



The University of the State of New York

The State Education Department State Review Officer

No. 07-113

Application of a CHILD WITH A DISABILITY, by his parent, for review of a determination of a hearing officer relating to the provision of educational services by the New York City Department of Education

Appearances:

Law Offices of Deusdedi Merced, P.C., attorney for petitioner, Deusdedi Merced, Esq., of counsel

Hon. Michael A. Cardozo, Corporation Counsel, attorney for respondent, Daniel J. Schneider, Esq., of counsel

DECISION

Petitioner appeals from the decision of an impartial hearing officer which denied her request to be reimbursed for her son's tuition costs at the Minding Miracles Learning Center (Minding Miracles) for the 2006-07 school year. The appeal must be dismissed.

At the commencement of the impartial hearing in December 2006, the student was attending Minding Miracles (Parent Ex. AA at pp. 1, 4). Minding Miracles is not approved by the Commissioner of Education as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7). The student's eligibility for special education programs and services as a student with autism is not in dispute in this appeal (see 34 C.F.R. § 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

In February 2003, the student was referred to the New York State Early Intervention Program due to his daycare teacher's concerns that he was not responding to stimuli or responding to his name (Parent Ex. B at p. 2). The student began receiving early intervention services (EIS) in March 2003 (Tr. p. 37; Parent Ex. B at p. 2). Due to concerns about the student's relatedness, lack of communication, aloofness with peers, and self-stimulatory behavior, the student was referred for a psychological evaluation to determine the etiology of his behavior (Parent Ex. A at p. 1). In December 2003, the student was evaluated by a private psychologist who diagnosed the

student with mild to moderate autism (*id.* at pp. 2, 4). The psychologist reported that the student had a vocabulary of approximately eight recognizable words that he used consistently (*id.* at p. 2). In January 2004, the student began attending a half-day therapeutic preschool program where he received occupational therapy (OT), physical therapy (PT), and speech-language therapy (Tr. p. 31; Parent Ex. B at p. 2). The student returned to his mainstream daycare in the afternoon (Tr. pp. 30-32, 159).

Petitioner reported that the student stopped speaking in approximately January 2004 (Tr. pp. 35-36; Parent Ex. B at pp. 1, 4). In July 2004, the student began receiving ten hours per week of at-home applied behavioral analysis (ABA) instruction (Tr. pp. 36-37; Parent Ex. B at p. 2). The student reportedly regained speech following the initiation of home-based ABA therapy in July 2004 (Tr. pp. 35-37, 177, 180; Parent Ex. B at pp. 1, 2).

In September 2004, a pediatric neurologist conducted an evaluation of the student (Parent Ex. B at p. 4). The pediatric neurologist reported that the student demonstrated severe delays of expressive and receptive language following a developmental regression at age two and one half years of age (*id.*). The neurologist indicated that the student had severe delays in play, cognitive, and social-adaptive skills; as well as multiple problems in the autism spectrum including self-directed, obsessive and repetitive play, unsustained eye-contact, very poor social interaction, tactile defensiveness, poor gaze-monitoring, and difficulty with transitions (*id.*). The pediatric neurologist concluded that the student met the diagnostic criteria for pervasive developmental disorder, not otherwise specified (PDD-NOS) and recommended that the student be enrolled in a full time center based program specializing in the care of children with autism spectrum disorders and in addition, receive full time 1:1 intensive ABA therapy in the home (*id.*). The neurologist also recommended that the student receive speech therapy on a daily basis and occupational therapy at least three times per week (*id.*).

The student aged out of EIS (Tr. p. 39). In September 2004, the student began attending an 8:1+2 special class at YAI Gramercy School (YAI) that was recommended by respondent's Committee on Preschool Special Education (CPSE) (Tr. pp. 39-41). He received speech-language therapy, OT and PT at YAI (*id.*). At petitioner's request, the student was also provided with ABA instruction in the afternoon at his mainstream daycare (Tr. pp. 39-43).

