The University of the State of New York

The State Education Department
State Review Officer
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No. 11-072

Application of the BOARD OF EDUCATION OF THE Cornwall Central School District for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:
Girvin & Ferlazzo, P.C., attorneys for petitioner, Christopher P. Langlois, Esq., of counsel

Mayerson & Associates, attorneys for respondent, Gary S. Mayerson, Esq., of counsel

DECISION

Petitioner (the district) appeals from the decision of an impartial hearing officer which found that it failed to offer an appropriate educational program to respondents' (the parents') son and ordered it to reimburse the parents for their son's tuition costs at Butterhill Day School (Butterhill) for the 2010-11 school year. The district also appeals pursuant to section 8 NYCRR 279.10(d) of State Regulations from an interim decision of an impartial hearing officer determining the student's pendency program and services. The appeal must be sustained in part.

At the time of the impartial hearing, the student was attending a general education kindergarten class at Butterhill and receiving special education/applied behavior analysis (ABA) services and related services as arranged by the student's parents (see Parent Ex. P). Butterhill is a nonpublic school that has not been 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 related services as a student with autism is not in dispute in this appeal (34 C.F.R. § 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

Background

The student's educational history is set forth in detail by the impartial hearing officer and the parties' familiarity with the student's history is assumed (IHO Decision at pp. 2-4). Briefly, at age two the student reportedly received a diagnosis of a pervasive developmental disorder, not otherwise specified (PDD-NOS) and began receiving services through the Early Intervention Program (EIP) (Tr. pp. 39-40). Subsequently, the student was determined eligible for special

education services as a preschool student with a disability by the Committee on Preschool Special Education (CPSE) (Tr. p. 39). Between ages three and five the student attended general education preschool programs and received 25 hours per week of 1:1 special education itinerant teacher (SEIT) services, three 30-minute sessions of 1:1 speech-language therapy per week, two 45-minute sessions of 1:1 occupational therapy (OT) per week, two 45-minute sessions of 1:1 physical therapy (PT) per week, and three hours per month of parent counseling and training (Tr. pp. 40-42, 45-46; IHO Ex. VIII at pp. 8-9). A board certified behavior analyst (BCBA) assisted in developing the student's program, provided the student with direct services, and supervised the student's team (Tr. pp. 45, 1384, 1387-88; see Parent Ex. L). The student's SEIT and related services were provided both at home and in the general education preschool setting (IHO Ex. VIII at pp. 8-9, 13).

On May 29, 2009, the CPSE met and recommended extended school year (ESY) services for the student for summer 2009 (Joint Ex. Q at pp. 1-2).[1] In anticipation of the student's transition to school-age programming, the Committee on Special Education (CSE) also met on May, 29, 2009 and reviewed the services provided to the student through the CPSE (Joint Ex. 31 at pp. 10-11). The CSE chairperson explained the differences between preschool and school-aged service delivery and the CSE discussed potential school-aged programs (id. at p. 11). The parents disagreed with the CSE's recommendation for a center-based placement for the student for the 2009-10 school year, as well as subsequent recommendations for placement in an 8:1+1 special class with related services, and placement in a mainstream kindergarten class with special education and related services, as well as home-based services (id. at p. 9-11).

For the 2009-10 school year, the parents unilaterally placed the student at Butterhill and arranged for the student to receive special education and related services at home and at Butterhill (Joint Ex. 15 at p. 1). In fall 2009, the parents requested an impartial hearing which ultimately resulted in a stipulation of settlement on October 30, 2009 (Tr. pp. 51-53). According to the stipulation, the parents agreed to pay the expense of the Butterhill placement for the 2009-10 school year; the district agreed to reimburse the parents for 25 hours per week of 1:1 SEIT services,[2] three 30-minutes sessions of 1:1 speech-language therapy per week, two 45-minute sessions of 1:1 OT per week, two 45-minute sessions of 1:1 PT per week, and three 60-minute sessions of parent counseling and training per month (Joint Ex. 15 at pp. 1-2).[3]

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[1] The May 29, 2009 CPSE recommended the student for the following ESY services: 25 hours per week of 1:1 SEIT services, three 30-minutes sessions of 1:1 speech-language therapy per week, two 45-minute sessions of 1:1 OT per week, two 45-minute sessions of 1:1 PT per week, and three hours per month of parent counseling and training specific to the student's related services (Joint Ex. Q at pp. 1-2).

[2] The hearing record refers to the student's school-age educational support services as "SEIT" support. However, the Education Law defines special education itinerant services (commonly referred to as "SEIT") as "an approved program provided by a certified special education teacher . . . , at a site . . . , including but not limited to an approved or licensed prekindergarten or head start program; the child's home; a hospital; a state facility; or a child care location as defined in [§ 4410(8)(a)]" (Educ. Law § 4410[1][k]). Although mischaracterized in the hearing record, I will continue to refer to the privately obtained school-age educational support service providers as SEITs to remain consistent with the hearing record and to avoid confusion in this decision.

[3] Among other things, the stipulation included a clause which indicated that it "shall not be relied upon by any party to indicate, establish or support the position that Butterhill or the Service Program is or should be considered the 'then current placement' for the 2009-10 school year or any subsequent year" (Joint Ex. 15 at p. 3).

Beginning in February 2010, the district conducted observations of the student at Butterhill in preparation for the student's annual review (Joint Exs. 17; 18; 23; 25; 26; see Joint Ex. 30). The following month the student's private providers conducted evaluations of the student and generated progress reports detailing the student's abilities and needs (Joint Exs. 19; 20; 21; 22).

On March 19, 2010, the CSE convened for the student's annual review (Parent Exs. V; X). Meeting participants included the district director of pupil personnel services, who also served as the CSE chairperson; a district first grade teacher, special education teacher, occupational therapist, physical therapist, and school psychologist; the student's private ABA program supervisor, occupational therapist, and speech-language therapist; and the parents (Parent Ex. V at pp. 2, 61; see Tr. pp. 346, 1400). The student's ABA program supervisor and private therapists reviewed the results of their evaluations (Parent Ex. V at pp. 5-60). In addition, district staff shared their observations of the student at Butterhill (id. at pp. 61-84). With the input of committee members, the CSE chairperson summarized the student's needs (id. at pp. 85-92). The CSE discussed types of special education programs and services available in the district, but deferred making a placement recommendation until it could reconvene with the student's private physical therapist in attendance (id. at pp. 84, 92-110, 111). Although the district director of pupil personnel services took notes at the meeting, the CSE did not develop an individualized education program (IEP) (Tr. p. 460).

The CSE reconvened on April 16, 2010 (Parent Exs. U; W). Meeting participants included the district director of pupil personnel services, who also served as the CSE chairperson; a district speech-language pathologist, occupational therapist, physical therapist, school psychologist, special education teacher,[4] and regular education teacher; the student's private occupational therapist, physical therapist, and ABA program supervisor; and the student's mother (Parent Ex. U at pp. 2-3; Joint Ex. 14 at p. 6). The CSE chairperson reviewed the student's present levels of performance and needs as discussed at the March 19, 2010 CSE meeting (Parent Ex. U at pp. 3-12). In addition, she solicited information from the student's private physical therapist regarding the student's gross motor needs (id. at pp. 12-14). The student's private therapists, along with therapists from the district, discussed recommended therapy frequencies, as well as the preferred location for the delivery of therapy services (id. at pp. 14-33). The CSE discussed whether the student should attend a general education kindergarten or first grade class, the degree to which the student could participate in a general education class, and the types of special education services and support the student would need (id. at pp. 33-86). The CSE also discussed the student's need for ESY services (id. at pp. 86-95).

For the 2010-11 school year, the CSE recommended that the student attend a general education kindergarten class with a 1:1 teaching assistant and receive English language arts (ELA) and mathematics instruction in a 12:1+1 special class for 45 minutes each per day (Joint Ex. 14 at pp. 1-2). In addition, the CSE recommended that the student receive two hours per week of direct services from a behavior consultant who would also provide the parents with 60 minutes per month of parent training and counseling and consult with school staff one time per month for 60 minutes (id. at pp. 2-3). The CSE recommended a team meeting for school staff one time per month for

[4] According to CSE meeting minutes, one of the participants in the April 16, 2010 CSE meeting was a special education teacher (Joint Ex. 14 at p. 6). The transcribed recording of the CSE meeting identifies this individual as a first grade teacher (Parent Ex. U at pp. 2-3).

30 minutes (id. at p. 3). For related services, the CSE recommended that the student receive three 30-minutes sessions of 1:1 speech-language therapy per week, one 30-minute group (5:1) speech-language therapy per week, two 45-minutes sessions of 1:1 OT per week, and two 30-minute sessions of 1:1 PT per week (id. at p. 2). The CSE also recommended the student for a summer academic program consisting of three hours per day in a 12:1+1 special class with related services of two 30-minute sessions of 1:1 speech-language therapy per week, one 30-minute session of group (5:1) speech-language therapy per week, two 30-minute sessions of 1:1 OT per week, and two 30-minute sessions of 1:1 PT per week (id.). The April 16, 2010 IEP also afforded the student numerous program modifications and accommodations, as well as testing accommodations (id. at p. 2). At the conclusion of the April 16, 2010 CSE meeting the parent indicated that she would like to visit the recommended program (Parent Ex. U at pp. 94-95).

On June 4, 2010, the parents received a copy of the proposed IEP for the 2010-11 school year (Joint Ex. 13 at p. 1). On June 10, 2010, the student's mother and her behavior consultant met with the district director of pupil personnel services, special education teacher, and behavior specialist to review the program proposed for the student for the 2010-11 school year (Tr. pp. 404-05; Joint Ex. 49 at pp. 8-11).[5, 6] In addition, the parent and her behavior consultant visited the proposed school and met with the teacher of the kindergarten class (Tr. pp. 408-11; Joint Ex. 49 at p. 10).

In a letter dated June 16, 2010, the parents informed the district that they were rejecting the proposed program and placement for the student for the 2010-11 school year (Joint Ex. 13). The parents cited insufficient training of the teaching assistant, insufficient time with nondisabled peers, classroom size, lack of experience by the regular education teacher, and lack of continuity between the ESY and school-year program as reasons for their rejection (id. at p. 1). The parents stated that in the absence of an appropriate and timely placement and program recommendation they would be looking to the school district to reimburse and otherwise fund an appropriate placement for the student that included a mainstream placement, such as Butterhill, with SEIT and related services support (id. at p. 2).

In an initial due process complaint notice dated July 1, 2010, the parents asserted that the district failed to offer the student a free appropriate public education (FAPE) for the 2010-11 school year (Joint Ex. 1 at pp. 1, 2-5). The parents invoked the student's pendency entitlements, citing the student's May 29, 2009 IEP, as the last agreed-upon IEP (id. at p. 2). The parents indicated that for the 2010-11 school year the student would continue to attend Butterhill and receive 1:1 ABA/SEIT support along with related services (id. at pp. 4-5). They requested tuition reimbursement and prospective funding for the student's placement at Butterhill, 40 hours per week of 1:1 ABA/SEIT services, five hours per week of 1:1 speech-language therapy, three 45-minute

[5] The district's behavior specialist was a board certified behavior analyst at the doctoral level (BCBA-D) as was the parents' behavior consultant (Tr. p. 1597; Joint Ex. 38).

