The University of the State of New York

The State Education Department
State Review Officer
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No. 09-009

Application of a STUDENT 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:
Michael Best, Special Assistant Corporation Counsel, attorney for respondent, Tracy Siligmeuller, Esq., of counsel

DECISION

Petitioner (the parent) appeals from the decision of an impartial hearing officer which denied his request to be reimbursed for his son's tuition costs at the Reach for the Stars School (RFTS) for the 2006-07 school year. The appeal must be dismissed.

At the start of the impartial hearing in October 2006, the student was attending a class at RFTS with approximately four other students and five teachers in a 1:1 setting (Tr. pp. 17-19). RFTS has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7). The student is reported to have received a diagnosis of a pervasive developmental disorder (PDD) and treatment for elevated lead levels revealed in a routine blood screening (Dist. Ex. 4 at pp. 1-2). His overall cognitive functioning has been found to be in the mildly delayed range (Dist. Ex. 3 at pp. 1-2). The student also has a history of chronic throat infections and sensitivity to citrus fruits (Dist. Ex. 4 at p. 2). The student's eligibility for special education programs and services as a preschool student with a disability is not in dispute in this appeal (see 8 NYCRR 200.1[mm]).

The student was first evaluated when he was two years old because he did not speak, was not toilet trained, and did not play or interact with adults (Tr. pp. 195-98). He subsequently received home-based early intervention services consisting of two hours per day of applied behavior analysis (ABA), three hours per week of speech-language therapy, and three hours per week of occupational therapy (OT) (Tr. pp. 198-201). In October 2005, the student reportedly received a diagnosis of PDD and began to attend a center-based "play group" for two and a half hours each day in addition to the services provided to him at home (Tr. pp. 201-02; Dist. Exs. 3 at p. 1; 4 at p. 1). In November 2005, the student's blood was found to contain a high level of lead

for which he was treated with chelation therapy (Tr. pp. 202-03; Dist. Exs. 3 at p. 1; 4 at p. 1; Parent Ex. U).

In January 2006, the student underwent evaluations preliminary to a Committee on Preschool Special Education (CPSE) review to determine his eligibility for preschool educational services (Dist. Exs. 2; 3; 4; Tr. pp. 387-88). At that time, he was attending a special education classroom five half-days per week and receiving three 30-minute sessions of OT per week (Dist. Exs. 3 at p. 1; 4 at p. 1). The student was also receiving ten hours of home-based special education instruction, five hours of home-based speech-language therapy, and two 30-minute sessions of home-based OT per week (id.). The parents were each receiving one hour per week of family training (id.).

A psychological evaluation of the student was completed on January 9, 2006 (Dist. Ex. 3 at p. 1). The evaluator reported that the student was curious and interested in his environment and immediately began to manipulate materials but not in response to the evaluator's directives (id.). Throughout the evaluation, the student remained seated but was frequently distracted and unfocused, and the evaluator's attempts to refocus him were not successful (id.). The student produced some spontaneous sounds but they were unintelligible (id.). Administration of the Stanford-Binet Intelligence Scales – Fifth Edition (SB-5) yielded a nonverbal IQ score of 61, a verbal IQ score of 56, and a full-scale IQ score of 56, which the evaluator determined placed the student in the mildly delayed range of intellectual functioning (id. at pp. 1-2). The evaluator also administered the "Vineland Adaptive Behavior Scales" "Interview Edition" "Survey Form," the results of which revealed that the student exhibited a "low" adaptive level in communication, daily living skills, and adaptive behavior; and a "mod low" adaptive level in socialization and motor skills (id. at p. 2). The evaluator noted that the student did not use words other than "mama" and "daddy" however used gestures to indicate "I want," "yes," and "no" (id.). He was inconsistently able to point to one body part (id.). The evaluator recommended that the student be placed in a full-time, 12-month, 6:1+2 special education preschool (id. at p. 3). She also recommended speech-language and OT evaluations to determine the student's needs for continuation of services (id.).