In September 2005, petitioner enrolled the student at the Francis of Paola School Early Learning Center (Francis of Paola) where he was placed in a 6:1+3 program and received 1:1 speech-language therapy twice weekly for 30 minutes, 1:1 OT twice weekly for 30 minutes, 1:1 PT one time per week for 30 minutes, and ten hours of home ABA instruction with a special education itinerant teacher (SEIT) (Tr. pp. 48-49; Parent Exs. I at p. 1; K).

In September 2005, a speech-language evaluation was conducted by the student's therapist at Francis of Paola (Parent Ex. C). The therapist reported that based on her administration of the Preschool Language Scale - 4 (PLS-4) the student received a standard score of 55 on measures of receptive language and a standard score of 70 on measures of expressive language (*id.* at pp. 1, 2). The therapist reported that, receptively, the student was able to identify photographs of familiar objects, understand inhibitory words, identify body parts and clothing items on himself, recognize

actions in pictures, understand use of objects, understand simple descriptive concepts, identify colors, and categorize animals and food (id. at p. 1). The student had difficulty following two-step related directions, and understanding part/whole relationships (id. at p. 2). According to the therapist, the student did not understand the prepositions in/out/off or the pronouns my/your (id. at pp. 1-2). In addition, the student had difficulty understanding quantitative concepts, did not make inferences and did not understand picture analogies (id. at p. 2). The therapist reported that, expressively, the student was able to name objects in photographs, use words more often than gestures to communicate, use words for a variety of pragmatic functions, use plurals appropriately, combine 3-4 words in spontaneous speech, answer "what" and "where" questions appropriately, and use present progressive tense appropriately (id.). According to the therapist, the student did not use a variety of speech parts in spontaneous utterances, had difficulty stating the functional use of objects, difficulty expressing quantitative concepts, difficulty answering questions logically and answering questions about hypothetical questions (id.). The therapist noted that the student's oral motor skills were adequate for speech production and feeding purposes, but that the student exhibited poor facial tone (id.).

In an October 2005 OT progress report, the student's occupational therapist reported that the student presented with a right static tripod grasp, required moderate assistance to position scissors in his hand and could inconsistently put together simple non-interlocking puzzles (Parent Ex. D). The therapist indicated that the student could snip paper, build a four block tower, place and remove large pegs, and string three out of five large beads on a pipe cleaner (id.). The student was not yet toilet trained and required assistance with fasteners (id.). The therapist noted that the student had made minimal gains in fine motor and visual perceptual skills due to his difficulty with sensory modulation and sensory regulation, which often interfered with his ability to attend to tasks (id.). In October 2005, the student's physical therapist reported that the student had demonstrated improvement in stair negotiation, jumping from a higher surface, and balance (Parent Ex. E). According to the physical therapist, the student had difficulty catching a small ball and riding a tricycle, and he demonstrated delayed motor planning when attempting to avoid obstacles (id.).

The student's special education teacher at Francis of Paola described the student's classroom as language-based with a strong emphasis on social and play skills (Parent Ex. F at p. 1). She indicated that the principles of ABA were used consistently throughout the day (id.). In her annual review progress report, dated October 19, 2005, the teacher indicated that the student was making progress sitting in his chair during an activity and instructional periods (id. at p. 2). According to the teacher, the student's responsiveness to tasks increased depending on his motivation or the presence of the right reinforcers (id.). The student was able to recognize himself and classmates in pictures, and complete non-interlocking puzzles (id.). The student was not able to match object to object or picture to picture, rote count to ten, or sort objects by color (id.). With regard to language development, the teacher reported that the student used single words and gestures to request his wants and needs (id.). The student demonstrated an increase in using 2-3 words with prompting (id.). The teacher indicated that, socially, the student had difficulty initiating interactions and sharing preferred toys with peers (id. at p. 1). The student was able to make eye contact and sustain it for approximately one minute and was beginning to imitate adult play models and incorporate them into his own play schemes (id.). According to the teacher, the

student required social praise, and primary and secondary reinforcers to work with him in a one-to-one or small group setting (id.). The teacher indicated that the student sometimes displayed tantrum behavior including pushing, dropping to the floor and throwing items to avoid an activity (id.).