[6] The parents' behavior consultant reported that at the time of the June 10, 2010 meeting she inquired of the district director of pupil services as to whether the student's ESY program included a 1:1 teaching assistant and behavior consultation services (Joint Ex. 49 at p. 8). According to the parents' behavior consultant, the district director of pupil services stated that a one hour per week behavior consultation would be added to the student's ESY IEP, as would a 1:1 teaching assistant (id.).

sessions of 1:1 OT per week, two 45-minute sessions of 1:1 PT per week, two hours per week of parent training and counseling, five hours per week of ABA program supervision by a BCBA (id. at p. 5). They further requested transportation services to and from school (id.). The parents also asserted that the student required the services on a 12-month basis (id.).[7]

In a response dated July 16, 2010, the district asserted that it offered the student an appropriate IEP for the 2010-11 school year, that Butterhill did not offer specialized instruction or services designed to address the student's special education needs, that to the extent the student received specialized support and services they were provided pursuant to the October 30, 2009 stipulation of settlement, that the stipulation of settlement included a clause stating that it could not be relied on to support the position that Butterhill or the "Service Program" constituted the student's "'then current placement,'" and that the district would be scheduling a CSE meeting, as well as a resolution session, to address the parents' concerns (Joint Ex. 47 at p. 3).

After an unsuccessful resolution session on July 30, 2010, the district reconvened the CSE on August 20, 2010 to conduct a program review (Parent Exs. T; Y; Joint Ex. 2). Meeting participants included the district director of pupil personnel services who also served as the CSE chairperson; a district regular education teacher, special education teacher, school psychologist, speech-language pathologist, occupational therapist, physical therapist, and behavior intervention specialist; and the student's mother (Joint Ex. 2 at p. 7). The CSE reviewed and modified the student's IEP (Parent Ex. T; Joint Ex. 2 at p. 7). The district's behavior specialist discussed the training provided to the special education teacher and teaching assistant over the summer (Joint Ex. 2 at p. 6). The CSE also reviewed a functional behavioral assessment (FBA) conducted by the student's ABA program supervisor in May 2010 (Joint Ex. 2 at p. 8; Joint Ex. 11). The CSE revised the student's IEP to reflect changes discussed at the July 30, 2010 resolution session (Joint Ex. 14 at pp. 2-4). Based on its revisions, the CSE recommended that the student attend a general education kindergarten class with a 1:1 teaching assistant and receive ELA and mathematics instruction in a 12:1+1 special class five times per week (Joint Ex. 2 at pp. 1-2). In addition, the CSE recommended that the student receive two hours per week of direct services from a behavior consultant who would also provide the parents with 60 minutes per month of parent training and counseling, and consult with school staff one time per week for 60 minutes (id. at pp. 3-4). For related services, the CSE recommended that the student receive four 30-minute sessions of 1:1 speech-language therapy per week, one 60-minute session of group (5:1) speech-language therapy per week, two 45-minute sessions of 1:1 OT per week, and two 30-minute sessions of 1:1 PT per week (Joint Ex. 14 at p. 2). The IEP reflected a weekly 30-minute team meeting for staff and a monthly 60-minute team meeting with the parents (Joint Ex. 2 at p. 3). The IEP further indicated that general education staff would receive support from the special education teacher for 15 minutes per week (id. at p. 4). With respect to the student's behavior the IEP indicated that, with parental consent, the district's behavior specialist would collect data and observe the student during

[7] Although the student did not attend the ESY program recommended by the district, during summer 2010 the district's behavior specialist provided training to the student's proposed special education teacher and a 1:1 teaching assistant (Tr. p. 439; see Joint Ex. 49 at p. 8).

the first month of attendance to develop an FBA and a behavioral intervention plan (BIP) if necessary (id. at p. 3).[8]

Amended Due Process Complaint Notice

The parents filed an amended due process complaint notice dated September 6, 2010 after receiving the August 20, 2010 IEP (IHO Ex. II; Joint Ex. 46). The parents asserted that the district failed to offer the student a FAPE for the 2010-11 school year (Joint Ex. 46 at pp. 4-7). The parents' amended due process complaint notice listed 53 allegations of, among other things, procedural and substantive deficiencies in the April 16, 2010 and August 20, 2010 CSE meetings and the resultant IEPs, including deficiencies in the recommended program, services, and placement (id. at pp. 2-7). Assertions by the parents included, among other things, that the district's failure to offer the student an ESY program in the least restrictive environment (LRE) denied the student a FAPE; that the CSE's recommendations for the student's ESY program were inappropriate because the April 2010 IEP did not include sufficient 1:1 teaching and behavioral support; that the student would not have been suitably grouped for instructional purposes; that the evaluations considered by the CSE were not sufficient; that the CSE did not conduct an FBA or develop a BIP as part of the IEP development process; that the general education class size was too large for the student; that the recommended program would not have provided the student with the consistency that he needed; that the August 2010 IEP did not include sufficient behavior consultant support; and that the part-time mainstream placement with "pullouts" did not constitute the student's LRE (Joint Ex. 46 at pp. 2-7). The parents requested the same relief as outlined in their July 1, 2010 due process complaint notice (compare Joint Ex. 46 at pp. 7-8, with Joint Ex. 1 at p. 5). In a response dated September 16, 2010, the district reiterated its assertion that the district offered the student an appropriate IEP for the 2010-11 school year (Joint Ex. 48 at p. 4).

February 2, 2011 Interim Impartial Hearing Officer Decision

An impartial hearing convened on September 13, 2010 and concluded on January 31, 2011, after eight nonconsecutive days of proceedings (Tr. pp. 1-2022).[9] In a decision dated February 2, 2011, addressing the issue of the student's pendency program and services, the impartial hearing officer initially found that the stipulation entered into between the parents and the district for the 2009-10 school year did not constitute a waiver of the student's pendency entitlement (Interim IHO Decision at pp. 5-6). In determining the appropriate pendency program, the impartial hearing officer found, among other things, that the student's pendency entitlement was "fixed as of the July 1, 2010 filing date of the due process complaint;" and that the last agreed upon IEP as of that date was the May 29, 2009 IEP (id. at p. 6).

The impartial hearing officer next considered the manner in which the student's pendency entitlement should be implemented (Interim IHO Decision at p. 6). Noting that at the beginning

[8] The student's August 20, 2010 IEP was revised to indicate that the student would have received the services of a 1:1 teaching assistant and weekly behavior consultant services as part of his ESY program (Joint Ex. 2 at pp. 3-4).

[9] I remind the parties and impartial hearing officer that State regulations set forth that each party shall have up to one day to present its case and that additional hearing dates, if required, be scheduled on consecutive days whenever practicable (8 NYCRR 200.5[j][3][xiii]).

of the proceeding the district had determined that the student did not have pendency rights and had not provided the student with any pendency services during the proceeding, the impartial hearing officer found that the district violated the student's entitlement to receive pendency services (id. at pp. 7-8). The impartial hearing officer further noted that if the parents had not arranged and paid for the student's pendency services, then the student would have been deprived of the services for a prolonged period of time (id. at p. 8). For these reasons, the impartial hearing officer found that the district was required to reimburse the parents for the pendency services that it was obligated to provide (id.). Moreover, she found that the district failed to offer a valid reason for changing the student's providers to individuals selected by the district (id.). The impartial hearing officer noted that the providers identified by the CSE in both the March 2009 and May 2009 IEPs were the same providers used by the parents for the student during the school year at issue, which indicated that the parents arranged to continue the services of the providers previously identified and approved by the district (id.). In addition, the impartial hearing officer found that since the district was obligated to provide for the student's pendency services, whether the district paid the service providers directly or whether the district reimbursed the parents for payments to the providers was not an issue, and that the parents were not barred from seeking reimbursement for the student's pendency services on the grounds that it was the same remedy as the ultimate relief requested in the due process complaint notice (id. at pp. 8-9).

Accordingly, the impartial hearing officer ordered that the student's pendency program and placement constituted the program and services described in his May 29, 2009 IEP; and that the district reimburse the parents for the cost of the following services for the student's pendency program during the proceedings: 25 hours per week of SEIT services, two 45-minute sessions per week of 1:1 OT, two 45-minute sessions per week of 1:1 PT, three 30-minute sessions per week of 1:1 speech-language therapy, and one hour per month of 1:1 parent training (Interim IHO Decision at p. 9). She further ordered that the district fund the pendency program on a 12-month school year basis, effective as of the July 1, 2010 filing date of the due process complaint notice and directed that the district reimburse the parents for the costs of the pendency program upon receipt of invoices and proof of payment (id. at pp. 9-10).

May 16, 2011 Impartial Hearing Officer Decision

In a decision dated May 16, 2011, the impartial hearing officer initially found that the district did not meet its burden of proving that its recommendations for the student's summer 2010 program in a 12:1+1 self-contained class were appropriate (IHO Decision at p. 12). The impartial hearing officer reached this finding based in part on a determination that the recommended program was not the LRE for the student (id.). The impartial hearing officer indicated that the student could be educated in a general education classroom and noted that the CSE recommended a general education placement for September 2010 through June 2011 (id. at pp. 12-13). Regarding the district's assertion that the only students eligible for ESY services were students with disabilities, and therefore there was no district general education setting for the student during July and August 2010, the impartial hearing officer found that the absence of an appropriate in-district setting did not negate a student's right to be educated in the LRE and that the CSE was required to offer the student a placement in a general education setting with typically developing peers, with the supplemental aids needed to receive an appropriate education in that setting (id. at p. 13). The impartial hearing officer further indicated that the CSE's recommendation for the student's summer program was inadequate and inappropriate because the April 2010 IEP did not include the services of a behavior consultant or a 1:1 teaching assistant for the summer program; and the record did not

support a finding that the student would have been suitably grouped for instructional purposes (id.).

The impartial hearing officer next found that the district did not meet its burden of proving that the CSE's recommendations for September 2010 through June 2011 were reasonably calculated to enable the student to receive meaningful educational benefits (IHO Decision at p. 18). While the impartial hearing officer noted that the CSE "expended a great deal of effort and put a lot of thought into developing a special education program that would meet [the student's] unique needs," she concluded that the CSE recommendations "do not comport with FAPE requirements" (id. at p. 14). The impartial hearing officer's finding was based in part on a determination that the evaluations considered by the CSE were not sufficient, specifically, that the CSE did not conduct an FBA or develop a BIP as part of the IEP process (id.). The impartial hearing officer noted that the student had a history of problematic behaviors that significantly interfered with his academic, social, and language development, that this information was known to the CSE, and that the CSE should have performed an FBA and developed a BIP as part of the IEP development process (id. at pp. 15-16). Moreover, the impartial hearing officer found that the reference in the IEP to a possible future FBA and BIP was not a substitute for appropriately assessing and addressing the student's behavioral concerns during the IEP development process (id. at p. 16). The impartial hearing officer further found that deferring the FBA and BIP for up to one month after the student started attending the program would have required him to start the program without necessary behavioral supports and the likely result would be regression (id.). The impartial hearing officer added that the August 2010 CSE did not consider an FBA that was conducted in May 2010 (id. at p. 15). In addition, the impartial hearing officer indicated that the CSE's evaluation did not include cognitive testing or standardized assessments of academic achievement (id. at p. 14).

