



The University of the State of New York

The State Education Department State Review Officer

No. 07-002

Application of the BOARD OF EDUCATION OF THE SHERRILL CITY SCHOOL DISTRICT for review of a determination of a hearing officer relating to the provision of educational services to a child with a disability

Appearances:

Hancock & Estabrook, LLP, attorney for petitioner, Laurel E. Baum, Esq., of counsel

Law Office of Andrew K. Cuddy, attorney for respondents, Andrew K. Cuddy, Esq., of counsel

DECISION

Petitioner, the Board of Education of the Sherrill City School District, appeals from that portion of a decision of an impartial hearing officer which determined that the failure of its Committee on Special Education (CSE) to provide direct consultant teacher or resource room services for respondents' son denied the child an appropriate educational program for the 2005-06 school year. Respondents' cross-appeal from that portion of the impartial hearing officer's decision which denied their request for an award of additional services. The appeal must be sustained. The cross-appeal must be dismissed.

At the commencement of the impartial hearing on July 17, 2006, respondents' son was six years old and receiving occupational therapy and speech-language services at home (Tr. p. 705; Dist. Ex. 181 at p. 2). The child's classification and eligibility for special education programs and services as a student with autism are not in dispute (Parent Exs. 1, 2; see 8 NYCRR 200.1[zz][1]).

In April 2002, when the child was two years old, the child's pediatrician referred him to the New York State Early Intervention Program (EIP) due to concerns regarding his communication development (Dist. Exs. 2; 8 at pp. 1, 7). A May 2002 EIP evaluation of the child revealed global expressive and receptive language delays (Dist. Ex. 8 at p. 4). The evaluator recommended monitoring his cognitive ability development and behavior (Dist. Ex. 8 at p. 7). Through the EIP, the child received speech-language therapy and also developmental group services provided by a special education teacher (Dist. Ex. 9; Parent Ex. 53). In November 2002, the child was referred by the EIP to petitioner's Committee on Preschool Special Education (CPSE) (Dist. Ex. 6). In August 2003, petitioner's CPSE convened for an initial review of the child (Parent Ex. 9). The

CPSE determined that the child was eligible for special education services as a preschool student with a disability and recommended placement in a ten-month 12:1+3 integrated preschool program with the related services of counseling and speech-language therapy (Parent Ex. 9 at pp. 1-2).

At the beginning of the 2003-04 school year, the child attended a full-day integrated preschool program at United Cerebral Palsy (UCP) and received daily special education teacher services, speech-language therapy three times per week, and counseling services twice weekly (Dist. Exs. 15, 19). At the end of September 2003, classroom observations of the child were conducted by the director of UCP's Promise Program, a program for students with autism spectrum disorders, and UCP's licensed psychologist, due to concerns regarding the child's behavior and adjustment to the classroom (Parent Exs. 48, 49). The licensed psychologist reported that the child exhibited significant delays in language and social skills, demonstrated "aberrant" sensory responses and had difficulty with transitioning (Parent Ex. 49 at p. 4). She stated that the child presented as meeting the criteria for a diagnosis of Pervasive Developmental Disorder-Not Otherwise Specified (PDD-NOS) (*id.*). Her recommendations included an occupational therapy evaluation in order to develop a sensory diet for the child, and the development of a home program for respondents (*id.*).

In October 2003, the child's special education teacher referred him for an occupational therapy evaluation to assess his fine motor skills (Dist. Ex. 19; Parent Ex. 47). The December 2003 occupational therapy evaluation revealed fine and visual motor delays and poor sensory processing ability (Parent Ex. 47 at p. 5). The CPSE reconvened in January 2004 and added three sessions of occupational therapy per week to the child's program (Parent Ex. 8 at pp. 1-3).

On June 1, 2004, the CPSE met and recommended that during the 2004-05 school year the child continue in his 12:1+3 integrated UCP preschool program with the related services of speech-language and occupational therapy (Dist. Ex. 66; Parent Ex. 7). Counseling services were discontinued (Dist. Ex. 66). The child received extended school year services during summer 2004 (Dist. Exs. 28, 29). The CPSE reconvened in late July 2004 and changed the child's 2004-05 program and placement recommendation to a 12:1+1 integrated classroom at a Board of Cooperative Educational Services (BOCES) preschool (Parent Exs. 6.1, 24, 26).