An educational evaluation was also conducted on January 9, 2006 and included completion of the Developmental Assessment of Young Children (DAEYC), a parent interview, and a clinical observation (Dist. Ex. 2 at p. 1). The evaluator noted that the student presented as an unrelated child with poor eye contact (id.). He was mostly unfocused, easily distracted, and could not be directed or redirected to tasks (id.). The evaluator observed the student in his classroom and reported that the student sat nicely during circle time demonstrating interest in the teacher and activities, but required hand-over-hand prompting to imitate hand motions and finger play and was unable to identify his own picture amongst pictures of peers (id.). The student's teacher reported to the evaluator that the student had made some progress since his start in the classroom in October 2005 (id. at p. 2). He no longer cried when coming to school and he responded to his name; however, the student required hand-over-hand assistance to complete all activities and was not able to function without a 1:1 paraprofessional (id.). The evaluator determined that the student presented with significant delays in all areas of development and that he was unable to function independently in his then current class setting (id.). The evaluator recommended that the student be placed in a full-day, 12-month, 6:1+2 special education classroom (id.). She also "highly" recommended a 1:1 paraprofessional to "allow [the student] to learn new skills," and recommended "more comprehensive" speech-language and OT evaluations (id.).

The student's mother provided information for a social history of the student on January 18, 2006 (Dist. Ex. 4). The resultant report reflected family information and resources, student birth and medical history, and parent concerns and priorities (id.).

The CPSE convened on February 28, 2006 and determined that the student was eligible for special education programs and services as a preschool student with a disability (Parent Ex. F at p. 1). The CPSE recommended a 12-month school year with placement in a 6:1+2 special class for five hours per day, five days per week to begin September 1, 2006 (id. at pp. 1-2).[1] The resultant individualized education program (IEP) reflected information from the aforementioned evaluations as well as results of testing completed by the student's OT and speech-language related service providers (id. at pp. 3-17). The February 2006 IEP included "[d]raft" goals and short-term objectives to address the student's deficits in readiness skills, socialization, gross and fine motor skills, activities of daily living and self care, self awareness, and language skills (id.).

In approximately late May/early June 2006, the student's father contacted the CPSE chairperson and requested that the student transition to preschool services in July (Tr. p. 209). The parent subsequently contacted several schools that used an ABA methodology (id.). On June 12, the parent and the student met with administrators at Shema Kolainu, who found the student appropriate for their program and were able to enroll him in July 2006 (Tr. p. 210).

The CPSE reconvened on June 21, 2006 and recommended placement of the student at Shema Kolainu in a 12-month, 6:1+3 class for five hours per day, five days per week (Parent Ex. X at p. 1). Related services to be provided at Shema Kolainu consisted of two individual 30-minute and one group 30-minute session of speech-language therapy and two individual 30-minute sessions of OT (id. at p. 20). The CPSE also recommended "dual services," to be provided after school in the student's home or a therapist's office, consisting of five hours per week of special education itinerant teacher (SEIT) services, three hours per week of speech-language therapy, and three hours per week of OT (Tr. p. 392; Parent Ex. X at p. 1). The student's present levels of performance and recommended goals and short-terms objectives on the resultant June 2006 IEP were unchanged from the February 2006 IEP (compare Parent Ex. X at pp. 3-17, with Parent Ex. F at pp. 3-17).

The student began attending Shema Kolainu on July 5, 2006 (Tr. p. 221). The parent observed the student in the Shema Kolainu program and met with the student's teacher on July 12, 2006 (id.). Because of his concerns regarding the lack of a "shadow"[2] assigned to his son, the student's frequency of speech-language therapy, and his belief that one of the classroom teachers was not appropriately "certified," the parent began to look for an alternate placement for the student in early August 2006 (Tr. pp. 229-32, 258, 260-62).