The impartial hearing officer further indicated that the April and August 2010 IEPs described the student's academic functional levels in narrative form, did not include objective data regarding the student's cognitive function, and did not include grade equivalents, percentile scores, or standard scores for academic achievement for mathematics, reading, and writing (IHO Decision at pp. 14-15). In addition, the impartial hearing officer made the following findings: the general education class size of 25 students was too large for the student; the student needed to be in a class with no more than 15 students; the IEP mandate for special class instruction for reading and mathematics was overly restrictive in light of the student's demonstrated ability to function in a general education class with appropriate supports; and the provision of related services as multiple "pull-out" sessions during the course of the school day was problematic (id. at p. 17). The impartial hearing officer noted that the student's August 2010 IEP recognized the student's need for "'a predictable routine and structured setting,'" and that the program recommended by the CSE would not have provided the student with the continuity and structure that he needed (id.). Moreover, according to the impartial hearing officer, the August 2010 IEP did not include sufficient behavior consultant support because the two hours listed in the IEP would not provide sufficient time for the level of supervision that would be needed by a teaching assistant with minimal or no background in ABA instruction and interventions (id. at pp. 17-18).

In addition, the impartial hearing officer found that the parents met their burden of establishing that the program they chose for the student was appropriate and that the equitable factors favored tuition reimbursement (IHO Decision at pp. 19-20).

As relief, the impartial hearing officer ordered that the district reimburse the parents for the cost of the educational program and services that they obtained for the student during the 2010-11 school year (IHO Decision at p. 21).

Appeal for State-Level Review

In a petition, the district asserts that the impartial hearing officer erred in concluding that the district failed to offer the student an appropriate ESY program because (1) the district's recommended ESY placement in a 12:1+1 self-contained class was the only summer placement option available; (2) the recommended summer program would have included the services of both a 1:1 teaching assistant and a behavior consultant despite the inadvertent omission of such services from the April 2010 IEP; and (3) no issue was raised as to whether the student would have been suitably grouped with other students in the ESY placement in the parents' initial or amended due process complaint notice or at the impartial hearing. In addition, the district asserts that the impartial hearing officer erred in concluding that the evaluations considered by the CSE were not sufficient, citing the written reports submitted by the student's providers, observations by district staff and information shared during the March, April, and August 2010 CSE meetings, as well as the background information contained in the reports from the prior year, which the district contends sufficiently detailed the student's present levels of academic and functional performance and needs, and provided the CSE with substantial current evaluative information. In addition, the district asserts that the impartial hearing officer erred in concluding that the failure to conduct an FBA or develop a BIP denied the student an appropriate program. The district asserts that any behaviors exhibited by the student were not of such a frequency or degree as to impede his learning or that of others, could be adequately addressed by redirection and refocusing, and did not require an FBA or BIP.

In addition, the district asserts that the general education class of 25 students was not too large for the student because 90 minutes of his school day would be in a 12:1+1 ELA and mathematics special class, the student would be supported in his general education class by a 1:1 teaching assistant, and the general education kindergarten class employed a "center-based" model where students were placed in small groups and rotated through different activity centers. Moreover, the district asserts that the CSE recommendation to place the student in a 12:1+1 special class for ELA and mathematics struck the proper balance of providing the student with the special education instruction he needed with respect to the core academic areas, in a small group setting, while maximizing his inclusion in school programs with nondisabled students. The district further asserts that the CSE recommendation included the student in the general education environment to the maximum extent appropriate and removed the student from that setting only as necessary to meet his individual need for 90 minutes per day of special education in the proposed 12:1+1 ELA and mathematics classes and for related services of OT, PT, and speech-language therapy. In addition, the district asserts that the August 2010 IEP provided two hours per week of direct services by the behavior consultant to the student and appropriately provided for one hour per week by the behavior consultant for indirect support to teaching staff, an additional fifteen minutes per week of indirect support for non-teaching staff, and one hour per month for parent counseling and training. The district further asserts that the impartial hearing officer erred in concluding that the parents' 2010-11 program and services were appropriate and erred in awarding reimbursement for SEIT services at a rate in excess of the market rate.

Regarding the February 2, 2011 pendency decision, the district asserts that the impartial hearing officer erred in concluding that the district must "'continue to fund the student's pendency program through the conclusion of these due process proceedings and any appeals thereof'" and directing the district to reimburse the parents for the cost of pendency services. The district asserts that the impartial hearing officer improperly granted the parents' relief in excess of which they were entitled under pendency and improperly precluded the district from exercising its right to provide the student with pendency services through its own staff and/or through outside providers of its own choosing at public cost, which would be much less than that of the parents' private program providers.

In an answer, the parents admit some and deny other allegations. The parents specifically assert that the district's appeal from the February 2, 2011 pendency decision was untimely, that the district should be estopped from asserting its pendency claim because of its failure to recognize that the student had any pendency rights and failure to offer to fulfill the student's pendency rights with district personnel, and that in any event, the decision properly recognized the student's automatic and unconditional pendency protections. In addition, the parents assert that the impartial hearing officer properly found that the district denied the student a FAPE for the 2010-11 twelve-month school year, that the parents' unilateral placement was appropriate, and that the rate charged by the student's SEIT was not unreasonable or excessive. The parents request that the impartial hearing officer's decision and award be affirmed.

In a reply, the district opposes the parents' claim that the pendency appeal was untimely. The district asserts that 8 NYCRR 279.10(d) does not require a party to take an interlocutory appeal from an impartial hearing officer's interim ruling or decision regarding pendency; that a party may seek review of "'any'" interim ruling or decision in an appeal from a final determination of an impartial hearing officer; that the February 2, 2011 pendency decision qualifies as "'any'" interim ruling or decision, and therefore the district's appeal from the February 2, 2011 pendency determination is timely. The district also opposed the parents' assertion that the district should be estopped from challenging the February 2, 2011 interim impartial hearing officer decision. In addition, the district opposes the parents' assertion that the May 16, 2011 impartial hearing officer decision should be sustained based on other issues raised in the parents' due process complaint notice, but not decided by the impartial hearing officer.[10, 11]

Applicable Standards

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]-

[10] By letter dated July 21, 2011, the parents assert that the district's reply was not permissible because it raised new matters and documentary evidence not discussed in the petition. In a letter dated July 22, 2011, the district submits that its reply was permissible based upon 8 NYCRR 279.6.

[11] The district attaches as an exhibit to the reply a copy of a letter brief dated September 29, 2010 provided to the impartial hearing officer to assist in the review of the parents' pendency request. I note that this document already constitutes part of the hearing record as IHO Exhibit VIII.

[B]; see generally Forest Grove v. T.A., 129 S. Ct. 2484, 2491 [2009]; 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]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; A.H. v. Dep't of Educ., 2010 WL 3242234, at *2 [2d Cir. Aug. 16, 2010]; 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 P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; 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 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 Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; 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]; Tarlowe v. Dep't of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008]), 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).

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 burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at *7 [S.D.N.Y. Aug. 27, 2010]).

Discussion

Scope of Review

The district alleges that it was improper for the impartial hearing officer to make a finding that the district did not show that the student would have been suitably grouped for instructional purposes with other students in the ESY placement because it was not raised in the parents' initial or amended due process complaint notice or at the impartial hearing. The IDEA and its implementing regulations provide that a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process request unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 C.F.R. §§ 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]) or the original due process complaint notice is amended prior to the impartial hearing per permission given by the impartial hearing officer at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 C.F.R. § 300.508[d][3]; 8 NYCRR 200.5[i][7][b]; see M.P.G., 2010 WL 3398256, at *8; Snyder v. Montgomery County Pub. Sch., 2009 WL 3246579, at *7 [D. Md. Sept. 29, 2009]; Saki v. Hawaii, 2008 WL 1912442, at *6-7 [D. Hawaii Apr. 30, 2008]; Application of a Student with a Disability, Appeal No. 11-042; Application of a Student with a Disability, Appeal No. 11-041; Application of the Dep't of Educ., Appeal No. 10-070; Application of a Student with a Disability, Appeal No. 09-140). Upon review of the impartial hearing officer's May 16, 2011 decision, it is evident that she decided this issue based upon finding that the parents asserted that the student would not have been suitably grouped for instructional purposes with the other students in the self-contained summer program (IHO Decision at p. 8).

Upon review of the parents' amended due process complaint notice, I find that it can be reasonably read to include the issue of whether the student would have been suitable grouped with other students in the ESY placement (see Joint Ex. 46 at p. 7).[12] Therefore, the impartial hearing officer did not err in deciding this issue. However, the merits of the parents' allegation need not be addressed, here, as I find the claim to be speculative. State regulations require that in special classes, students must be suitably grouped for instructional purposes with other students having similar individual needs (8 NYCRR 200.1[ww][3][ii], 200.6[a][3], [h][3]; see Walczak, 142 F.3d at 133 [approving an IEP that placed a student in a classroom with students of different intellectual, social, and behavioral needs, where sufficient similarities existed]; Application of a Student with a Disability, Appeal No. 09-082; Application of the Dep't of Educ., Appeal No. 08-095; Application of the Dep't of Educ., Appeal No. 08-018; Application of a Child with a Disability, Appeal No. 07-068; Application of a Child with a Disability, Appeal No. 05-102). In this case, a meaningful analysis of the parents' claim with regard to functional grouping would require me to determine what might have happened had the district been required to implement the student's IEP. While parents are not required to try out the school district's proposed program (Forest Grove, 129 S.Ct. at 2496), I note that neither the IDEA nor State regulations require a district to establish the manner in which a student will be grouped on his or her IEP, as it would be neither practical nor appropriate. The Second Circuit has also determined that, unlike an IEP, districts are not expressly required to provide parents with class profiles (Cerra, 427 F.3d at 194). The IDEA and State regulations provide parents with the opportunity to offer input in the development of a student's IEP, but they do not permit parents to direct through veto a district's efforts to implement each student's IEP (see T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420, cert. denied, 130 S. Ct. 3277 [2010]). A delay in implementing an otherwise appropriate IEP may form a basis for finding a denial of a FAPE only where the student is actually being educated under the plan, or would be, but for the delay in implementation (see E.H., 2008 WL 3930028, at *11 [N.D.N.Y. Aug. 21, 2008] aff'd 2009 WL 3326627 [2d Cir. Oct. 16, 2009]). The sufficiency of the district's offered program is to be determined on the basis of the IEP itself (see R.E. v. New York City Dept. of Educ., 2011 WL 924895, at *10 [S.D.N.Y. Mar. 15, 2011]). If it becomes clear that the student will not be educated under the proposed IEP, there can be no denial of a FAPE due to the failure to implement it (id.; see also Grim, 346 F.3d at 381-82 [holding that the district was not liable for a denial of a FAPE where the challenged IEP was determined appropriate, but the parents chose not to avail themselves of the public school program]).