In September 2004, the child received a physical therapy evaluation that revealed gross motor skill delays for which physical therapy was recommended (Parent Ex. 41). At the beginning of the 2004-05 school year, respondents opted to keep the child at home, and in November 2004 the CPSE recommended that he receive home-based special education itinerant teacher (SEIT) services, and speech-language, occupational and physical therapy services, also at home (Parent Ex. 6).

On February 1, 2005, the CPSE convened and placed the child in the 12:1+1 integrated BOCES preschool program where he also received speech-language, occupational and physical therapies (Parent Ex. 5). At that time, the child's SEIT reported that he exhibited developmentally appropriate cognitive skills for his age and grade (Dist. Ex. 87).

On March 29, 2005, petitioner's developmental program special education teacher (special education teacher) observed the child in his BOCES preschool class and spoke with his teachers (Tr. pp. 390-93; Parent Ex. 66; *see* Dist. Ex. 147). After discussion with his teachers, the special

education teacher concluded that the child was "doing great," exhibited typical behaviors and was "fit" for a kindergarten class rather than a self-contained 12:1+1 class (Parent Ex. 66).

In spring 2005, the child underwent a variety of assessments in preparation for his June 2005 annual review (Parent Exs. 4 at p. 4; 37; 38; 40). Administration of the Mullen Scales of Early Learning that measured the child's skills in the areas of visual reception (Below Average), fine motor (Average), receptive language (Very Low) and expressive language (Very Low) yielded an early learning composite standard score (SS) of 64 (1st percentile, Very Low) (Parent Ex. 40). The Bracken Basic Concept Scale-Revised was administered to the child in April 2005 and yielded a total test SS of 79, and a school readiness composite SS of 103 (Dist. Ex. 96 at p. 2; Parent Ex. 4 at p. 4). The occupational therapist conducted gross and fine motor assessments, a test of visual motor integration and a sensory profile (Parent Ex. 38). Twice weekly group occupational therapy was recommended for the child for the upcoming 2005-06 school year (Parent Ex. 38 at p. 1). Speech-language assessments of the child revealed moderate to severe expressive and receptive language delays and the need to increase his functional communication skills (Parent Ex. 37).

Petitioner's CSE met for an initial annual review of the child on June 2, 2005 (Tr. p. 68; Parent Ex. 4). Staff from the child's BOCES preschool program attended (Tr. p. 160; see Parent Ex. 4 at p. 16). The proposed 2005-06 individualized education program (IEP) described the child as having a moderate to severe language delay, for which he needed to improve his ability to follow complex directions, respond to questions that required reasoning, and expand the complexity of his utterances (Parent Ex. 4 at p. 6). The IEP stated that the child got along well with peers and adults, was socially appropriate and engaged in cooperative play (*id.*). He was noted to generally follow classroom routines, and behaviors such as temper tantrums and hypersensitivity to noise were not observed (Parent Ex. 4 at p. 7). The IEP contained annual goals and short-term objectives in the areas of gross motor, sensory processing, auditory comprehension, expressive language, self-care, perceptual motor, and social skills (Parent Ex. 4 at pp. 10-15). The child was found eligible for special education services as a student with autism and a ten-month general education kindergarten program was recommended (Parent Ex. 4 at pp. 1-3). The CSE offered the child speech-language therapy four times per week, occupational therapy three times per week and physical therapy twice per week, as well as program modifications/accommodations and supplementary aides and services that included ear muffs for fire drills, a home/school communication notebook, monthly parent communication and parent/team meetings (Parent Ex. 4 at pp. 2-3).

Prior to the beginning of the 2005-06 school year, the child's mother requested that petitioner's special education teacher provide her with academic materials for the child (Tr. pp. 390-91; Parent Ex. 66). The child's mother also visited the special education teacher's classroom to discuss her concerns regarding the upcoming school year and met with petitioner's staff including the child's kindergarten teacher, speech-language pathologist, principal, and special education coordinator/CSE Chairperson (CSE Chairperson) to discuss the child's program (Tr. pp. 21, 70, 129, 158-59, 443-44, 606; Parent Ex. 95).