By letter dated August 8, 2006, the parent's advocate notified respondent's (the district's) CPSE chairperson that the parents did not feel that the student was "receiving an appropriate

[1] The hearing record indicates that the parents initially elected to have the student remain in Early Intervention through August (Tr. p. 208).

[2] The words "shadow" and "1:1 paraprofessional" are used interchangeably in the hearing record to refer to an adult who is assigned to work 1:1 with the student throughout the school day.

education at Shema Kolainu" and requested a "CPSE meeting to discuss their concerns" (Parent Ex. D).

In "late" August 2006, the student was "interviewed" by RFTS and subsequently enrolled there by his parent on September 1, 2006 (Tr. pp. 233, 267, 275-76).

According to the parent, he received a letter from the district on September 11, 2006 stating that a CPSE meeting was scheduled for September 27, 2006 (Tr. p. 230). On September 27, 2006, the CPSE reconvened for the parent requested review and modified the student's recommended program to include a 1:1 management paraprofessional (Dist. Ex. 1 at pp. 1-2). The CPSE also updated the student's academic performance and learning characteristics, social/emotional performance, and health and physical development; the CPSE developed two additional annual goals and corresponding short-term objectives related to matching skills and attending skills; and the CPSE reduced the size of the group in the student's speech-language therapy recommendation (compare Dist. Ex. 1 at pp. 5-6, 8, 12-13, 20, with Parent Ex. X). The CPSE continued the student's previously recommended placement in a 12-month, 6:1+3 special class at Shema Kolainu with related services as well as the after-school services of a SEIT and related services (Dist. Ex. 1 at pp. 1-2, 25).

After the September 2006 CPSE meeting, the student continued to attend RFTS, and attended that program for the duration of the 2006-07 school year (Tr. pp. 238-40). By due process complaint notice dated October 13, 2006, the parent challenged the September 27, 2006 IEP and requested tuition reimbursement for the student's 2006-07 school year at RFTS (Parent Ex. A at pp. 1-3). Specifically, the parent asserted that the district failed to offer the student a free appropriate public education (FAPE) because there was not an appropriate program and placement in effect at the start of the 2006-07 school year (id. at p. 1). The parent further asserted that the September 2006 IEP contained numerous errors including misspelling the student's name, using the wrong name, misstating the student's age, identifying some of the material in the IEP as "draft," leaving certain information areas blank, and leaving the dates of earlier IEP meetings on the IEP (id. at p. 2). The parent also maintained that the goals and objectives were carried over unchanged from two previous IEPs and were computer generated for a different student, and that these errors reflect that the IEP did not memorialize the essential components of a valid educational program (id.). The parent also asserted that the district failed to offer the student a FAPE in that at the start of the school year the student's program failed to include a 1:1 paraprofessional that the student required and that the proposed placement, at Shema Kolainu, was not appropriate for the student (id.). The parent also argued that the CPSE predetermined the placement at Shema Kolainu (id.). Lastly, the parent asserted that the CPSE did not include the student's then current special education teacher and therefore failed to accurately assess the student's present levels of functioning (id.).

Although the hearing record is not clear on this issue, apparently the parties discussed settlement for some time after the due process complaint notice was filed (Parent Ex. B). On June 28, 2007, the parent's counsel requested that the case be "re-opened" and scheduled for an impartial hearing (id.). An impartial hearing was held over five days from November 28, 2007 through May 20, 2008 (Tr. pp. 1, 383). The parent presented five witnesses and entered 26 documentary exhibits into evidence (Tr. pp. 15, 74, 129, 194, 311; Parent Exs. A-Z). The district presented two witnesses and entered five documentary exhibits into evidence (Tr. pp. 360, 386; Dist. Exs. 1-5).