A progress report from the student's SEIT dated January 27, 2006, indicated that when measured over two consecutive sessions, the student attended to a task for one minute in response to "wait here" and followed ten two-step commands with 90 percent accuracy, identified the letters A-D and the numerals 1-4 with 70 percent accuracy when presented with an array of four, receptively and expressively identified four different colors with 60 percent accuracy, and requested five preferred items/activities in four word utterances using autoclitics with 90 percent accuracy (Dist. Ex. 12 at p. 1). The student also exhibited turn taking with his teacher with 70 percent accuracy for a ten second period during a preferred activity, and parallel play with peers in multiple play situations (id.). The SEIT also reported that the student identified ten body parts receptively and four body parts expressively with 90 percent accuracy when measured over two consecutive sessions (id.). The student's toileting skills were reportedly inconsistent (id.).

In February 2006, petitioner requested that respondent conduct evaluations of the student for the purpose of developing an individualized education program (IEP) for the 2006-07 school year (Tr. pp. 52-53). On March 19, 2006, respondent's school psychologist conducted a psychoeducational evaluation of the student (Tr. p. 53; Parent Ex. I). Attempted administration of the Wechsler Preschool and Primary Scale of Intelligence -Third Edition (WPPSI-III) and the Woodcock Johnson III - Tests of Achievement (WJ-III ACH) was unsuccessful due to the student's resistance and lack of response despite that evaluator's attempts to provide structure, encouragement, clarification, refocusing, and limit setting (Parent Ex. I at pp. 2-3). The evaluator noted that the student was an extremely active and distractible child who exhibited significant impairments in focusing, communication, relatedness, and in his social interactions (id. at p. 3). The student did not respond to his name or exhibit spontaneous speech; however the evaluator reported that he gestured to communicate his needs at times (id. at p. 2). The evaluator also noted that the student did not exhibit spontaneous language and did not exhibit stereotypical behaviors (id.). The evaluator opined that the student displayed many characteristics of a child with autism, and that his inability to communicate may result in the student becoming frustrated and impulsive, and that the student would benefit from a small class program with much support and close supervision to address his needs (id.).

On March 19, 2006, the student was evaluated by respondent's speech-language therapist (Parent Ex. H). The speech-language therapist noted that during testing the student was uncooperative, never made eye contact, and was very difficult to engage (id. at pp. 1-2). According to the evaluation report, the student preferred to flush the toilets in the bathroom rather than play with toys (id. at p. 1). Consistent with previous speech-language reports, the speech-language therapist indicated that the student presented with severe receptive and expressive language delays and also exhibited poor social interaction, play skills, attending and focusing skills, and low facial tone (id. at pp. 3-4). The speech-language therapist recommended that the student receive speech-language therapy twice weekly for 30 minutes with a student-to-staff ratio of no more than 3:1 (id. at p. 4).

Petitioner sought a private observation of the student from Minding Miracles which resulted in the generation of an observation report dated May 16, 2006 (Parent Ex. L). The student was observed in both a small group and a 2:1 setting by the Minding Miracles program director (id. at p. 1). In addition, a parent interview was conducted (id.). The observer noted that the student presented with an engaging demeanor upon entering the setting (id.). When placed in a play setting with other children, the student became possessive of a favored truck, which distracted him from engaging in social interactions with peers (id.). In addition, the observer reported that the student positioned cars in a standard formation and became preoccupied about the possibility that someone would disrupt his planning (id.). The observer opined that the student's social skills and problem solving abilities were challenged with the interrelatedness of the other children in the group (id.). She noted that the student demonstrated a strong desire to engage with the other children in the group and required support to do so appropriately (id.). According to the observer, the student understood turn taking and the concept of sharing, although he chose not to (id.). The observer stated that conversational skills, play imitation, and spontaneous interactions were skills in the student's repertoire that required ongoing support and intervention (id.). She opined that the skill deficiencies experienced by the student are best addressed through interaction with same-age, typically developing peer models (id. at p. 2). The observer recommended consideration of an appropriate inclusive setting, an analysis of the student's behavior and the development and implementation of a behavior plan (id. at p. 3).

