in significant reduction in range of motion and contractures, and that the child required occupational therapy (Parent Ex. V).

The record indicates that the child demonstrated significant fine motor deficits (Parent Ex. E at p. 3). The CSE subcommittee did not have an updated or current occupational therapy evaluation when it convened in August 2005 and I find that a current occupational therapy

evaluation was necessary in order for the August 2005 CSE to make an appropriate recommendation.

An occupational therapy evaluation was conducted on September 23, 2005 (Parent Ex. W), but the CSE subcommittee did not review the results of the evaluation until it met in February 2006, five months after it was completed (Parent Ex. CCCC). Respondent should have convened a CSE meeting sooner to review the results of the occupational therapy evaluation.

A review of the occupational therapy evaluation shows that it did not fully identify the child's needs. The occupational therapy evaluation consisted of a standardized assessment, clinical observations and task performances (Parent Ex. W at p. 1). As measured by subtests of the LAP-D the student demonstrated significant delays in fine motor and manipulation skills (id. at pp. 4, 5, 6). The occupational therapy evaluation report also indicated that the student demonstrated visual and tactile sensory impairments, as well as perceptual motor impairments (id. at pp. 2, 5). However, the evaluating therapist concluded that occupational therapy was not indicated (id. at p. 6). Other than identifying the child's impairments, the evaluator did not provide information regarding the child's current level of functioning or whether these impairments affected her ability to function in an educational environment.

The February 2006 CSE subcommittee recommended that home instruction be continued as the child's medical condition prevented her from attending school (Parent Ex. CCCC at p. 6). The February 2006 CSE subcommittee indicated that it would reconvene to review the child's program after it received additional medical reports (id.). When the CSE subcommittee reconvened in March 2006, it reviewed the September 2005 occupational therapy evaluation and did not recommend occupational therapy services (Dist. Ex. 1 at p. 11).

Based on respondent's failure to complete an updated occupational therapy evaluation, its failure to timely review the occupational therapy evaluation once it was received, and its failure to ensure that an appropriate occupational therapy evaluation was conducted, respondent failed to offer petitioners' daughter a FAPE during the 2005-06 school year. Having so found it is not necessary to address petitioners' remaining challenges to the program recommended for the child for the 2005-06 school year.

Petitioners seek an order requiring respondent to arrange for equitable services for their daughter as a result of respondent's failure to provide their daughter a FAPE during the 2005-06 school year. State Review Officers have awarded equitable relief in the form of additional educational services to students who remain eligible to attend school and have been denied appropriate services, if such deprivation of instruction could be remedied through the provision of additional services before the student becomes ineligible for instruction by reason of age or graduation (Application of the Bd. of Educ., Appeal No. 03-075; Application of a Child with a Disability, Appeal No. 02-042; Application of a Child with a Disability, Appeal No. 02-030). In general, the award of additional educational services, for a student who is still eligible for instruction, requires a finding that the student has been denied a FAPE (Application of the Bd. of Educ., Appeal No. 04-085; Application of the Bd. of Educ., Appeal No. 02-047). Having found that respondent denied the child a FAPE, given the facts and circumstances of this case, petitioners are entitled to an award of additional services in the form of occupational therapy.

In determining the additional services I note that petitioners did not specify the services they sought to remedy the denial of FAPE. I agree with the impartial hearing officer that the parties have difficulty reaching consensus. For this reason I will not remand the determination of the award of additional services to the CSE. I have reviewed the medical information from the child's physicians recommending that the child receive occupational therapy three times per week (Parent Exs. N; V; NN; YY; ZZ; AAA; BBB; NNN; GGGG).[4] Based upon respondent's failure to provide occupational therapy services from September 2005 through January 2006,[5] I will order as additional services that the child be offered sixty 30-minute sessions of occupational therapy, in addition to her regularly scheduled IEP services. The additional services should be offered within a two year period from the date of this decision.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the impartial hearing officer's decision is hereby annulled to the extent that he found that respondent offered the child a FAPE for the 2005-06 school year; and

IT IS FURTHER ORDERED that unless the parties otherwise agree, respondent offer the child occupational therapy consistent with this decision.

Dated: **Albany, New York**
September 14, 2007

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PAUL F. KELLY
STATE REVIEW OFFICER

[4] In the absence of a specific recommendation for occupational therapy services, I am relying on the medical information contained in the record from the child's physicians.

[5] Additional services are awarded through January 2006 because the record shows that homebound instruction began in February 2006, but the record does not reflect with clarity what services the child received from February until the end of the school year.