I will now address another matter concerning the scope of review, State regulations provide that "[a] respondent who wishes to seek review of an impartial hearing officer's decision may cross-appeal from all or a portion of the decision by setting forth the cross-appeal in respondent's answer" (8 NYCRR 279.4[b]). Here, the parents asserted additional allegations in their amended due process complaint notice that were not addressed by the impartial hearing officer in her May 16, 2011 decision, and in their answer asserted generally that the impartial hearing officer could have further addressed the district's FAPE violations in her decision (see Joint Ex. 48; IHO Decision at pp. 13, 18,). However, a review of the parents' answer indicates that they did not cross-appeal from the impartial hearing officer's decision. Raising additional issues in an answer without cross-appeal is not authorized by State Regulations and, in effect, deprives the petitioner

[12] I note that the assertion in the parents' amended due process complaint notice that the students in the proposed class are grouped primarily by age and not by functioning level does not specify that it is in reference to the student's 2010 summer program (Joint Ex. 46 at p. 7).

of the opportunity to file responsive papers on the merits because State regulations do not permit pleadings other than a petition and an answer except for a reply to "any procedural defenses interposed by respondent or to any additional documentary evidence served with the answer" (8 NYCRR 279.6). In essence, a party who fails to obtain a favorable ruling with respect to an issue submitted to an impartial hearing officer is bound by that ruling unless the party either asserts an appeal or interposes a cross-appeal.[13] Accordingly, the parents' general assertion that additional FAPE violations were alleged in the due process complaint notice that were not addressed by the impartial hearing officer will not be considered on appeal.

Pendency

Initially, I will consider whether the district's appeal from the February 2, 2011 Decision and Order on Pendency is untimely. Pursuant to State regulations, a party may not appeal an impartial hearing officer's interim order on an interlocutory basis unless the appeal concerns a student's pendency rights (8 NYCRR 279.10[d]; see Application of a Student with a Disability, Appeal No. 10-030). However, State regulations further provide that in an appeal to a State Review Officer from a final determination of an impartial hearing officer, a party may seek review of any interim ruling, decision, or refusal to decide an issue (id.). Accordingly, I find that the district's appeal from the impartial hearing officer's February 2, 2011 interim order on pendency, brought with the district's timely appeal from the May 16, 2011 final determination of the impartial hearing officer, is authorized under 8 NYCRR 279.10(d).[14]

I will now turn to the issue of the student's pendency placement. The IDEA and the New York State Education Law require that a student remain in his or her then current educational placement, unless the student's parents and the board of education otherwise agree, during the pendency of any proceedings relating to the identification, evaluation, or placement of the student (20 U.S.C. § 1415[j]; Educ. Law §§ 4404[4], 4410[7][c]; 34 C.F.R. § 300.518[a]; 8 NYCRR 200.5[m]; see Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *20 [E.D.N.Y. Oct. 30, 2008]; Bd. of Educ. of Poughkeepsie City Sch. Dist. v. O'Shea, 353 F. Supp. 2d 449, 455-56 [S.D.N.Y. Jan. 18, 2005]; Application of the Dep't of Educ., Appeal No. 08-061; Application of a Student with a Disability, Appeal No. 08-050; Application of the Dep't of Educ., Appeal No. 08-009; Application of a Student with a Disability, Appeal No. 08-003; Application of a Student with a Disability, Appeal No. 08-001; Application of a Child with a Disability, Appeal No. 07-095; Application of a Child with a Disability, Appeal No. 07-062). Pendency has the effect of an automatic injunction, and the party requesting it need not meet the requirements for injunctive relief such as irreparable harm, likelihood of success on the merits, and a balancing of the hardships (Zvi D. v. Ambach, 694 F.2d 904, 906 [2d Cir. 1982]; see Wagner v. Bd. of Educ., 335 F.3d 297, 301 [4th Cir. 2003]; Drinker v. Colonial Sch. Dist., 78 F.3d 859, 864 [3d Cir. 1996]). The purpose of the pendency provision is to provide stability and consistency in the education of a student with a disability and "strip schools of the unilateral authority they had traditionally employed to exclude disabled students . . . from school" (Honig v. Doe, 484 U.S. 305, 323 [1987]; Evans v. Bd. of Educ., 921 F. Supp. 1184, 1187 [S.D.N.Y. 1996], citing Bd. of Educ. v. Ambach, 612 F. Supp.

[13] An impartial hearing officer's decision is final and binding upon the parties unless appealed to a State Review Officer (34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[j][5][v]).

[14] The parties do not dispute that the district's appeal from the May 16, 2011 final determination of the impartial hearing officer was timely.

230, 233 [E.D.N.Y. 1985]). The pendency provision does not mean that a student must remain in a particular site or location (Concerned Parents and Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751 [2d Cir. 1980]; Application of a Student with a Disability, Appeal No. 08-107; Application of the Bd. of Educ., Appeal No. 07-125; Application of a Child with a Disability, Appeal No. 07-076; Application of the Bd. of Educ., Appeal No. 05-006; Application of the Bd. of Educ., Appeal No. 99-90), or at a particular grade level (Application of a Child with a Disability, Appeal No. 03-032; Application of a Child with a Disability, Appeal No. 95-16).

Under the IDEA, the pendency inquiry focuses on identifying the student's then current educational placement (Mackey v. Bd. of Educ., 386 F.3d 158, 163 [2d Cir. 2004], citing Zvi D., 694 F.2d at 906). Although not defined by statute, the phrase "then current placement" has been found to mean the last agreed upon placement at the moment when the due process proceeding is commenced (Murphy v. Bd. of Educ., 86 F. Supp. 2d 354, 359 [S.D.N.Y. 2000] aff'd, 297 F.3d 195 [2002]; Application of a Student with a Disability, Appeal No. 08-107; Application of a Child with a Disability, Appeal No. 01-013; Application of the Bd. of Educ., Appeal No. 00-073). The U.S. Department of Education has opined that a student's then current placement would "generally be taken to mean current special education and related services provided in accordance with a child's most recent [IEP]" (Letter to Baugh, 211 IDELR 481 [OSEP 1987]; see Susquenita Sch. Dist. v. Raelee, 96 F.3d 78, 83 [3d Cir. 1996]). However, if there is an agreement between the parties on placement during the proceedings, it need not be reduced to a new IEP, and it can supersede the prior unchallenged IEP as the then current placement (Evans, 921 F. Supp. at 1189 n.3; see Bd. of Educ. v. Schutz, 137 F. Supp. 2d 83 [N.D.N.Y. 2001] aff'd, 290 F.3d 476, 484 [2d Cir. 2002]; see also Letter to Hampden, 49 IDELR 197[OSEP 2007]). Moreover, a prior unappealed impartial hearing officer's decision may establish a student's current educational placement for purposes of pendency (Student X, 2008 WL 4890440 at *23; Letter to Hampden, 49 IDELR 197 [OSEP 2007]; Application of a Student with a Disability, Appeal No. 08-107; Application of a Student with a Disability, Appeal No. 08-050; Application of the Dep't of Educ., Appeal No. 08-009; Application of the Dep't of Educ., Appeal No. 07-140; Application of the Dep't of Educ., Appeal No. 07-134).

Regarding pendency, the district's assertions in their petition on appeal are limited to the position that the impartial hearing officer "(1) improperly granted the Parents relief in excess of that to which they were entitled under pendency, and (2) improperly precludes the District from exercising its right to provide [the student] with pendency services through its own staff and/or through outside providers of its own choosing at public cost," which the district asserts would be less expensive than the parents' private program providers. The district's above assertions are made without further specificity. Upon review of the hearing record, I find that the parents in their initial due process complaint notice dated July 1, 2010 "invoke[d]" the student's pendency rights (see Joint Ex. 1) and the district in its response averred that no pendency applied to the student's program or placement at Butterhill based upon the parties' 2009 stipulation of settlement, without any other assertions as to the student's pendency program or placement, and later in a response to the parents' amended due process complaint notice dated September 16, 2010, the district again referred to the parties' 2009 stipulation of settlement and concluded that "no pendency applies to the student's program or placement at the Butterhill Day School or to any programming, supports or services provided to [the student] in a home or community program outside the hours the student

is in attendance at the Parents' chosen program," without any other assertions as to the student's pendency program or placement (see Dist. Exs. 47 at p. 3; 48 at p. 4).

In addition, I note that the issue of the student's pendency program and services was addressed on the record on September 13, 2010 (Tr. pp. 22-37). At that time, the district stated its position: "[t]he pendency is established by the settlement agreement that there is no pendency … the parents would be funding and arranging their own education during the course of this hearing" (Tr. p. 23). The district further indicated that "[w]e believe that there is no pendency" and "there should not be an automatic right to continuation of services from a preschool program that actually is now over two years out of date;" and that the stipulation of settlement between the parties was an agreement that "we would be essentially breaking pendency" (Tr. pp. 29, 30). In a letter brief prepared by the district dated September 29, 2010, the district indicated that "the Parents do not have the right to have [pendency] services with their own providers at a location of their choosing" (IHO Ex. VIII at p. 5). The district further asserted that the student "has a right either to a place in public school with pendency services provided by the District, or he may remain at his private school and receive supports and services at his parents' expense" (id. at pp. 5-6). As to the district's assertions that the parents inappropriately picked their own providers, it must first be noted that the hearing record does not include any indication that the district offered or provided a pendency program or services for the student. Moreover, the hearing record does not reflect efforts by the district to provide the student with a pendency program or services with district or other providers, or otherwise comply with their pendency obligations. In addition, upon review, I find that the providers selected by the parents for the current school year are the same providers identified in the student's March 2009 and May 2009 IEPs (see Parent Exs. E; F; J; K; see also Dist. Ex. Q at pp. 1-2; IHO Ex. VIII at pp. 8-9). Accordingly, the parents continued the services of providers that were approved by the district on the student's March and May 2009 IEPs, rendering the district's contention that the parents inappropriately picked their own providers to be unsubstantiated by the hearing record. In sum, I find that the district's assertions that the impartial hearing officer improperly granted the parents relief in excess of that to which they were entitled under pendency and improperly precluded the district from exercising its right to provide the student with pendency services through its own staff and/or through outside providers is not supported by the hearing record.

September 2010 - June 2011 School Year Program

Evaluation

I will now consider the finding by the impartial hearing officer that evaluations considered by the CSE were not sufficient. A district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 C.F.R. § 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree and at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; see 34 C.F.R. § 300.303[b][1]-[2]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). Any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in

determining, among other things the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 C.F.R. § 300.304[b][1][ii]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 C.F.R. § 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 C.F.R. § 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 C.F.R. § 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]; see Application of the Dep't of Educ., Appeal No. 07-018). Among the other elements of an IEP is a statement of a student's academic achievement and functional performance and how the student's disability affects his or her progress in relation to the general education curriculum (20 U.S.C. § 1414[d][1][A][i][I]; 34 C.F.R. § 300.320[a][1];8 NYCRR 200.4[d][2][i]; see 8 NYCRR 200.1[ww][3][i]).

In developing the recommendations for a student's IEP, the CSE must consider the results of the initial or most recent evaluation; the student's strengths; the concerns of the parents for enhancing the education of their child; the academic, developmental and functional needs of the student, including, as appropriate, the student's performance on any general State or district-wide assessments as well as any special factors as set forth in federal and State regulations (34 C.F.R. § 300.324[a]; 8 NYCRR 200.4[d][2]).