On May 18, 2006, respondent's Committee on Special Education (CSE) convened to conduct a review and develop the student's IEP for the 2006-07 school year (Parent Ex. X).¹ The meeting was attended by petitioner, the student's special education teachers from the student's preschool, a school psychologist, an additional parent member, a district representative and a social worker (id. at p. 2). The May 2006 IEP indicated that the student's levels of cognitive and academic functioning could not be obtained and that the student was "untestable" (id. at p. 3). However, results from the October 2005 educational progress report detailing the student's acquisition of basic skills were included in the present levels of academic performance (id.). With regard to language development, the May 2006 IEP stated that the student had severe receptive and expressive language delays (id.). The student was described as exhibiting poor social interaction and play skills, attending/focusing skills, and low facial tone (id. at p. 4). The May 2006 IEP also indicated that the student exhibited severe preservative behavior that required ABA modification (id.). With regard to the student's academic management needs, the May 2006 IEP indicated that the student required praise, encouragement, positive reinforcement, individual and small group instruction, constant repetition, learning tasks broken up into small units, and a paraprofessional for refocusing (id. at p. 3).

Socially, the May 2006 IEP described the student as pleasant, active and distractible, with significant impairment in focusing, communication, relatedness, and social interactions (id. at p. 5). The May 2006 IEP noted that the student was echolalic, that his eye contact was poor, and that he did not socialize appropriately with peers (id.). The May 2006 IEP also indicated that the student's inability to communicate led to frustration, impulsive behavior, and tantrums (id.). With

¹ The CSE first convened in April 2006, however, the psychoeducational evaluation was unavailable to the meeting participants and it was rescheduled for May 18, 2006 (Tr. pp. 68, 1352).

regard to his social/emotional needs, the May 2006 IEP indicated that the student required a very small structured and tightly supervised class setting to help him focus on classroom activities; prompting and cues to complete tasks; and intensive behavior management to improve on task behavior and increase interaction and social skills (id.). The May 2006 IEP contained goals and objectives for reading comprehension, decoding, numerical operations, math applications, self-help skills, and socialization skills (id. at pp. 7-9). Among other goals and objectives, the May 2006 IEP contained speech-language goals in the areas of cognition, as well as receptive and expressive language skills (id. at pp. 9-10).

Petitioner indicated that she wanted the student to be placed in a collaborative teaching class or inclusion setting (Tr. pp. 74-76, 1450-51). The May 2006 CSE recommended that the student be placed in a 6:1+1 special class in a specialized school for all class periods, with related services of speech-language therapy five times weekly for 30 minutes in a group of three, and OT and PT each two times weekly for 30 minutes in a 1:1 setting (Parent Ex. X at pp. 1, 14, 16). The May 2006 IEP also recommended full participation with nondisabled students for school activities such as lunch, assemblies and trips (id. at p. 16). The May 2006 IEP also included a behavioral intervention plan (id. at p. 17). According to the May 2006 IEP, the CSE considered recommending placement in a special class in a community school; however, they believed that such a program would not address the student's global delays (id. at p. 15).

In a letter dated May 20, 2006, the student's preschool speech-language therapist detailed the student's receptive and expressive language deficits, while noting that the student also presented with delays in pragmatics and play skills for which he required intensive modeling of appropriate socialization skills (Parent Ex. O). The therapist reported that the student required maximum prompting to interact with peers throughout the day and suggested that the student would benefit from a classroom setting that focused on developing both academic and social skills (id.).