The impartial hearing officer issued a 31-page decision dated December 12, 2008, denying the parent's reimbursement request. In the decision, the impartial hearing officer summarized the positions of the parties and the testimony of the witnesses and set out the relevant law (IHO Decision at pp. 1-26). The impartial hearing officer addressed the question of the composition of the CPSE and found that the CPSE team was properly constituted at both the June and September 2006 IEP meetings (id. at p. 26). The impartial hearing officer found that the student made progress during summer 2006 when attending the district's recommended placement (id. at p. 27). The impartial hearing officer found that the parent had requested the placement at Shema Kolainu and had initially consented to the June 2006 IEP and the placement without a 1:1 paraprofessional for the student, but later withdrew consent and requested a second CPSE meeting to modify the program (id.). The impartial hearing officer found that the district's offer of a 1:1 paraprofessional at the September 2006 IEP meeting was not so late as to amount to a denial of a FAPE for the 2006-07 school year, and cited Application of a Child with a Disability, Appeal No. 04-023, as support (id. at pp. 27-28). The impartial hearing officer found that the parent's failure to notify the CPSE in writing of his unilateral placement of the student at RFTS until the filing of the October 13, 2006 due process complaint notice would preclude reimbursement to the parent on equity grounds (id. at pp. 28-29). The impartial hearing officer concluded that the parents had not met their burden of persuasion under Schaffer v. Weast (546 US 49 [2005]) to prove that the district failed to offer the student a FAPE for the 2006-07 school year and declined to address the appropriateness of the parent's unilateral placement (id.).

The parent appeals and requests as relief reversal of the impartial hearing officer's decision and an award of tuition reimbursement for RFTS for the 2006-07 school year. Specifically, the parent brings four arguments on the appeal.

First, the parent argues that the impartial hearing officer cannot rely on Application of a Child with a Disability, Appeal No. 04-023, for his finding that the district offered a FAPE for the 2006-07 school year because the facts of that case differ from those of the case at bar. In Application of a Child with a Disability, Appeal No. 04-023, an impartial hearing officer found no denial of a FAPE where a timely and appropriate IEP was completed before the school year but a copy was not provided to the parents until after the school year commenced. Whereas in the present case, the parent argues, the school year had commenced well before an appropriate IEP was in place for the student.

Second, the parent contends that on September 1, 2006 he was faced with what he believed was an inappropriate IEP and despite requesting a new CPSE meeting three weeks previously, one had not yet been scheduled. The parent contends that he was well within his rights at that point to make an appropriate unilateral placement and obtain reimbursement. However, the impartial hearing officer found that the September 2006 IEP, which included a 1:1 paraprofessional for the student, offered the student a FAPE and was not "too late." The parent argues that the impartial hearing officer's holding would require the parent to hope and speculate that the CPSE would correct the IEP and offer an appropriate placement, thereby risking a year of actual failure. The parent argues that such a "first bite at failure is not required by the IDEA" and cites to Frank G. v Bd. of Educ., 459 F.3d 356 (2d Cir. 2006).

Third, the parent argues that the impartial hearing officer found that the parent's initial consent to the June 2006 IEP to be conclusive of its appropriateness and requests that a State

Review Officer establish that a parent may subsequently determine that a placement is inappropriate and withdraw his consent.

Fourth, the parent argues that the impartial hearing officer erred in finding that the student made progress during his attendance at the recommended placement during summer 2006. The parent also argues that the district's offer of the 1:1 paraprofessional at the September 27, 2006 IEP meeting amounts to an admission by the district that the June 21, 2006 IEP was inappropriate.

The district answers and argues that the impartial hearing officer correctly found that it offered a FAPE for the 2006-07 school year. Specifically, the district argues that the June 2006 IEP was not appealed in the due process complaint notice, and is therefore not at issue, and argues that the June 2006 IEP is moot in any event, having been superseded by the September 2006 IEP. The district also argues that the September 2006 IEP was not untimely, as the parent argues, because the district had 60 days from the date of the parent's August 8, 2006 request for a CPSE meeting in which to develop an IEP, pursuant to State regulations at 8 NYCRR 200.4[d]), and that they complied with that requirement. The district contends that the parent has failed to plead many of the arguments in the due process complaint notice and that those arguments have therefore been abandoned. Lastly, the district argues that the parent cannot prevail as a matter of equity because he failed to give prior written notice of the unilateral placement as required by federal regulations at 34 C.F.R. § 300.148(d)(1), and because he admitted during testimony that he had determined prior to the September CPSE meeting that he would reject any placement offered by the district.