Here, the hearing record shows that the following documents were considered in the development of the student's 2010-11 IEP: an ABA evaluation conducted by the student's SEIT,[15] dated March 3, 2010 (Joint Ex. 19); a speech-language evaluation and progress summary report prepared by the student's private speech-language pathologist, dated March 9, 2010 (Joint Ex. 22); an OT evaluation and progress summary report prepared by the student's private occupational therapist, dated March 2, 2010 (Joint Ex. 20), and a PT evaluation and a progress summary report prepared by the student's private physical therapist, dated March 2, 2010 (Joint Ex. 21). In addition, the following reports were considered, which reflected district staff observations of the student at Butterhill: a February 19, 2010 classroom observation by the school psychologist (Joint Ex. 26), a March 2010 classroom observation by the district's special education teacher (Joint Ex. 23), a February 8, 2010 speech-language observation by the district's speech-language pathologist (Joint Ex. 25), a March 12, 2010 OT observation by the district's occupational therapist (Joint Ex. 18), and a March 12, 2010 PT observation by the district's physical therapist (Joint Ex. 17). The hearing record also shows that with exception of the SEIT/BCBA who conducted the student's ABA evaluation, all of the professionals whose reports were considered were present for at least one of the CSE meetings and presented their findings to the CSE (Parent Exs. U; V). The results of the ABA evaluation were presented and reviewed by the student's ABA supervisor (Parent Ex. V at pp. 5-32).

Although the impartial hearing officer faulted the district for describing the student's academic functioning in narrative form on his IEPs and failing to include an IQ or range and/or grade equivalents, percentile ranks, or standard scores for academic achievement (see IHO

[15] The SEIT who evaluated the student was also a BCBA (Joint Ex. 19 at p. 1).

Decision at pp. 14-15), as detailed below, I find that the evaluations and observations considered by the March, April, and August CSEs, and reflected on the April and August 2010 IEPs, were sufficiently comprehensive to identify all of the student's special education needs.

At the onset of the March 2010 CSE meeting, the student's ABA program supervisor reviewed the results of the student's performance on the Assessment of Basic Language and Learning Skills-Revised (ABLLS-R) as documented by the student's SEIT in the ABA evaluation report (Parent Ex. V at p. 5; see Joint Ex. 19). In accordance with the ABLLS-R, the evaluating SEIT detailed the student's abilities across numerous categories (Joint Ex. 19). The SEIT reported the student was able to sit at a table appropriately waiting for instructor directions with some verbal and partial physical prompts (Joint Ex. 19 at p. 2). In addition, at school, the student would work for praise for 15 minutes with back up reinforcers (id.). With respect to visual performance the SEIT reported that the student could correctly juxtapose three non-interlocking puzzle pieces to form a picture, match at least ten associated pictures, and extend a two item pattern in alternating sequence (Joint Ex. 19 at p. 2; Parent Ex. V at p. 5). The student's imitation skills included the ability to imitate fine and gross motor movements with a verbal prompt, at least two motor movements with corresponding vocalizations, and spontaneously imitate at least two motor activities with a model not directly in front of him (Joint Ex. 19 at p. 2). The student was also able to readily imitate most sounds and imitate four word phrases upon request (Joint Ex. 19 at p. 2; Parent Ex. V at pp. 6-7). According to the SEIT, the student requested many preferred items, toys, and activities when they were present and occasionally requested items that were not present (Joint Ex. 19 at p. 2; Parent Ex. V at p. 12). The student sometimes asked for things that he wanted using short sentences (Joint Ex. 19 at p. 2). The SEIT reported that the student could label at least 200 objects and pictures and at least 20 ongoing actions and pictures of actions (Joint Ex. 19 at p. 2; Parent Ex. V at pp. 7-8). The student could also label three or more features of at least 10 objects and label 10 objects when told their features or functions (Joint Ex. 19 at pp. 2-3). On occasion the student could spontaneously label or request items (id. at p. 2). According to the SEIT the student often sang songs (Joint Ex. 19 at p. 2; Parent Ex. V at p. 11). With respect to receptive language, the SEIT reported that the student could select at least 200 pictures from a field of 6, including at least 25 pictures when told their functions and 10 pictures when told their features (Joint Ex. 19 at p. 2; Parent Ex. V at p. 5). The student could imitate at least five specified pretend actions (Joint Ex. 19 at p. 2). In terms of social interaction, the SEIT reported that the student was generally appropriate around other students but required verbal prompts (id. at p. 3). The student attended to the actions of peers, typically followed direction from adults, and shared items that he was using with others (id.). The SEIT reported that in a given 10-minute period the student would typically pick-up and manipulate at least one toy (id.). The student sat in a small group without disrupting others with some prompting and also attended to a teacher during small group instruction about 50 percent of the time (id.). The SEIT reported that the student was able to follow daily classroom routines with some prompting (Joint Ex. 19 at p. 3; Parent Ex. V at p. 20). The student would wait appropriately for his turn and during transitions from different areas and activities (Joint Ex. 19 at p. 3). The SEIT stated that the student could use acquired skills outside the original training situation with minimal prompting and skills taught individually in a group setting with minimal prompting (Joint Ex. 19 at p. 3; Parent Ex. V at p. 23). With respect to academic skills, the SEIT reported that the student could receptively identify and label upper and lowercase letters and receptively identify and label letters by their corresponding sounds (Joint Ex. 19 at pp. 3-4: Parent Ex. V at pp. 32, 40). The student could also read at least 20 simple words (Joint Ex. 19 at p. 4; Parent Ex. V at p. 9). The SEIT noted that the student could rote count to 20,

count up to 10 objects using 1:1 correspondence, and identify numbers 1 through 10 (Joint Ex. 19 at p. 4; Parent Ex. V at pp. 32-33). The student could "roughly" print the ABCs and numbers through 10 and spell his name and some simple words (Joint Ex. 19 at p. 4; Parent Ex. V at pp. 10, 35-36). According to the SEIT, the student also demonstrated numerous self-help skills related to dressing, eating, grooming, and toileting (Joint Ex. 19 at p. 4; Parent Ex. V at pp. 36-37, 40). The SEIT reported that the student followed classroom routines with prompting and was generally not disruptive (Joint Ex. 19 at p. 5). She noted that the student sometimes engaged in stereotypical behaviors and that during testing, heavy breathing, tapping on the table, and hair twirling were observed (id.). Based on the results of the evaluation, the SEIT concluded that the student presented with deficits in all domains tested (Joint Ex. 19 at p. 4).[16]

In addition to the information provided by the student's ABA program supervisor regarding the student's academic and classroom performance, the district's special education teacher and school psychologist reviewed their observations of the student at Butterhill with the March 2010 CSE members (Parent Ex. V at pp. 61-72; Joints Exs. 23; 26). The school psychologist commented that the student had made "such progress" since the previous year (Parent Ex. V at pp. 59-60). She noted that the student was able to sit and wait, was compliant, followed directions, and seemed very interested in his peers (Parent Ex. V at p. 62; Joint Ex. 26). The school psychologist reported that the student knew the routines of the classroom and was able to follow them, but that he needed someone to direct him in following the routines (Parent Ex. V at pp. 64, 65; Joint Ex. 56). The special education teacher reported that the student was successful in the 14:1+1 setting "with an additional 1:1 assistant (or ABA therapist)" to guide him through the activities and events (Joint Ex. 23 at p. 2). During her observation, she noted that the student engaged in parallel play, but had "very, very little interaction" with peers (Parent Ex. V at p. 70; Joint Ex. 23).

With respect to the student's speech-language needs, the private speech-language pathologist reported to the March 2010 CSE that the student exhibited a severe delay in all areas of language (Joint Ex. 22 at p. 1). On the Preschool Language Scale-Fourth Edition (PLS-4) the student received a total language standard score of 51 (1st percentile) (id.). The speech-language pathologist reported that the student was unable to identify categories of objects in pictures, but that he could sort objects based on their functions and understand picture analogies based on object functions (id.). According to the private speech-language pathologist the student consistently answered some yes/no questions and was able to answer simple "what" and some "where" questions (id.). The student was also able to state the function of certain familiar objects that had been reviewed in therapy (id.). At the March 2010 CSE meeting, the private speech-language pathologist stated that the student's social skills were beginning to emerge, he was beginning to verbally request things, and he was able to imitate peers' actions (Parent Ex. V at pp. 44, 45, 46, 53). The private speech-language pathologist indicated that the student was compliant during therapy and had never been a behavior problem for her (id. at p. 49). During the March 2010 CSE meeting, the district's speech-language pathologist described the student as a "passive communicator" who was demonstrating emerging verbal skills (Joint Ex. 25; Parent Ex. V at p. 77). She noted that the student did not initiate interactions or conversations with others until they were initiated by an adult who was familiar with him, but that the student was starting to use words

[16] The CSE chairperson requested that the student's ABA program supervisor provide the district with baseline data as well as data regarding the student's current levels of functioning (Parent Ex. V at pp. 14-16, 112-13). The ABA program supervisor stated that she would "get the hard numbers" out to the district (Parent Ex. V at p. 42).

to get his needs met rather than using gestures (Joint Ex. 25; Parent Ex. V at pp. 77-78). The district speech-language pathologist reported that during her observation the student was prompted to answer questions during snack and would repeat the question as well as wait for redirection before giving a one-word answer (Joint Ex. 25). She noted that all verbal directions provided for the student were one-word directions paired with gestures or pointing (Joint Ex. 25; Parent Ex. V at p. 76). The district's speech-language pathologist reported that the student did not verbally imitate peers (Joint Ex. 25).

Also at the March 2010 CSE meeting, the student's private occupational therapist reported that the student's fine-motor quotient of 76 (5th percentile), as determined by the Peabody Developmental Motor Scales-Second Edition (PDMS-2), represented a "poor" performance for the student's age (Parent Ex. V at p. 55; Joint Ex. 20 at p. 2). The occupational therapist reported that during testing the student demonstrated difficulty sitting at the table for more than five minutes at a time without becoming distracted (Joint Ex. 20 at p. 2). She noted an increase in the student's imitation of stories or television shows during testing (id.). The occupational therapist reported that the student had demonstrated improvement in his fine motor skills, despite testing below average in grasping (id. at p. 3). According to the occupational therapist, the student independently demonstrated a tripod grasp for all writing tasks and also demonstrated the ability to button/unbutton a large button with moderate assistance (Parent Ex. V at pp. 58-59; Joint Ex. 20 at p. 3). The occupational therapist reported that the student could write his name on a line with correct sizing and spacing of letters and draw shapes (Joint Ex. 20 at p. 3). In addition, the student used a pincer grasp when manipulating small objects and was able to cut on straight and wavy lines using a mature "'thumbs up'" position of bilateral hands (Parent Ex. V at p. 57; Joint E. 20 at p. 3). With respect to visual motor integration, the occupational therapist reported that the student was able to copy a square with closed corners and straight lines, put ten pellets in a bottle, and build a tower of five blocks from a therapist model (Joint Ex. 20 at p. 3). The student was unable to connect two dots or build steps as illustrated (id.). According to the occupational therapist, the student self-engaged in activities and independently requested movement while in therapy equipment (Parent Ex. V at p. 55-56; Joint Ex. 20 at p. 3). The occupational therapist reported that the student was interested in what other children were doing and had been observed attempting to interact with other children (Parent Ex. V at p. 56; Joint Ex. 20 at p. 3). The occupational therapist stated that the student continued to require verbal cues and assistance to attend for extended periods of time (Parent Ex. V at pp. 56-57; Joint Ex. 20 at p. 3). She indicated that the student did not require hand-over-hand assistance and only required a minimum amount of verbal cueing (Parent Ex. Vat p. 59). Also at the March 2010 CSE meeting, the district's occupational therapist recounted the details of her observation of the student at Butterhill (Parent Ex. V at pp. 79-84; Joint Ex. 18). She noted that with prompting the student participated in circle time (Parent Ex. V at p. 81; Joint Ex. 18). She further noted that the student observed and imitated the motor movements of other students during a body part identification activity and transitioned well from a dance activity to picture taking (Parent Ex. V at pp. 81-83). The occupational therapist noted that the student could manipulate fasteners with assistance (Joint Ex. 18 at p. 1).