In additional letters, dated May 24, 2006, the student's preschool special education teachers recommended that for the 2007-08 school year the student be placed in a setting with small group teaching and typical peers for social modeling (Parent Exs. N; P). The teachers opined that it would be premature to place the student in a full day typical education setting; however, they noted that the student was able to learn through imitation and would benefit from a partial inclusion program (id.).

Petitioner identified a 12:1 collaborative team teaching class located in another region in which she was interested in having the student placed (Tr. pp. 85-86). Petitioner requested another CSE meeting to consider an inclusion class for the student, and the CSE reconvened on June 2, 2006 (Tr. pp. 87, 127-28; Parent Ex. V). The June 2006 CSE considered the additional reports and letters from the Francis of Paola instructional and service providers (Tr. pp. 89-90; Parent Exs. N-P). The June 2006 CSE participants agreed that a collaborative team teaching class of 20-25 students was too large for the student and that the student could not be appropriately grouped with the students in the 12:1 class petitioner identified (Tr. pp. 115-16, 810-11; Parent Ex. V at p. 15). The timeframes for several annual goals and objectives were updated in the student's IEP (compare Parent Ex. V at pp. 7-11, with Parent Ex. X at pp. 7-11). The June 2006 CSE considered and

rejected a special class in a special school with a 12:1+4 ratio as too restrictive for the student (Parent Ex. V at p. 15). The June 2006 CSE maintained its recommendation for a 6:1+1 special class for the student (*id.* at p. 14). Petitioner thereafter received a final notice of recommendation dated June 14, 2006 based upon the placement recommendations set forth in the May 2006 IEP (Parent Ex. W).²

Petitioner visited the recommended placement, and after informing respondent that she was dissatisfied with the placement, respondent scheduled another evaluation of the student, which took place in July 2007 (Tr. pp. 129-132, 1073). Respondent attempted to evaluate the student using formal testing instruments on two occasions (Tr. pp. 832-34, 1080). During the first attempt, the student became fixated on flushing the toilets, could not be refocused after 15-20 minutes, and the evaluation was rescheduled (Tr. pp. 832, 1080-81). During the second attempt, the student was unresponsive, and he would not follow directions or participate in the assessment (Tr. pp. 1081-82). The evaluator attempted to work with the student for approximately 30 minutes, but was unable to complete any formal testing instruments and no evaluation report was produced (Tr. pp. 1082-84).

According to petitioner, the student's SEIT opined to her that some of the goals in the student's IEP were inappropriate and the SEIT recommended that petitioner request a CSE meeting for the purpose of revising the student's IEP (Tr. pp. 148-49). Upon petitioner's request, the CSE reconvened on August 16, 2006 (Tr. pp. 149-50). At the August 2006 CSE meeting, petitioner requested that the CSE amend the goals and objectives (Tr. p. 985). Attempts were made to contact the student's SEIT and the instructional staff at Francis of Paola to discuss the goals, however, they were not available (Tr. pp. 986-88; Dist. Ex. 4). Petitioner advised the August 2006 CSE that she was seeking an evaluation by a private psychologist and that she would provide the results of that evaluation at another CSE meeting (Tr. pp. 997-98). The August 2006 CSE continued the recommendations regarding the student's goals, objectives and placement from the May 2006 IEP (Tr. p. 988; Dist. Ex. 4).

A private psychological evaluation of the student was conducted on August 12 and 19, 2006 (Tr. p. 156; Parent Ex. Q at p. 1). On the first day of the evaluation, which lasted between 1 – 1.5 hours, the private psychologist was unable to engage the student (Tr. p. 582; Parent Ex. Q at p. 2). During breaks, the child preferred independent play, but allowed adult intrusion (Parent Ex. Q at p. 2). The private psychologist noted that the student enjoyed playing with soap bubbles (*id.*). On the second day of the evaluation, the private psychologist was able to engage the student and portions of the WPPSI-III and the Stanford Binet Intelligence Scales were administered (Tr. p. 583; Parent Ex. Q at pp. 2-3, 6). The student's mother and his SEIT were present during the evaluation of the student on the second day of the assessment, and the private psychologist spoke with the SEIT after the testing (Tr. pp. 588, 640-41; Parent Ex. Q at p. 3). The private psychologist noted that the student appeared to have a good relationship with the SEIT and that the student responded well to social praise (Parent Ex. Q at p. 3).