The child began the 2005-06 school year in petitioner's general education kindergarten class and received related services (Tr. pp. 159, 257-58, 287-89, 443-44). In middle to late September 2005, the child began to receive daily speech-language therapy and petitioner added transitional support services to the child's program for his general education teacher (Tr. pp. 166,

687-88). The child was absent from school 11 days, tardy one day and excused once mid-day during September 2005 (Parent Ex. 90).

Respondents met with petitioner's staff to discuss their concerns about the child's educational program on September 22, 26 and 30, 2005 (Parent Exs. 92-94). One of the concerns raised by respondents at the September 30, 2005 meeting was the frequency of the child's speech-language therapy services (Parent Ex. 92).

The CSE convened on October 17, 2005 for a program review (Tr. p. 728; Parent Ex. 3). The resultant IEP, which is in dispute in this appeal, recommended that the child receive daily speech-language therapy services, three times per six-day cycle in a group of two or less and three times per six-day cycle individually (Tr. p. 54; Parent Ex. 3 at p. 2). The CSE also added group counseling services one time per six-day cycle (Parent Ex. 3 at p. 2). The level of occupational and physical therapy service remained unchanged (*id.*). In the area of supplementary aides and services, the CSE added bi-weekly family networking support, a communication tracking sheet, Special Education Training and Resource Center (SETRC) family support, and use of social stories (Tr. p. 52; Parent Ex. 3 at pp. 2-3). Additions to supports for school personnel included consultation with petitioner's developmental programming teacher as transitional support services and an independent consultation with a private special education teacher who has a background in autism (independent consultant) (Tr. pp. 51, 517, 523-24; Parent Exs. 3 at p. 3; 34). An annual presentation to faculty on the topic of autism was recommended (Parent Ex. 3 at p. 3).

On November 29, 2005 the independent consultant conducted a three-hour observation of the child in his classroom of 16 students and one teacher and in the lunchroom (Parent Ex. 34). The independent consultant reported that the teacher's interactions with the child were appropriate and that she provided assistance by breaking down tasks into smaller steps for him (Parent Ex. 34 at p. 4). She also reported that the child was praised multiple times for his good attending, listening and quiet sitting (Parent Ex. 34 at p. 3). The child was observed to appropriately request assistance, respond positively to praise, attend and participate in a teacher-led activity, help his peers, and use peer modeling to complete an activity (Parent Ex. 34). The independent consultant's report stated that the child was "observed as a typical kindergartener," was not set apart from his peers, displayed age appropriate eating habits, social interactions with peers and adults, and transitioned independently (Parent Ex. 34 at p. 3). Behaviors noted in reports that the independent consultant read prior to the observation, such as olfactory sensitivity, licking, auditory sensitivity, picky eating, fearfulness, hand flapping, inconsistent eye contact and poor social engagement, were not observed (*id.*). The only concern reported by the independent consultant was the difference between the child's performances when working independently versus in a group; however, she also noted that during independent work the child did not require any more assistance than his typical kindergarten peers (Parent Ex. 34 at p. 4). She suggested exploring the use of visual prompts during completion of the child's independent work to assess how much support he required to learn and retain the information presented (*id.*).

On December 15, 2005, a physician conducted a neurodevelopmental evaluation of the child (Parent Ex. 33). The child was observed to exhibit appropriate social responses and eye contact, demonstrate well-developed nonverbal communication skills and "nicely modulated" symbolic/pretend play skills (Parent Ex. 33 at p. 3). The physician reported that results of standardized behavioral observations did not support an autism spectrum diagnosis, but that the

child's difficulties were related to a complex language disorder that showed early signs of manifesting as a language based learning disability (*id.*). The evaluation report indicated that the child also demonstrated motor planning and motor control difficulties (*id.*). Although the physician reported that the child functioned "rather well" in his current classroom environment, he recommended that the child receive increased in-class support in the form of a 1:1 aide and resource room support to assist with academic skill development (Parent Ex. 33 at pp. 3-4).