Next, the district's physical therapist reported that during her observation of the student at Butterhill, the student was able to sit at the table for a writing activity without his feet touching the floor, which showed that he had sufficient core strength (Parent Ex. V at pp. 72-73; Joint Ex. 17). She observed that the student transitioned to standing through half kneeling with a wide base of support with his knees extended; a move that she characterized as "atypical" (id.). The district's

physical therapist indicated that the student was otherwise able to do everything that he needed to do in the classroom (Joint Ex. V at p. 73).

At the conclusion of the March 2010 CSE meeting, the district director of pupil personnel services reviewed the student's needs based on notes that she had taken during the meeting (Parent Ex. V at pp. 85-92). The student's mother and ABA program supervisor, as well as other CSE members, commented on and contributed to the list of the student's needs reviewed by the district director of pupil personnel services (id.).

At the beginning of the April 2010 CSE meeting, the CSE chairperson read a narrative of the student's present levels of performance to the CSE team members (Parent Ex. U at pp. 4-11). In addition, she reviewed the student's needs (id. at p. 11-12). The narrative and description of needs were then incorporated into the student's April 16, 2010 IEP (Joint Ex. 14 at pp. 2-5). The student's private physical therapist, who was not present at the March 2010 CSE meeting, presented the results of her evaluation to the April 2010 CSE (Parent Ex. U at pp. 12-14). The student's private physical therapist reported that the student walked independently on all surfaces (Joint Ex. 21). She noted that the student was able to ascend and descend stairs without a handrail, but that he was safer using one (Joint Ex. 21; Parent Ex. U at p. 13). According to the private physical therapist, the student could jump with two feet forward and side to side, jump over three consecutive blocks, and hop one time on his right foot without shoes (id.). The physical therapist indicated that the student's ability to stand on one foot and maintain a half kneel while throwing and catching a ball were inconsistent (Joint Ex. 21) The student could throw a tennis ball overhand but not underhand (id.; Parent Ex. U at pp. 13-14). Administration of the PDMS-2 by the physical therapist yielded a gross motor quotient of 70 (2nd percentile) (Joint Ex. 12).

Based on all of the above, I find that the April 16, 2010 and August 20, 2010 IEPs accurately reflected the results of the private evaluations and district observations and provided the CSE with relevant and sufficient information that assisted it in determining the educational needs of the student.[17]

FBA/BIP

Next, I will consider the finding by the impartial hearing officer that the failure of the district to conduct an FBA and develop a BIP denied the student a FAPE. The district maintains that, contrary to the impartial hearing officer's determination, it was not required to complete an FBA and BIP of the student. Under the IDEA, a CSE may be required to consider special factors in the development of a student's IEP. Among the special factors in the case of a student whose behavior impedes his or her learning or that of others, the CSE shall consider positive behavioral interventions and supports, and other strategies, to address that behavior (20 U.S.C. § 1414[d][3][B][i]; 34 C.F.R. § 300.324[a][2][i]; see 8 NYCRR 200.4[d][3][i]; see also E.H, 2009 WL 3326627; A.C., 553 F.3d at 172; J.A. v. East Ramapo Cent. Sch. Dist., 603 F. Supp. 2d 684, 689 [S.D.N.Y. 2009]; M.M. v. New York City Dep't of Educ., 583 F. Supp. 2d 498, 510 [S.D.N.Y. 2008]; Tarlowe, 2008 WL 2736027, at *8; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 149-40 [S.D.N.Y. 2006]; Application of a Student with a Disability, Appeal No. 09-101; Application

[17] In addition, the hearing record shows that the August 2010 CSE considered additional reports, including oral reports from the district's behavioral specialist and the student's mother, an August 3, 2010 speech-language progress summary, and an August 20, 2010 teacher report (Joint Ex. 2 at p. 8).

of a Student with a Disability, Appeal No. 09-038; Application of a Student with a Disability, Appeal No. 08-028; Application of the Dep't of Educ., Appeal No. 07-120). To the extent necessary to offer a student an appropriate educational program, an IEP must identify the supplementary aids and services to be provided to the student (20 U.S.C. § 1414[d][1][A][i][IV]; 34 C.F.R. § 300.320[a][4]; 8 NYCRR 200.4[d][2][v][a], [b][3]; Piazza v. Florida Union Free Sch. Dist., 2011 WL 1458100, at *1 [S.D.N.Y. Apr. 7, 2011]; Gavrity v. New Lebanon Cent. Sch. Dist., 2009 WL 3164435, at *30 [N.D.N.Y. Sept. 29, 2009] [discussing the student's IEP which appropriately identified program modifications, accommodations, and supplementary aids and services]; P.K. v. Bedford Central Sch. Dist., 569 F. Supp. 2d 371, 380 [S.D.N.Y. 2008]; see also Schreiber v. East Ramapo Central Sch. Dist., 700 F. Supp. 2d 529, 556 [S.D.N.Y. 2010] [noting that when defending a unilateral placement as appropriate under the IDEA, a parent in some circumstances may also be required to demonstrate that appropriate "supplementary aids and services" are provided to the student]).

In New York State, policy guidance explains that "the IEP must include a statement (under the applicable sections of the IEP) if the student needs a particular device or service (including an intervention, accommodation or other program modification) to address one or more of the following needs in order for the student to receive a [FAPE]" ("Guide to Quality Individualized Education Program [IEP] Development and Implementation," at p. 25, Office of Special Educ. [Dec. 2010], available at http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf). "The behavioral interventions and/or supports should be indicated under the applicable section of the IEP," and if necessary, "[a] student's need for a [BIP] must be documented in the IEP" (id.).[18] State procedures for considering the special factor of a student's behavior that impedes his or her learning or that of others may also require that the CSE consider having an FBA conducted and a BIP developed for a student in certain non-disciplinary situations (8 NYCRR 200.4[d][3][i], 200.22[a], [b]). An FBA is defined in State regulations as "the process of determining why a student engages in behaviors that impede learning and how the student's behavior relates to the environment" and "include[s], but is not limited to, the identification of the problem behavior, the definition of the behavior in concrete terms, the identification of the contextual factors that contribute to the behavior (including cognitive and affective factors) and the formulation of a hypothesis regarding the general conditions under which a behavior usually occurs and probable consequences that serve to maintain it" (8 NYCRR 200.1[r]). According to State regulations, an FBA shall be based on multiple sources of data and must be based on more than the student's history of presenting problem behaviors (8 NYCRR 200.22[a][2]). An FBA must also include a baseline setting forth the "frequency, duration, intensity and/or latency across activities, settings, people and times of the day," so that a BIP (if required) may be developed "that addresses antecedent behaviors, reinforcing consequences of the behavior, recommendations for teaching alternative skills or behaviors and an assessment of student preferences for reinforcement" (8 NYCRR 200.22[a][3]). Although State regulations call

[18] While the student's need for a BIP must be documented in the IEP, and prior to the development of the BIP, an FBA either "has [been] or will be conducted ("Guide to Quality Individualized Education Program [IEP] Development and Implementation," at p. 25 [emphasis in original]), it does not follow that in every circumstance an FBA must be conducted and a BIP developed at the same time as the IEP (see Cabouli v. Chappaqua Cent. Sch. Dist., 2006 WL 3102463 [2d Cir. Oct. 27, 2006] [noting that it may be appropriate to address a student's behaviors in an IEP by noting that an FBA and BIP will be developed after a student is enrolled at the proposed district placement]).

for the procedure of using an FBA when developing a BIP, the failure to comply with this procedure does not automatically render a BIP deficient (A.H., 2010 WL 3242234).

With regard to a BIP, the special factor procedures set forth in State regulations further note that the CSE or CPSE "shall consider the development of a [BIP] for a student with a disability when: (i) the student exhibits persistent behaviors that impede his or her learning or that of others, despite consistently implemented general school-wide or classroom-wide interventions; (ii) the student's behavior places the student or others at risk of harm or injury; (iii) the CSE or CPSE is considering more restrictive programs or placements as a result of the student's behavior; and/or (iv) as required pursuant to" 8 NYCRR 201.3 (8 NYCRR 200.22[b][1]). Once again, "[i]f a particular device or service, including an intervention, accommodation or other program modification is needed to address the student's behavior that impedes his or her learning or that of others, the IEP shall so indicate" (8 NYCRR 200.22[b][2]). If the CSE determines that a BIP is necessary for a student "the [BIP] shall identify: (i) the baseline measure of the problem behavior, including the frequency, duration, intensity and/or latency of the targeted behaviors . . . ; (ii) the intervention strategies to be used to alter antecedent events to prevent the occurrence of the behavior, teach individual alternative and adaptive behaviors to the student, and provide consequences for the targeted inappropriate behavior(s) and alternative acceptable behavior(s); and (iii) a schedule to measure the effectiveness of the interventions, including the frequency, duration and intensity of the targeted behaviors at scheduled intervals (8 NYCRR 200.22[b][4]).[19] Neither the IDEA nor its implementing regulations require that the elements of a student's BIP be set forth in the student's IEP ("Student Needs Related to Special Factors," Office of Special Education [April 2011], available at http://www.p12.nysed.gov/specialed/formsnotices/IEP/training/QA-411.pdf). However, once a student's BIP is developed and implemented, "such plan shall be reviewed at least annually by the CSE or CPSE" (8 NYCRR 200.22[b][2]). Furthermore, "[t]he implementation of a student's [BIP] shall include regular progress monitoring of the frequency, duration and intensity of the behavioral interventions at scheduled intervals, as specified in the [BIP] and on the student's IEP. The results of the progress monitoring shall be documented and reported to the student's parents and to the CSE or CPSE and shall be considered in any determination to revise a student's [BIP] or IEP" (8 NYCRR 200.22[b][5]).