² The final notice of recommendation was the result of the May 18, 2006 CSE meeting, and, for all times relevant to this proceeding, the CSE's placement recommendation remained unchanged thereafter (*see* Parent Ex. W).

Based upon his review of the subtests that the student worked on, the private psychologist predicted the student's intellectual potential to be at least within the low average range with structured nonverbal tasks (id. at p. 4). The private psychologist also noted that the student's language skills were clearly underdeveloped and his functional language was of concern (id.). He pro-rated the student's scores and indicated that on WPPSI-III the student received a verbal composite score (and percentile rank) of 64 (1 percent), a performance score of 80 (18 percent) and a general language score of 78 (7 percent) (id. at p. 6). On the Adaptive Behavior Assessment System completed by petitioner and the SEIT, the student scored in the "extremely low" range (id.).

The private psychologist noted that there were several factors that were currently serving as obstacles to his obtaining adaptive functioning (Parent Ex. Q at p. 5). He noted the student's difficulties in making eye contact, poor social skills, limited functional communication, reciprocity, poor attention to task and his lack of interpersonal engagement (id.). He noted that the student must develop these weaker skills in order to take advantage of his higher cognitive potential (id.). The private psychologist recommended that the student needed good models for language and behavior as well as intensive language and behavioral interventions (id. at p. 6). He recommended a small therapeutic environment for the student (id.). He also recommended that the student needed a "placement with children who can serve as better language and behavioral models" (id.). Petitioner did not provide a copy of the private psychologist's evaluation report to respondent's CSE (Tr. pp. 706-07).

In a letter to respondent dated August 21, 2006, petitioner rejected the placement offered by respondent and provided notice that she was unilaterally placing the student in Minding Miracles and seeking tuition reimbursement at public expense (Parent Ex. Z). The student was enrolled in Minding Miracles, where he attended a class consisting of 15 students in a 2:1 student-to-staff ratio (Tr. pp. 299, 345). Approximately half of the pupils in the student's class were on the autism spectrum and the remaining half were regular education students (Tr. pp. 299-300).

In a due process complaint notice dated October 30, 2006, petitioner alleged that respondent failed to properly evaluate the student and that the CSE's recommendation to place the student in a 6:1+1 special class failed to offer the student a free appropriate public education (FAPE) and failed to offer the student instruction in an inclusion environment (Parent Ex. AA pp. 1-4). Petitioner also alleged, among other things, that respondent failed to properly conduct a functional behavioral assessment (FBA) of the student prior to developing a behavioral intervention plan (BIP) (id. at p. 4). Petitioner requested reimbursement for the cost of tuition at Minding Miracles for the 2006-07 school year (id.). In its response to the due process complaint notice, respondent alleged that the CSE had considered all of the available information about the student at its three meetings, and that petitioner had participated in a meaningful way (Parent Ex. BB at p. 2). Respondent also alleged that the program recommended for the student was appropriate to meet his special education needs and that there was no evidence that the student was ready for an inclusion class (id.). Respondent further alleged that the student required a more restrictive setting than what had been requested by petitioner (id.).

An impartial hearing commenced on December 11, 2006 and concluded on June 15, 2007 after eight days of testimony. Documentary evidence was entered into the record and testimony was taken from petitioner, the director of Minding Miracles, the student's private psychological evaluator, respondent's school psychologists who conducted the March and July 2006 evaluations and who participated in the May and August 2006 CSE meetings, a special education teacher who observed the student at Frances of Paola and who participated in the May and June 2006 CSE meetings, a special education teacher who worked at the CSE's recommended placement, and a social worker who participated in the May 2006 CSE meeting.