Two purposes of the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). While school districts are required to comply with all IDEA procedures, not all procedural errors render an IEP legally inadequate under the IDEA (A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; 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 student, 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]; 8 NYCRR 200.5[j][4][ii]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

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 student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with

sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 130 [2d Cir. 1998]; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the 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 200.1[cc], 200.6[a][1]; see P. v. Newington Bd. of Educ., 546 F.3d 111, 114 [2d Cir. 2008]; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs (34 C.F.R. § 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals related to those needs (34 C.F.R. § 300.320[a][2]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (34 C.F.R. § 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see 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). Subsequent to its development, an IEP must be properly implemented (8 NYCRR 200.4[e][7]; Application of a Child with a Disability, Appeal No. 08-087).

The New York State Legislature amended the Education Law to place the burden of production and persuasion upon the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of production and persuasion regarding the appropriateness of such placement (Educ. Law § 4404[1][c], as amended by Ch. 583 of the Laws of 2007). The amended statute took effect for impartial hearings commenced on or after October 14, 2007; therefore, it does not apply to the instant case because the impartial hearing was commenced before the effective date of the amendment and the burden rests upon the parent to prove that the district failed to offer the student a FAPE for the 2006-07 school year (see Application of a Child with a Disability, Appeal No. 07-133).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student 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 (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]). 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 (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 student 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).

The first and second points of argument brought by the parent are in essence two ways of looking at the same issue. In Point One, the parent argues that the impartial hearing officer cannot rely on Application of a Child with a Disability, Appeal No. 04-023, (holding that a student was not deprived of a FAPE when the district failed to provide the student's parents with a copy of the completed IEP until after the school year had commenced) for his finding that the district offered a FAPE for the 2006-07 school year because in the present case, the parent contends, the school year had commenced well before an appropriate IEP was in place for the student. Similarly, in Point Two, the parent argues that at the start of the 2006-07 school year he was faced with what he believed was an inappropriate IEP and although he had requested a new CPSE meeting previously, one had not yet been scheduled. The parent contends that it was appropriate at that point for the parent to make a unilateral placement and obtain reimbursement. In the parent's view, the impartial hearing officer's finding that the September 2006 IEP included a 1:1 paraprofessional for the student, offered the student a FAPE and was not "too late" would require the parent to hope and speculate that the CPSE would correct the IEP and offer an appropriate placement, thereby risking a year of actual failure. Both of these arguments hinge on the claim that the June 2006 IEP did not offer the student a FAPE and that the September 2006 IEP was untimely.

The hearing record reflects that the CPSE initially evaluated the student in January 2006 (Dist. Exs. 2; 3; 4). The CPSE convened in February 2006 and found the student eligible for special education programs and services as a preschool child with a disability (Parent Ex. X at p. 1). Following the CPSE's determination that the student was eligible to receive preschool special education programs and services, the hearing record reflects that the parent chose to continue his son's early intervention services until September 1, 2006 (Tr. p. 208).[3] The hearing record further reflects that the parent contacted the district's CPSE chairperson in spring 2006 requesting that his son transition to preschool in July because the student's early intervention provider would not be available to him during the summer (Tr. p. 209). The parent testified that he contacted several preschool programs and following an observation and meeting at Shema Kolainu, determined it was appropriate to meet his son's needs (Tr. pp. 209-10). As discussed in detail above, the CPSE convened on June 21, 2006 and recommended a placement for the student in a 6:1+3 class at Shema Kolainu with related services and after-school services consisting of a SEIT, speech-language therapy, and OT (Parent Ex. X at pp. 1, 20). The June 2006 CPSE participants included