In this case, upon review of the hearing record, I find that any behaviors exhibited by the student were not of such a frequency or degree so as to impede his learning or that of others, could adequately be addressed by redirection and refocusing, and that the student did not require an FBA or a BIP. The hearing record identifies two behaviors that the student's private providers sought to address, inappropriate vocalizations and hair twirling (Parent Ex. V at p. 17). At the March 2010 CSE meeting, the student's ABA program supervisor indicated that staff in the student's private program had worked hard to reduce the student's inappropriate vocalizations, a behavior that they believed would make the student stand out socially and which the student used as a way of escaping difficult tasks (id.). According to the ABA program supervisor, a contingency effort procedure had been developed to use with the student to decrease this behavior; however it had not been implemented because the student had been able to respond to redirection for the duration

[19] The Official Analysis of Comments to the federal regulations explains that the decision regarding whether a student requires interventions such as a BIP rests with the CSE and is made on an individual basis (Consideration of Special Factors, 71 Fed. Reg. 46683 [August 14, 2006]).

of the 2009-10 school year (id. at pp. 28-29). The district director of pupil personnel services stated that based on the information shared with the CSE it seemed as though with redirection the student had been compliant (id. at p. 30). The student's ABA program supervisor endorsed this statement (id.). There was less discussion regarding the student's behavior at the April 16, 2010 CSE meeting (see Parent Ex. U). However, during CSE discussions, the ABA supervisor reported that the student was getting "good jobs" and "high fives" as reinforcers (id. at p. 35). She indicated that if the reinforcers were not powerful enough that the student would immediately engage in self-stimulatory behavior (id.).

The April 2010 IEP reflected the information shared with the CSE regarding the student's behavior at the March and April 2010 CSE meetings. Specifically, the IEP noted that the student might engage in heavy breathing, tapping, and hair twirling when he was focusing and concentrating and that the behaviors seemed to serve as an automatic reinforcement for the student (Joint Ex. 14 at p. 4). Consistent with the information provided by the student's ABA program supervisor, the IEP listed nonverbal prompts and redirection as program modifications needed by the student, as well as positive reinforcement with regard to social skills (id. at pp. 2, 5).

In July 2010, the district became aware of an FBA conducted by the student's ABA program supervisor in April and May 2010 (Tr. p. 431; see Joint Ex. 9). The district requested a copy of the FBA, which the parents provided on or around August 6, 2010 (Tr. p. 431; Joint Exs. 3; 7; see Joint Ex. 9).

The ABA program supervisor described how, as part of the FBA, systematic manipulations were completed in six segments to determine motivating variables, and partial interval recording was conducted throughout the systematic manipulation (Joint Ex. 7 at pp. 3-4). Also as part of the FBA, the ABA program supervisor observed the student in his classroom environment (id. at p. 5). She reported that problem behavior was evident throughout each activity (id.). According to the ABA program supervisor, the student exhibited "fidgeting" most often during circle/story time, but that it was not disruptive to the other students (id.). She noted that the behavior that became disruptive, such as inappropriate vocalizations and singing, occurred more often when the student was required to complete repetitive tasks and was not provided with continual prompting and redirection (id.). Based on the data collected, the ABA program supervisor reported the hypothesized function of the behavior as automatic positive reinforcement and socially mediated negative reinforcement (escape) (id.). She opined that based on the frequency of the problem behavior and the risk of the student being socially stigmatized, a behavior reduction plan was warranted (id. at p. 6).

Subsequently, when the CSE reconvened on August 20, 2010, the committee members reviewed the May 2010 FBA conducted by the student's ABA program supervisor (Parent Ex. T at p. 64). The district director of pupil personnel services noted that the CSE wanted to "review this information and then be prepared … if we need to make any changes" (id.). The district's behavior specialist asked the student's mother numerous questions in an attempt to clarify portions of the FBA (id. at pp.64-92). The parent reported that she would take notes of the behavior

specialist's questions and address them (id. at p. 90).[20] The district director of pupil personnel services stated that if the student had a BIP that the district would need to see that as well "so that we can either. . . work collaboratively, make changes," or "modify" the BIP (id. at p. 71).[21]

As result of the CSE's review and discussion of the May 2010 FBA, the August 2010 CSE added a statement to the student's IEP indicating that with parental consent the district's behavioral consultant would collect data and observe the student during the first month he attended the district's school to develop an FBA and BIP if necessary (Joint Ex. 2 at p. 3).

While the impartial hearing officer cited the ABA program supervisor's May 2010 FBA as indicating that the student had a history of stereotypical behaviors that significantly interfered with his academic, social, and language development, the hearing record shows that at the CSE meetings the ABA program supervisor reported that the student's social interactions were generally appropriate and that his inappropriate verbalizations could be redirected (Parent Ex. V at pp. 16-17, 28-30; IHO Decision at p. 15). The ABA program supervisor indicated that a contingency effort procedure had been developed based on the student's history, but that she had never implemented the plan because the student had met her expectations (Parent Ex. V at. p. 30). The impartial hearing officer further found that when the student was engaged in self-stimulatory behaviors that he was not available for learning (IHO Decision at p. 16). However, the student's mother indicated that this was not always the case and that sometimes the student was able to complete his independent work while engaging in hair-twirling (Parent Ex. T at pp. 75, 79-80). The student's mother also reported that the student was not disruptive (id. at p. 80).

Based on a review of the hearing record, I find that the district adequately planned to meet the student's behavioral needs. Here, where the hearing record shows that in anticipation of the student attending the district school the district contracted with a BCBA-D to train its staff and provide direct services to the student, recommended a 1:1 teaching assistant for the student to assist him across all settings, reviewed and sought clarification of an FBA conducted by the student's private providers, and agreed to conduct additional assessments of the student's behavior during the first month that the student attended the program; and, that the CSE recommended the use of strategies such as redirection and positive reinforcement, which the ABA program supervisor had indicated were successful with the student, I cannot conclude that the absence of a district conducted FBA and a BIP resulted in a denial of a FAPE (Parent Exs. T; V at pp. 28-29; Joint Ex. 2 at pp. 2, 5).

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[20] The student's ABA program supervisor responded to the behavior specialist's questions in a document dated August 30, 2010 (Joint Ex. 12).

[21] The hearing record includes an August 17, 2010 BIP from the student's private providers that stated that the "contingent effort procedure" was discontinued in June 2010 and that the students' twirling and inappropriate vocalizations were blocked and redirected (Joint Ex. 43 at p. 2). The BIP indicated that although the student continued to exhibit the problem behaviors that they did not occur at a frequency, intensity, or duration that was currently disruptive to the student's peers or teachers (id.). The BIP further indicated that if the student emitted inappropriate vocalizations, he was to be verbally redirected back to task (id.). If the student engaged in twirling, the behavior was to be blocked with a physical prompt and the student prompted to fold his hands, or if he was using a manipulative to direct him back to task (id.). The BIP indicated that frequency data would continue to be collected (id.). It does not appear that the BIP, which was written on April 27, 2010 and revised on August 17, 2010, was shared with the district (see Parent Ex. T at p. 71; Joint Ex. 43 at p. 1).

Proposed Class Size

Next, I will address the finding by the impartial hearing officer that the size of the assigned class was too large. I note that this issue is in part speculative insofar as the parents did not accept the recommendations of the CSE or the program offered by the district and, furthermore, I note that the hearing record, in its entirety, does not support the conclusion that, had the student attended the assigned school, the district would have deviated from substantial or significant provisions of the student's IEP in a material way and thereby precluded the student from the opportunity to receive educational benefits (Rowley, 458 U.S. at 206-07; A.P. v. Woodstock Bd. of Educ., 2010 WL 1049297 [2d Cir. March 23, 2010]; Cerra, 427 F.3d at 192 [2d Cir. 2005]; see Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811 [9th Cir. 2007]; Houston Independent School District v. Bobby R., 200 F.3d 341 at 349 [5th Cir. 2000]; see also Catalan v. Dist. of Columbia, 478 F. Supp. 2d 73 [D.D.C. 2007]). Additionally, the parents concerns are not adequately supported by the evidence in the hearing record. Although the parents agreed that the student should be placed in a general education kindergarten class, they objected to the number of students that would be assigned to such a class (Parent Ex. U at pp. 30, 34; Joint Ex. 13 at p. 1). The hearing record shows that during the 2009-10 school year, the student had attended a developmental kindergarten class at Butterhill with 14 students, one teacher, and one teacher assistant (see Joint Ex. 23 at p. 2). The student was also assisted in the developmental kindergarten class by an ABA teacher (Joint Ex. 19 at p. 1). Within that setting, the student was able to follow daily classroom routines with prompting, appropriately wait for his turn, and transition appropriately (id. at p. 3). The student was also able to sit in a small group without disrupting others with some prompting, and would attend to the teacher during small group instruction for about 50 percent of the time (id.). According to the district director of pupil personnel services, based on the proposed August 2010 IEP, the student would have attended the district's general education kindergarten class comprised of 25 students for the majority of the school day, including morning routine, calendar, group-time activities, social studies and science, "specials," and lunch (Tr. p. 377). The district director of pupil personnel services reported that the district's kindergarten class would be staffed by a teacher and a teaching assistant (Tr. p. 387). To support the student in this setting, the CSE recommended that the student be provided with an additional 1:1 teaching assistant and the services of a behavior consultant (Tr. pp. 378-80; Joint Ex. 2 at p. 3). The proposed IEP allowed for the behavior consultant to provide direct services to the student in the general education setting and also for indirect consultation by the behavior specialist to the general education teacher (Joint Ex. 2 at pp. 3, 4). In addition, the IEP indicated that general education staff would receive support from the special education teacher 15 minutes per week (id. at p. 4). The IEP indicated that some of the student's related services, specifically group speech-language therapy and PT, could be provided in a flexible setting, allowing the therapists to push into the general education classroom and support the student as necessary (Joint Ex. 2 at p. 3; see Parent Ex. U at pp. 15-33). The ABA program supervisor objected to placing the student in a general education kindergarten class of 25 students, due to her concern that based on the "sheer size" of the class there would more noise and more distractions and the student would have an "issue" with that (Tr. p. 1536). The district director of pupil personnel services stated that the CSE considered the parents' concerns regarding the size of the general education kindergarten class, but determined that based on the information they reviewed, their knowledge of the kindergarten class functioning and small groups structure, and the supports being offered to the student that it was an appropriate placement (Tr. pp. 384-88, 527). Based on the foregoing, I find that the hearing record shows that the district thoughtfully considered the parents' concerns regarding placing the student in a general education kindergarten

class of 25 students and recommended numerous special education services designed to support the student in that environment.