In a decision dated August 27, 2007, the impartial hearing officer found that the student could not be formally tested in March 2006 due to his unmanageable behavior, and that while petitioner attributed this to a "bad day," she did not request another evaluation (IHO Decision at p. 57). The impartial hearing officer also determined that the CSE considered the private observation provided by petitioner at the May 2006 CSE, and that the CSE accorded it due weight as an observation because no formalized testing was conducted (*id.* at pp. 57-58). The impartial hearing officer also reviewed the documentation provided by petitioner at the June 2006 CSE meeting and concluded that language therein relied upon by petitioner to endorse her request for an integrated class was ambiguous at best, and noted that none of the individuals making those recommendations were called as witnesses (*id.* at pp. 58-59). The impartial hearing officer further found that the August 2006 CSE did not have an objective basis for changing the goals in the student's IEP, especially when the SEIT who had suggested modifications did not participate in the meeting (*id.* at p. 59). She also determined that, although petitioner was dissatisfied with the evaluations conducted by respondent, she neither requested reevaluation or an independent educational evaluation of the student, and she could not rely upon the private psychologist's success in obtaining some formalized testing results because it was conducted after the CSE met for the last time and was not provided to respondent (*id.* at p. 60). The impartial hearing officer determined that respondent offered the student an appropriate placement in the least restrictive environment (LRE) (*id.* at pp. 60-61). Consequently, the impartial hearing officer denied petitioner's request for tuition reimbursement (*id.* at p. 63).

Petitioner appeals, contending that the student's placement was determined by his categorized disability of autism and that the CSE made no efforts to accommodate the student in a regular classroom. Petitioner also argues that there was no discussion at the CSE meeting regarding how supplementary aids and services would be designed to allow the student to enter a regular education environment. Petitioner argues that the benefits that would have been available to the student, had he been placed in a regular class, would have far outweighed any benefits he might have obtained from placement in a special class in a special school. According to petitioner, the impartial hearing officer erred in finding that there was no objective evidence that would justify placement of the student in an integrated program in light of the student's behavioral and severe language deficits. Petitioner contends, among other things, that the opportunity for intensive

modeling and appropriate social skills would not have been available at the CSE's recommended placement.³

In its answer, respondent alleges that the impartial hearing officer correctly determined that petitioner was an active participant in the CSE processes and that the CSE correctly rejected petitioner's request to place the student in an inclusion class. Respondent argues, among other things, that petitioner failed to meet her burden to establish that respondent failed to offer the student an appropriate placement. Respondent urges affirmance of the impartial hearing officer's decision, contending that the IEP was procedurally and substantively proper and that the student's program and placement recommendations were appropriate.

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];⁴ see 20 U.S.C. § 1414[d]; 34 C.F.R. § 300.320).⁵

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

³ In the petition, petitioner incorporates by reference her post-hearing memorandum of law submitted to the impartial hearing officer in support of her allegations that the IEP was procedurally defective and that Minding Miracles is an appropriate placement for the student (Pet. ¶¶ 91, 94, 97). I note that the Commissioner's regulations require that the reasons for challenging an impartial hearing officer's decision must be set forth with sufficient clarity in the petition for review (8 NYCRR 279.4[a]). State regulations also provide that a petition may not exceed 20 pages in length (8 NYCRR 279.8[a][5]). In this appeal, petitioner is represented by counsel. To the extent that petitioner refers to her post-hearing memorandum of law in her petition for factual allegations, a post-hearing brief is not a substitute for a properly drafted petition and cannot be used to circumvent state regulations governing pleading requirements (see Application of a Child with a Disability, Appeal No. 06-096). Therefore, I will not address those issues that were not set forth with sufficient clarity in the petition.

⁴ 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.