In early January 2006, respondents, the CSE Chairperson and the independent consultant met to discuss the consultant's November 2005 observation and to discuss respondents' request for a 1:1 aide for the child (Parent Ex. 108). The independent consultant opined that a 1:1 aide would restrict the child and potentially be used as a crutch (Parent Ex. 108 at pp. 5-6). The CSE Chairperson suggested classroom accommodations to be provided by the classroom teacher and speech-language pathologist (Parent Ex. 108 at pp. 6-8). At the conclusion of the January 2006 meeting, a 1:1 aide for the child was not recommended (Tr. p. 120).

On February 2, 2006, the CSE convened for the child's annual review (Dist. Ex. 132). It was reported that the child was performing in the average to below average range academically, and that socially he got along well with others (Dist. Ex. 132 at p. 4). Changes to the child's related services provision were discussed, as were respondent mother's request for additional assistance for the child (Dist. Ex. 132 at pp. 1, 5). The meeting was tabled to allow petitioner's staff to review special education regulations (Dist. Ex. 132 at p. 1; see Dist. Ex. 132 at p. 5).

In the middle of February 2006, the child stopped attending petitioner's school (Dist. Ex. 149). Respondents requested an impartial hearing by due process complaint notice dated February 17, 2006, which stated that academic intervention services (AIS) were available to children in kindergarten although they had been advised these services were not available, that the consultant teacher was not aware of the child's needs, that communication and academic concerns continued to arise and that petitioner refused to work with respondents regarding the child's academic concerns (Parent Ex. 2 at pp. 1-3). Respondents requested that an assistant teacher with knowledge of "disabled children" provide academic instruction, that a special education consultant teacher monitor the child's needs and that the child be placed with an "experienced" teacher and provide appropriate supports (Parent Ex. 2 at p. 4).

By letter dated March 20, 2006, respondents through their attorney amended the February 2006 due process complaint notice (Parent Ex. 1). Respondents alleged that petitioner failed to accomplish the following: 1) comply with Part 200.13 of the Regulations of the Commissioner of Education (entitled "Educational programs for students with autism"); 2) provide an IEP tailored to the child's needs; 3) provide an appropriate program provided by qualified staff; 4) perform an appropriate sensory integration evaluation and provide an appropriate sensory diet; 5) provide appropriate occupational and physical therapy services; 6) provide a 12-month program; 7) provide family support services in a timely fashion; 8) hold parent/team meetings; 9) properly use the home/school notebook; 10) provide appropriate consulting services; and 11) properly constitute the October 2005 CSE.

Toward the end of March 2006, the child's principal requested that respondents contact the school to arrange provision of the child's related services (Dist. Ex. 149). By letter dated March 31, 2006, petitioner's CSE Chairperson responded to respondents' amended due process complaint

notice (Dist. Ex. 136). A resolution session was held on April 3, 2006 (Dist. Ex. 150). In April 2006, the child's related service provision recommenced (Tr. pp. 748-50).

The impartial hearing commenced on July 17, 2006 and ended on September 14, 2006 after six days of testimony. By decision dated November 20, 2006, the impartial hearing officer found, as pertinent to this appeal, that the child was denied a free appropriate public education (FAPE)¹ to the extent that the October 2005 IEP failed to recommend special education services through direct consultant teacher or resource room services and ordered petitioner to amend the child's IEP to provide for such services.² However, respondents' request for corrective services was equitably denied because of the child's excessive absences and eventual removal from school (IHO Decision, pp. 26-30, 36-37). Additionally, the impartial hearing officer found that, despite substantial absences from school, the child was progressing in the regular education kindergarten class with the "consultant teacher transition services," related services, accommodations and modifications recommended on the October 2005 IEP; however, despite evidence of the child's ability to function in a regular education classroom, regular education AIS were insufficient as a remedial tool to reinforce classroom instruction given the profound nature of the child's language delays and the need for special education instruction in preschool (IHO Decision, pp. 26-30).