[3] Generally, a student's eligibility for early intervention services ends as of his or her third birthday (see 20 U.S.C. § 1432[5][A]; 34 C.F.R. § 303.16[a]); however New York State law provides that children in early intervention programs who are evaluated by the district's CPSE before their third birthday and found to be eligible for preschool educational services under the IDEA, and turn three years of age on or before the last day of August, are eligible to continue receiving early intervention services until the first day of September of the same calendar year (N.Y. Pub. Health Law § 2541[8][a][i]). The parent's son turned three before August 31 (Parent Ex. F at p. 1).

the parent, the CPSE chairperson, a regular education teacher, and a special education teacher from Shema Kolainu who participated by telephone (Tr. pp. 388-89; Parent Ex. X at p. 2).

The parent testified that his primary concerns with the program recommended by the CPSE in June 2006 was the lack of a 1:1 paraprofessional for his son, less speech-language therapy than he would have preferred, and his belief that he had been deceived regarding the "certification" of the classroom teacher (Tr. pp. 229-32, 258, 260-62).

In reference to the student's need for a 1:1 paraprofessional, the CPSE chairperson testified that when a student was placed in a small class with a high teacher-student ratio, the CPSE often waited to see how the student functioned in the class before recommending a 1:1 paraprofessional (Tr. pp. 396, 407, 411). I note that both the educational evaluation and the psychological evaluation completed in January 2006 recommended a 6:1+2 class for the student, a lower ratio than recommended by the June 2006 CPSE (compare Dist. Exs. 2 at p. 2; 3 at p. 3, with Parent Ex. X at p. 1). I note also that although the educational evaluation recommended a 1:1 paraprofessional to "allow [the student] to learn new skills," the psychological evaluation completed on the same day makes no similar recommendation regarding a 1:1 paraprofessional (Dist. Exs. 2 at p. 2; 3 at p. 3). The parent testified that he believed the student required 1:1 paraprofessional supervision for medical reasons due to his lead levels and because the student put things in his mouth; however, the hearing record reflects that neither the January 2006 evaluations nor the social history supplied by the student's mother revealed that the student required 1:1 supervision for safety or medical reasons (Tr. pp. 228, 423; see Dist. Exs. 2; 3; 4). Additionally, the parent testified that he did not have a "note" from the medical professionals treating his son stating that the student required a 1:1 paraprofessional, nor does the documentary evidence contained in the hearing record regarding the student's blood lead levels include a recommendation for 1:1 supervision (Tr. p. 427; see Parent Exs. U; V). Moreover, the parent testified that although he was "not satisfied" that a 1:1 paraprofessional was not recommended at the June 2006 CPSE meeting, his "fears were put aside" because "they said they w[ould] revisit it and so I was satisfied that they would revisit the issue" (Tr. pp. 218-19). The parent further testified that at the time of the June 2006 CPSE meeting, he felt that Shema Kolainu would be an appropriate setting for his son (Tr. p. 253).

Regarding the student's recommended speech-language therapy, the June 2006 IEP provided for two individual 30-minute and one group 30-minute session of speech-language therapy at Shema Kolainu, as well as three hours per week of speech-language therapy after school (Parent Ex. X at p. 1). There is no evidence in the hearing record that indicates that the student did not receive the speech-language therapy recommended in the June 2006 IEP or that the level of speech-language therapy recommended by the CPSE was insufficient to meet the student's identified needs.

Regarding the "certification" of the student's classroom teacher, it is unclear from the hearing record the type of certification the parent believes the student's teacher was lacking (Tr. pp. 222-23, 258-60). The education director of Shema Kolainu testified that the school's head teachers are certified in special education and the teacher assistants are certified teacher assistants (Tr. pp. 363-64). She further testified that if a "licensed" teacher has not completed the school's training modules, a "master teacher" is assigned to the classroom, is considered the classroom teacher and is in the classroom "doing the kids portfolios and training until the modules are completed" (Tr. p. 370). I find that there is insufficient information in the hearing record to support the parent's contention that the student's teacher lacked any required certification.