⁵ The term "free appropriate public education" means special education and related services that--

- (A) have been provided at public expense, under public supervision and direction, and without charge;
 - (B) meet the standards of the State educational agency;
 - (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and
 - (D) are provided in conformity with the individualized education program required under section 1414(d) of this title.
- (20 U.S.C. § 1401[9]).

IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). While school districts are required to comply with all IDEA procedures, not all procedural errors render an IEP legally inadequate under the IDEA (Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if a procedural violation is alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the child, or (c) caused a deprivation of 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 IDEA "expresses a strong preference for children with disabilities to be educated 'to the maximum extent appropriate,' together with their nondisabled peers" (Walczak, 142 F.3d at 122). A FAPE must be provided to a child with disabilities in the "least restrictive setting consistent with the child's needs" (see Perricelli, 2007 WL 465211 at *1, citing Walczak, 142 F.3d at 122, 132). In addition, federal and state regulations require that districts ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special

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

The burden of persuasion in an administrative hearing challenging an IEP is on the party seeking relief (see Schaffer, 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]).

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 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, 427 F.3d at 192). "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 (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 C.F.R. § 300.148).

After carefully reviewing the entire hearing record, I find that the impartial hearing officer, in a thorough, well-reasoned, and well-supported 67-page decision, correctly held that the 2006-07 IEP developed by respondent's CSE offered the student a FAPE in the LRE and that the evidence did not support petitioner's contention that the student's LRE required placement in a "full-time general education program with a standard curriculum" (IHO Decision at pp. 44-52). As noted above, the IDEA LRE provision requires that school districts educate children with disabilities in the LRE by providing them with supports and services to enable them to participate in the regular education environment "to the maximum extent appropriate" before removing them to a more restrictive self-contained class or school (20 U.S.C. § 1412[a][5][A]; see Grim, 346 F.3d at 379). The impartial hearing officer reached the correct conclusion regarding whether respondent complied with the IDEA LRE requirements when it recommended placing the student in a 6:1+1 District 75 class (IHO Decision at pp. 60-61). Based upon the hearing record, I find that the evidence supports the impartial hearing officer's conclusion that the student has "exceptionally limited speech and requires extensive prompting, cuing and redirection to stay on point", and that the student's instruction providers and evaluators universally recommended a small structured environment (IHO Decision at p. 61). The CSE's decision to forego some of the student's participation with his regular education peers by placing him in a special class will allow the student's teachers and therapists to provide a more functional curriculum to address the student's significant language and communication needs, which comports with the needs identified in nearly all of his observations and evaluations (Parent Exs. C; H; I; K; L; N-P; Q; S; see 34 C.F.R. § 300.116[d]; 8 NYCRR 200.4[d][4][ii][c]). The student's 2006-07 IEP, which reflected consideration of the student's significant global delays at the time that the CSE meeting was conducted, was designed to meet the student's unique abilities and special education needs, while providing the student with educational benefits.

The impartial hearing decision demonstrates that the impartial hearing officer carefully considered and accorded due weight to all of the testimony and exhibits from both parties. The hearing record amply supports the impartial hearing officer's conclusion that respondent offered the student a program that was appropriate to meet his special education needs. In short, based upon my review of the entire hearing record, I find that the hearing was conducted in a manner consistent with the requirements of due process and that there is no need to modify the determination of the impartial hearing officer (34 C.F.R. § 300.510 [b][2]; N.Y. Educ. Law § 4404[2]). Therefore, I adopt the findings of fact and conclusions of the impartial hearing officer (see Application of the Bd. of Educ., Appeal No. 03-085; Application of a Child with a Disability, Appeal No. 02-096).

I have examined petitioner's remaining contentions and find that it is either unnecessary to address them in light of my determination or that they are without merit.

THE APPEAL IS DISMISSED.

**Dated: Albany, New York
November 29, 2007**

**PAUL F. KELLY
STATE REVIEW OFFICER**