Petitioner appeals and asserts that the impartial hearing officer erred in determining that it failed to provide a FAPE to the child. On appeal, petitioner seeks an annulment of that portion of the impartial hearing officer's decision that found that petitioner denied the child a FAPE to the extent that the IEP failed to recommend special education services through either direct consultant teacher or resource room services and a declaration that petitioner provided the child a FAPE pursuant to the October 2005 IEP during the 2005-06 school year.

Respondents cross-appeal and assert that the impartial hearing officer erred by providing no explanation or authority for denying the requested services on equitable grounds. Respondents seek an award of additional services to remedy petitioner's failure to offer the child special education services during the 2005-06 school year.

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

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

(20 U.S.C. § 1401[9]).

² An impartial hearing officer's decision is final and binding upon the parties unless appealed to the State Review Officer (34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[k]). Consequently, the remainder of the decision that was not appealed by petitioner or cross-appealed by respondents is final and binding (Application of a Child Suspected of Having a Disability, Appeal No. 06-092; Application of a Child with a Disability, Appeal No. 04-024; Application of a Child with a Disability, Appeal No. 03-108; Application of a Child with a Disability, Appeal No. 02-100; Application of a Child with a Disability, Appeal No. 02-073).

The central purpose of the Individuals with Disabilities Education Improvement Act (IDEA) (20 U.S.C. §§ 1400-1482)³ is to ensure that students with disabilities have available to them a FAPE (20 U.S.C. § 1400[d][1][A]; see Schaffer v. Weast, 126 S. Ct. 528, 531 [2005]; Bd. of Educ. v. Rowley, 458 U.S. 176, 179-81, 200-01 [1982]; Frank G. v. Bd. of Educ., 459 F.3d 356, 371 [2d Cir. 2006]). A FAPE includes special education and related services designed to meet the student's unique needs, provided in conformity with a comprehensive written IEP (20 U.S.C. § 1401[9][D]; 34 C.F.R. § 300.17[d]; see 20 U.S.C. § 1414[d]; 34 C.F.R. § 300.22).⁴ A FAPE is offered to a student when (a) the board of education complied 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]).

The Second Circuit has determined that "a school district fulfills its substantive obligations under the IDEA if it provides an IEP that is 'likely to produce progress, not regression'" and if the IEP affords the student with an opportunity greater than mere "trivial advancement" (Cerra, 427 F.3d at 195, quoting Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 130 [2d Cir. 1998]), in other words, is likely to provide some "meaningful" benefit (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]). The IDEA, however, does not require school districts to develop IEPs that maximize the potential of a student with a disability (Rowley, 458 U.S. at 197 n.21, 199; see Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 379 [2d Cir. 2003]; Walczak, 142 F.3d at 132). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 C.F.R. §§ 300.114, 300.116; 8 NYCRR 200.6[a][1]). The burden of persuasion in an administrative hearing challenging an IEP is on the party seeking relief (see Schaffer, 126 S. Ct. at 537 [finding it improper under the IDEA to assume that every IEP is invalid until the school district demonstrates that it is not]).

An appropriate educational program begins with an IEP which accurately reflects the results of evaluations to identify the student's needs, establishes annual goals related to those needs, and provides for the use of appropriate special education services (Application of the Bd. of Educ., Appeal No. 06-076; Application of a Child with a Disability, Appeal No. 06-059; Application of the Bd. 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).

³ On December 3, 2004, Congress amended the IDEA; however, the amendments did not take effect until July 1, 2005 (see Individuals with Disabilities Education Improvement Act of 2004 [IDEA 2004], Pub. L. No. 108-446, 118 Stat. 2647). As the relevant events in the instant appeal took place after the effective date of the 2004 amendments, the provisions of the IDEA 2004 apply and the citations contained in this decision are to the newly amended statute.

⁴ The Code of Federal Regulations (34 C.F.R. Parts 300 and 301) has been amended to implement changes made to the Individuals with Disabilities Education Act, as amended by the Individuals with Disabilities Education Improvement Act of 2004. The amended regulations became effective October 13, 2006. In this case, none of the new provisions contained in the amended regulations are applicable because all the relevant events occurred prior to the effective date of the new regulations. However, for convenience, citations herein refer to the regulations as amended because the regulations have been reorganized and renumbered.