Behavior Consultant Support

Next, I will address the impartial hearing officer's determination that the August 2010 IEP did not include sufficient support from a behavior consultant, specifically that the two hours listed on the student's IEP would not provide sufficient time for the level of supervision needed by a teaching assistant with minimal or no prior background providing ABA instruction, and for the district's behavior specialist to develop instructional programs, and provide staff training (IHO Decision at p. 18). Here, the hearing record shows that by the time of the August 2010 CSE meeting, both the 1:1 teaching assistant and special education teacher had received 45 hours of instruction from the behavior specialist on reinforcement procedures and data collection (Tr. p. 439; Parent Ex. T at pp. 60-61). In addition, the behavior specialist had assisted the special education teacher with redesigning her classroom management system (Tr. pp. 701-08; Parent Ex. T at pp. 44-58). Furthermore, while the impartial hearing officer cited only two hours per week of consultant services by the behavior specialist, the August 2010 IEP actually recommended that the student be provided with two hours per week of direct services from the behavior specialist and that the behavior specialist would provide school staff with 60 minutes per week of indirect consultation (Tr. p. 426; Joint Ex. 2 at p. 4). The IEP also called for 60 minutes per month of parent counseling and training to be provided by the behavior specialist (Joint Ex. 2 at p. 3). The district director of pupil personnel services estimated that the behavior specialist would provide 13 hours of services per month, directly to or regarding the student, whereas according to the impartial hearing officer's calculation the student would have only received 8 hours per month of services (Tr. p. 426). Accordingly, I find that the August 2010 IEP included sufficient support from a behavior consultant.

LRE

Next, I will consider the impartial hearing officer's finding that the student's proposed placement in a 12:1+1 special class for ELA and mathematics was overly restrictive. The IDEA requires that a student's recommended program must be provided in the 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 Newington, 546 F.3d at 111; Gagliardo, 489 F.3d at 105; Walczak, 142 F.3d at 132; Patskin, 583 F. Supp. 2d at 428). In determining an appropriate placement in the LRE, the IDEA requires that students with disabilities be educated to the maximum extent appropriate with students who are not disabled and that special classes, separate schooling, or other removal of students with disabilities from the general 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]; Newington, 546 F.3d at 112, 120-21; Oberti, v. Bd. of Educ., 995 F.2d 1204, 1215 [3d Cir. 1993]; J.S. v. North Colonie Cent. Sch. Dist., 586 F. Supp. 2d 74, 82 [N.D.N.Y. 2008]; Patskin, 583 F. Supp. 2d at 430; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 144 [N.D.N.Y. 2004]; Mavis v. Sobel, 839 F. Supp. 968, 982 [N.D.N.Y. 1993]). 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]; 8 NYCRR 200.4[d][4][ii][b]; see

34 C.F.R. § 300.116). Consideration is also given to any potential harmful effect on students or on the quality of services that they need (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 students with disabilities for special education and related services (34 C.F.R. § 300.115; 8 NYCRR 200.6). The continuum of alternative placements 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]).

To apply the principles described above, the Second Circuit adopted a two-pronged test for determining whether an IEP places a student in the LRE, considering (1) whether education in the general classroom, with the use of supplemental aids and services, can be achieved satisfactorily for a given student, and, if not, (2) whether the school has mainstreamed the student to the maximum extent appropriate (Newington, 546 F.3d at 119-20; see North Colonie, 586 F. Supp. 2d at 82; Patskin, 583 F. Supp. 2d at 430; see also Oberti, 995 F.2d at 1217-18; Daniel R.R., 874 F.2d at 1048-50). A determination regarding the first prong, (whether a student with a disability can be educated satisfactorily in a general education class with supplemental aids and services), is made through an examination of a non-exhaustive list of factors, including, but not limited to "(1) whether the school district has made reasonable efforts to accommodate the child in a regular classroom; (2) the educational benefits available to the child in a regular class, with appropriate supplementary aids and services, as compared to the benefits provided in a special education class; and (3) the possible negative effects of the inclusion of the child on the education of the other students in the class" (Newington, 546 F.3d at 120; see North Colonie, 586 F. Supp. 2d at 82; Patskin, 583 F. Supp. 2d at 430; see also Oberti, 995 F.2d at 1217-18; Daniel R.R., 874 F.2d at 1048-50). The Court recognized the tension that occurs at times between the objective of having a district provide an education suited to a student's particular needs and the objective of educating that student with non-disabled peers as much as circumstances allow (Newington, 546 F.3d at 119, citing Daniel R.R., v. State Bd. of Educ., 874 F.2d 1036, 1044 [5th Cir. 1989]). The Court explained that the inquiry is individualized and fact specific, taking into account the nature of the student's condition and the school's particular efforts to accommodate it (Newington, 546 F.3d at 120).[22]

If, after examining the factors under the first prong, it is determined that the district was justified in removing the student from the general education classroom and placing the student in a special class, the second prong requires consideration of whether the district has included the student in school programs with nondisabled students to the maximum extent appropriate (Newington, 546 F.3d at 120).

In this case, I find that the hearing record demonstrates that the recommended placement for the student for the 2010-11 school year was the LRE for the student. With regard to the first prong of the Newington test and whether the student could be educated satisfactorily in the general education classroom with supplemental aids and services for ELA and mathematics, I find that the hearing record reflects the student's need for specialized instruction to address the student's deficits

[22] The Second Circuit left open the question of whether costs should be taken into account as one of the relevant factors in the first prong of the LRE analysis (Newington, 546 F.3d at 120 n.4).

in the areas of reading, language, and mathematics (Tr. pp. 376-77, 655-56, 663-64; Joint Exs. 2; 14). Accordingly, I find that the CSE's decision to depart from the presumption that the student should be placed in a general education class with supplementary aids and services for ELA and mathematics is supported by the hearing record and further find that the student required a special class setting for those two subjects in order to be educated satisfactorily.

Turning to the second prong, I am persuaded by the hearing record that while recommending a 12:1+1 special class setting for ELA and mathematics, the recommended placement provided the student with the special education instruction that the student required in a small group setting while maximizing his inclusion in the remainder of the school programs with general education peers to the maximum extent appropriate (see Tr. pp. 363, 374-77, 393-94, 415, 616; Joint Exs. 2; 14; see also 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]; Newington, 546 F.3d at 112, 120-21; Oberti, 995 F.2d at 1215; North Colonie, 586 F. Supp. 2d at 82; Patskin, 583 F. Supp. 2d at 430; Watson, 325 F. Supp. 2d at 144; Mavis, 839 F. Supp. at 982).

ESY Program

In developing an IEP for a student with a disability, a CSE "shall include" 12-month services in the IEP recommendations for students who meet the eligibility requirements (8 NYCRR 200.4[d][2][x]; see 34 C.F.R. 300.106[a][1], [a][2] [requiring districts to "ensure that extended school year services are available as necessary to provide FAPE," and further requiring that extended school year services "must be provided" to a student if the CSE determines "that the services are necessary for the provision of a FAPE"]; 34 C.F.R. 300.106[b] [defining extended school year services as both "special education and related services" that are provided to a student with a disability beyond the "normal school year," in accordance with the student's IEP, and at no cost to the parents]).

To determine eligibility, State regulations require that students "shall be considered for 12-month special services and/or programs in accordance with their need to prevent substantial regression, if they are:"

> students who are not in programs as described in subparagraphs (i) through (iv) of this paragraph during the period of September through June and who, because of their disabilities, exhibit the need for a 12-month special service and/or program provided in a structured learning environment of up to 12 months duration in order to prevent substantial regression as determined by the committee on special education

(8 NYCRR 200.6[k][1]; [k][1][v]). State regulations define a 12-month special service and/or program as a

> special education service and/or program provided on a year-round basis, for students determined to be eligible in accordance with sections 200.6(k)(1) . . . of this Part whose disabilities require a structured learning environment of up to 12 months duration to prevent substantial regression. A special service and/or program

> shall operate for at least 30 school days during the months of July and August, inclusive of legal holidays, except that a program consisting solely of related service(s) shall be provided with the frequency and duration specified in the student's individualized education program

(8 NYCRR 200.1[eee]).

Here, the hearing record shows that the April 14, 2010 CSE found the student eligible for ESY services for the 2010-11 school year (Joint Ex. 14 at p. 1). In addition, the April CSE recommended the student for ESY services, specifically three hours per day in a 12:1+1 special class with related services of two 30-minute sessions of 1:1 speech-language therapy per week, one 30-minute session of group (5:1) speech-language therapy per week, two 30-minute sessions of 1:1 OT per week, and two 30 minute sessions of 1:1 PT per week (id. at p. 2). The IEP also included a one time per month 60 minute behavior consultation by a behavior specialist (id. at p. 3). While the April 2010 IEP did not include the provision of a 1:1 teaching assistant (see Joint Ex. 14), the district director of pupil personnel services testified that the omission of a 1:1 teaching assistant and behavior consultation services for the ESY program was a clerical error (Tr. pp. 581-83; see Parent Ex. U at p. 90).[23] She indicated that when she met with the student's mother on June 10, 2010, she assured her that these services would be added to the student's IEP (Tr. p. 584). The parent acknowledged that the conversation regarding a 1:1 teaching assistant and the student's ESY IEP took place on June 10, 2010 (Tr. pp. 136-37, 147). The parents' behavior consultant also noted this conversation in her educational observation and program review report (Joint Ex. 49 at p. 8). In addition, the hearing record shows that in summer 2010, the district's behavior specialist was present in the recommended 12:1+1 placement for approximately 9 hours per week for five weeks, during which time she provided staff with training within the classroom (Tr. pp. 439).

Regarding the impartial hearing officer's finding that the recommended summer program was not the student's LRE, I find that the impartial hearing officer erred in applying the LRE analysis without taking into consideration that the district does not have an obligation to provide ESY services to nondisabled students and did not have any summer programs for non-disabled students in which the student could be placed (see Tr. pp. 668, 671; see also Travis G. v. New Hope-Solebury School District, 544 F. Supp.2d 435, 443 [E.D.N.Y. 2008]).[24] In addition, while it has been recognized that LRE is a component of an ESY determination, the IDEA has been construed as not creating a requirement for "artificial LRE settings during the summer months" (Reusch v. Fountain, 872 F. Supp. 1421, 1438 [D. Maryland 1994]). Accordingly, I find that the impartial hearing officer erred in finding that the district denied the student a FAPE based upon a finding that the placement offered for the ESY was not the student's LRE.

[23] Although the April IEP included a one time per month 60 minute behavior consultation, the district director of pupil personnel services appears to be referring to the weekly behavior consultation services discussed with the parent's behavior consultant (see Joint Ex. 49 at p. 8).

[24] The hearing record indicates that the district had two ESY placement choices for the student and that the parents rejected a full day BOCES program, leaving the district's six week half-day 12:1+1 special class (Tr. pp. 135, 138-39, 400-403).

Conclusion

Having determined that the district offered the student a FAPE for the 2010-11 school year, it is not necessary to reach the issue of whether Butterhill was appropriate for the student or whether equitable considerations support the parents' claim and the necessary inquiry is at an end (M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 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 determination herein.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that those parts of the impartial hearing officer's decision, dated May 16, 2011, which found that the district did not offer the student a FAPE for the 2010-11 school years are annulled; and

IT IS FURTHER ORDERD that the portions of the impartial hearing officer's decision dated May 16, 2011, directing the district to reimburse the parents for the costs of the student's tuition costs at Butterhill for the 2010-11 school year, services and transportation costs are annulled; and

IT IS FURTHER ORDERD that the district shall reimburse the parents for the costs of the student's pendency program upon receipt of invoices and proof of payment effective from the date of July 1, 2010 for the twelve-month school year.

Dated: **Albany, New York**
August 22, 2011

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STEPHANIE DEYOE
STATE REVIEW OFFICER