Although the parent argues that the IEP in place at the start of the 2006-07 school year was inappropriate, this assertion is not supported by the hearing record. As described above, the hearing record reflects that the parent was afforded the opportunity to meaningfully participate in the development of his son's program. The resultant June 2006 IEP accurately reflected the results of the evaluations conducted by the CPSE in January 2006 and reflected the requisite alignment between the student's needs and his annual goals and short-term objectives necessary for the provision of an appropriate educational program (Parent Ex. X at pp. 3-17). As such, the hearing record demonstrates that an appropriate program was in place for the student at the start of the 2006-07 school year which began on July 1, 2006 (Educ. Law § 2[15]).

Moreover, although the parent contends that the school year had already commenced well before the CPSE developed an appropriate IEP for the student on September 27, 2006; I note that the September 2006 IEP is very similar to the June 2006 IEP which was in place at the start of the school year (compare Dist. Ex. 1, with Parent Ex. Y). The September 2006 IEP included updated present levels of performance and two additional annual goals and corresponding short-term objectives to reflect the information contained in the student's August 2006 progress report from Shema Kolainu; as well as a modification to the size of the student's speech-language therapy group (compare Dist. Ex. 1 at pp. 5-6, 8, 12-13, 20, with Parent Ex. X). The September 2006 IEP continued the student's previously recommended placement in a 12-month, 6:1+3 special class at Shema Kolainu with related services, as well as the after-school services of a SEIT and related services (Dist. Ex. 1 at pp. 1-2, 25). Additionally, the September 2006 IEP included a 1:1 management paraprofessional for the student (id. at p. 1). The CPSE chairperson testified that the district believed that Shema Kolainu continued to be an appropriate placement for the student (Tr. p. 401). Based on the parent's concerns that the student was unable to "follow along" in the program and required "a lot of 1:1 assistance throughout the day," the CPSE determined that a 1:1 paraprofessional would be a "good addition" to his educational program (Tr. pp. 399-400, 410-11). As described above, testimony elicited from the parent and the CPSE chairperson demonstrates that the CPSE was willing to consider a 1:1 paraprofessional for the student. Although the parent testified that the education director of Shema Kolainu was not willing to assign a 1:1 paraprofessional to the student, the education director testified that if a 1:1 paraprofessional was recommended on a student's IEP, they would provide one and that there are students at Shema Kolainu who have 1:1 paraprofessionals (Tr. p. 378).

Turning to the argument brought by the parent in his third point, the parent contends that the impartial hearing officer found the parent's initial consent to the June 2006 IEP to be conclusive, or to be evidence that the IEP set out an appropriate program for the student and requests that a State Review Officer establish that a parent may subsequently determine that a placement is inappropriate and withdraw his consent, as provided for in the State regulations at 8 NYCRR 200.1(I)(3). The impartial hearing officer noted that the parent consented to the June 2006 IEP and had requested the placement recommendation contained in the IEP in a section of his decision that described the June 2006 IEP process as a whole, including the constitution of the IEP team and the material and evaluations reviewed at the meeting (IHO Decision at pp. 26-27). Thus, the inclusion of the facts regarding the parent's consent are best viewed as information relevant to the question of whether the parent had an opportunity to participate in the decision making process regarding the provision of a FAPE to the student. Nothing in the decision suggests that the impartial hearing officer was under the impression that the parent was not free to subsequently object to the content of the IEP, or that the parent was in any way legally impaired to bring his claim. Accordingly, after reading the impartial hearing officer's decision in its entirety,

and reviewing the portion of the decision that the parent finds fault with, in the context of the decision, I find that the hearing record does not support the parent's argument.

In the parent's fourth point, the parent makes two final arguments. First, the parent argues that the impartial hearing officer erred in finding that the student made progress during his attendance at the recommended placement during summer 2006. And, second, the parent contends that the district's offer of the 1:1 paraprofessional at the September 27, 2006 IEP meeting constituted an admission by the district that the June 21, 2006 IEP was inappropriate.