Initially, I note that the IEP in dispute is the October 17, 2005 IEP (Tr. pp. 342-43; Parent Ex. 3). However, the initial recommendation for the child to be placed in a general education kindergarten class without direct special education teacher support came from the June 2, 2005 CSE meeting (Parent Ex. 4). The CSE Chairperson testified that the primary reason for the October 2005 CSE program review was to add services pursuant to 8 NYCRR 200.13 to the child's IEP (Tr. p. 687). Therefore, a review of the information that was before the June 2005 CSE is relevant to the analysis of the appropriateness of the October 2005 IEP.

The impartial hearing officer stated that, based on the information before the CSE in October 2005, he did not see evidence to support the child's transition to a full-time general education class (17:1) without direct special education support (IHO Decision, p. 27). I disagree. Beginning in February 2005, the child attended a BOCES "pre-k" program which was part self-contained, part general education (Tr. pp. 113, 138, 420-21; Parent Ex. 5 at p. 2).⁵ The CSE Chairperson opined that BOCES had integrated the child into the general education pre-k program because "[the child] was participating in a program like a typical four year old" (see Tr. p. 113). In March 2005, petitioner's special education teacher conducted an observation of the child at his preschool program, discussed his performance with his teacher and subsequently provided an oral report to the June 2005 CSE (Tr. pp. 393-94, 399). She indicated that she was unable to identify which student she should be observing, and that the preschool teacher had to point out the child to her (Tr. pp. 420-21). The child was observed to follow verbal directions, transition to a new activity "beautifully," participate in a group activity and blend in with the class (id.).

The CSE Chairperson testified that the evaluation reports listed in the October 2005 IEP were reviewed by the June 2005 CSE (Tr. pp. 72-73; Parent Ex. 3 at p. 13). Although they were not listed in the June or October 2005 IEP, the CSE Chairperson indicated that the June 2005 CSE also reviewed the child's July 2003 psychological evaluation report, the September 2003 psychological addendum, the May 2004 developmental evaluation report and the sensory profile contained in the May 2005 occupational therapy annual review report (Tr. pp. 75-76, 79, 107-08; Parent Exs. 38, 42, 49, 50). The June 2005 CSE also reviewed the child's February 2005 preschool IEP, information that the child's therapists and teachers gathered during "transition activities" and his present levels of performance (Tr. pp. 68, 71, 74). Transition activities were described as BOCES staff members and the child's parents visiting available programs for the child, and petitioner's staff visiting the child in his current program (Tr. pp. 113, 681-82; see Parent Ex. 131).

According to the CSE Chairperson, the child's June 2005 IEP contained information from annual reports from the child's BOCES providers, and observations and recommendations based on his performance in that integrated preschool program (Tr. pp. 682-83). The CSE Chairperson testified that the BOCES providers also had reports from the staff who provided the child's home-based services in 2004-05 and reports from his 2003-04 UCP service providers (see Tr. p. 683).

The child's preschool special education teacher, speech-language therapist, occupational therapist, physical therapist and the BOCES educational coordinator were present at the June 2005 CSE meeting (Parent Exs. 4 at p. 16; 37 at p. 2; 38 at p. 1; 39 at p. 2; 40 at p. 1). The CSE reviewed information about the child provided by his preschool providers and the progress the child made

⁵ The child's BOCES program was referred to interchangeably as a preschool and pre-k program (Tr. p. 113; Parent Ex. 5 at p. 2).

in his preschool program (see Tr. pp. 71-72, 160). The present levels of performance contained in the June 2005 IEP were drafted by the child's preschool providers (compare Dist. Ex. 96 at pp. 1, 8-10, with Parent Ex. 4 at pp. 6-7).

Petitioner's speech-language pathologist, who attended the June 2005 CSE meeting, testified that the IEP was based on the child's performance in preschool (Tr. pp. 159-60, 223). She stated that, at the CSE meeting, it was not indicated that the child would need a special education teacher in the classroom with him (Tr. p. 223). The CSE Chairperson testified that the child's preschool staff's recommendation to the June 2005 CSE was that the child should participate in a kindergarten program with related services (Tr. p. 113; Dist. Ex. 96 at p. 1). The CSE concluded that the child's pre-academic skills were appropriate for kindergarten (Tr. p. 113). Therefore, it did not recommend consultant teacher or resource room services at that time (*id.*). This determination regarding direct special education teacher services was also based on the child's performance in the general education portion of his BOCES preschool program (Tr. p. 686). The CSE made the recommendation for general education kindergarten based on the child's performance in the BOCES general education pre-k program for "typical" four-year old children (Tr. pp. 684-85).

The CSE Chairperson observed the child in his classroom at the beginning of September 2005 (Tr. pp. 129-30). She testified that she observed him playing appropriately and that if she did not know who he was, she would not have "picked him out" among the students in the classroom (*id.*). The principal of the child's school observed him in the cafeteria during the first week of school in September 2005 and testified that he "looked typical" and responded very well in that situation (Tr. pp. 610-11).

At the time of the October 2005 CSE meeting, the most recent cognitive assessment of the child was the developmental evaluation conducted in May 2004 (Tr. p. 140; Parent Ex. 42). The CSE Chairperson testified that the child's language deficits identified by the evaluation were addressed by the daily speech-language services recommended by the CSE (Tr. p. 142; Parent Ex. 3 at p. 2).

The kindergarten teacher stated that the child's ability to identify letters, sounds and sight words early in the 2005-06 school year were "normal" and in the range of typical kindergarten students (Tr. pp. 677-78). It was reported that the child demonstrated typical kindergarten behavior in the classroom, a sensory diet was not necessary at that time, and he interacted with peers at lunch (Dist. Ex. 116 at p. 4).

Petitioner contends that it offered the child an appropriate program suited to his special education needs. I concur. Based on the above information that was before the CSE in June 2005 and October 2005, I find that the October 2005 IEP appropriately offered the child a placement that was reasonably calculated to provide him with a meaningful education (see *Rowley*, 458 U.S. at 199; *Cerra*, 427 F.3d at 194-95). Although the impartial hearing officer took note that, at the hearing, the independent consultant opined that the child would benefit from extra help with his reading and writing "through a resource room or that is typically given in a regular ed[ucation] setting" (Tr. p. 537; IHO Decision, p. 27), this was based on an observation of the child that occurred after the October 2005 CSE meeting, and this opinion was not included in the independent consultant's December 2005 report (Parent Ex. 34). Thus, I am not persuaded by this testimony

that the provision of resource room services was necessary to provide the child meaningful educational benefit in the 2005-06 school year (see Matrejek v. Brewster Cent. Sch. Dist., 2007 WL 210093, at *14-*15 [S.D.N.Y. Jan. 9, 2007]).

Moreover, the record shows that, pursuant to the October IEP, the child received special education services that addressed his areas of need. The child's speech-language pathologist for the 2005-06 school year testified that she pretaught the child themes and then reviewed the concepts presented in the classroom (Tr. pp. 193-94). She indicated that her instruction was consistent with the curriculum taught in the classroom (Tr. pp. 641-42). She also discussed weekly lesson plans with the classroom teacher and then retaught the material in therapy sessions (*id.*). The speech-language pathologist stated that the child needed lessons retaught or reinforced, and she provided that service (Tr. pp. 649-50). The CSE Chairperson confirmed that the speech-language pathologist supported the curriculum instruction that the child received in the kindergarten classroom (Tr. p. 30).

The special education teacher provided indirect services to the child's kindergarten teacher on an as-needed basis from October 2005 until February 2006 (Tr. pp. 395, 415-16). The services included informal discussions and formal meetings (Tr. p. 395). The meetings occurred one to two times per week for up to 40 minutes (Tr. p. 396). From October 2005 until February 2006, the special education teacher discussed with the kindergarten teacher child-specific curriculum modifications, fire drill protocols, and behavior management techniques (Tr. pp. 415-16). The special education teacher stated that she provided consultation to the general education teacher, who would develop necessary curriculum modifications (Tr. pp. 429-30). She testified that she and the kindergarten teacher compared curricula and that the kindergarten teacher used special education teaching strategies, such as visual support and repetition of information with the child (Tr. p. 432; Dist. Ex. 156). The kindergarten teacher testified that she did not need the special education teacher's assistance very often because the child was "doing so well" (Tr. p. 445).