Regarding the progress the student made while at the public placement, the evaluations summarized in the student's June 2006 IEP indicated that the student was able to mark with a crayon, negotiate high and low playground equipment, jump over a small object, and run smoothly (Parent Ex. X at pp. 4, 8). He was unable to point to his major body parts; identify and label common objects; or match, identify, or label colors and shapes (id. at p. 4). The June IEP also indicated that the student was unable to follow simple one-step directions and that he did not possess task approach, task completion, problem solving, or reasoning skills (id.).

An August 9, 2006 progress report developed by the student's teacher at Shema Kolainu after the student had attended Shema Kolainu for over a month reflected that the student had mastered matching "Mayer Johnson" pictures to digital pictures in an array of three, independently with only a few gestures (Dist. Ex. 5 at p. 1). The student had also mastered pointing independently to a variety of cultural symbols (id.). The teacher reported that the student was learning to use a picture communication book with one icon at a time and minimal prompting, to respond to the command "look at me" within an eight-foot distance, and to catch and throw a ball from a two foot distance with an "elbow prompt" (id.). The progress report also indicated that the student had started copying lines with physical prompts, as a prerequisite to writing letters and was participating in several "peer programs" daily designed to encourage peer play, increase eye contact, and generalize skills (id. at pp. 1-2). I note also, that when initially evaluated by RFTS in September 2006, the student was able to don clothing with moderate to maximum assistance, doff clothing with minimal to moderate assistance, follow most one-step directions given maximum verbal or visual prompts, follow simple sequences and routines, respond to social greetings, and follow simple commands such as "give me, pick up, throw away" with moderate prompts (Parent Exs. G at p. 4; I at pp. 1-3). In light of the above, I find that the hearing record does not support the parent's argument that the impartial hearing officer erred in finding that the student had made progress during the time he attended Shema Kolainu.

Regarding the parent's contention that the district's offer of the 1:1 paraprofessional at the September 27, 2006 IEP meeting constituted an admission by the district that the June 21, 2006 IEP was inappropriate, I note that it would be counterproductive to discourage school districts from updating a student's educational program after the commencement of the school year based upon new input from a parent or other information (see e.g. L.R. v. Manheim Township Sch. Dist., 540 F. Supp. 2d 603, 617 [E.D. PA, 2008][finding that an evaluation conducted after an IEP was created that showed that the student's language impairment was more serious than was previously known does not mean that the IEP was based on insufficiently comprehensive evaluations]; see also Application of a Child with a Disability, Appeal No. 07-012 [holding that a district denied a student a FAPE by failing to update the student's IEP for many months after the district became aware that the student had an impairment that was not identified or addressed on the IEP]). Moreover, as set forth in more detail above, the hearing record shows that the changes made to the

student's 2006-07 IEP as reflected on the September 2006 IEP were based upon updated information about the student gleaned from the progress report drafted by student's teacher at Shema Kolainu during summer 2006. Accordingly, the provision of the 1:1 paraprofessional was supported by the updated information reviewed by the September 2006 CPSE and did not constitute an admission by the district that the program set out on the June 2006 IEP was inappropriate.

In conclusion, I find that the impartial hearing officer's determination that the district offered the student a FAPE during the 2006-07 school year is supported by the hearing record. Having determined that the district offered the student a FAPE in the LRE for the 2006-07 school year, I need not reach the issue of whether RFTS was an appropriate unilateral placement for the student and the necessary inquiry is at an end (M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; Walczack, 142 F.3d at 134; Application of a Child with a Disability, Appeal No. 08-158; Application of a Child with a Disability, Appeal No. 05-038).

I have considered the parties' remaining contentions and find that I need not reach them in light of my determinations herein.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
March 13, 2009

PAUL F. KELLY
STATE REVIEW OFFICER