Based on the foregoing, I find that petitioner's October 2005 IEP offered the child a FAPE (see Rowley, 458 U.S. at 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). In light of my finding that the October 2005 IEP did not deny the child a FAPE, respondents' request for an equitable award of additional services is denied (see Application of a Child with a Disability, Appeal No. 05-041; Application of the Bd. of Educ., Appeal No. 04-085; Application of the Bd. of Educ., Appeal No. 02-047).

The record also reveals that the child made meaningful progress during the time that he attended kindergarten. The kindergarten teacher testified that the child was never uncooperative, always willing to participate, acted appropriately and did not exhibit problem behaviors (Tr. pp. 468, 480-81). He was observed to demonstrate appropriate social behavior with peers and teachers (Tr. pp. 484-85). She stated that the child's basic academic knowledge was in the average to slightly below average range and that he presented as a typical child in her classroom (Tr. pp. 468-69). She indicated that she had not seen any evidence of the child's language based learning disability affecting his performance in her classroom (Tr. p. 470). Although at times the child was observed to have comprehension and attention problems in the classroom, the kindergarten teacher stated that it did not occur more than with other typical kindergarten students and was "nothing out of the ordinary" (Tr. p. 475). The social worker who provided the child's counseling services described the child as enthusiastic, a good listener and a child who followed directions (Tr. pp.

491, 497). She opined that the child's responses were typical and although his speech was more limited than other children, it was very easy to communicate with him (Tr. p. 497). She testified that the child did not stand out within the kindergarten setting in his ability to communicate (Tr. p. 498). In November 2005, the independent consultant observed the child to be a "typical kindergartener" who was not set apart from his peers (Parent Ex. 34 at p. 3).

The child's report card indicated that during the first marking period he was absent 19 times and tardy six times (Dist. Ex. 172). In the second marking period he was absent 16 times, and in the third marking period he was absent 28 times before his removal from school in the middle of February 2006 (Tr. p. 595; Dist. Ex. 172). In October 2005, the child reportedly knew his colors and shapes, recognized numbers one through ten, 44 of 52 letters, 1 of 26 sounds, and 3 of 33 sight words (Dist. Ex. 172). In November 2005, the kindergarten teacher reported that academically the child made good progress and was adjusting well to kindergarten (Tr. p. 482; Dist. Ex. 172). In January 2006, the report card reflected that the child knew 52 of 52 letters, 11 of 26 sounds, 7 of 33 sight words and recognized numbers 1 through 20 (Dist. Ex. 172). The kindergarten teacher testified that despite the amount of absences, she was pleased with the growth the child made, which continued every marking period that he attended school (Tr. p. 482). The child's teacher stated that his progress was in the "typical range" (Tr. pp. 453-54, 678-80). She indicated that she did not significantly change the child's reading instruction compared to the other students in the class (Tr. pp. 448-49). She occasionally sat with the child and broke down the information, reiterated and re-explained it, but that was the same instruction that other children needed at times (*id.*). The kindergarten teacher stated that the child was successful in general education and ready to progress to first grade (Tr. p. 468). Under the circumstances, I find that petitioner offered appropriate special education services to meet the child's individual needs (see *Viola v. Arlington Cent. Sch. Dist.*, 414 F. Supp. 2d 366, 381, 384 [S.D.N.Y. 2006]).

I have considered the parties' remaining contentions and find them to be without merit.

THE APPEAL IS SUSTAINED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the impartial hearing officer's decision is hereby annulled to the extent that it found that petitioner denied the child a FAPE and ordered petitioner to amend the IEP to add direct consultant teacher or resource room services.

**Dated: Albany, New York
February 22, 2007**

**PAUL F. KELLY
STATE REVIEW OFFICER**