The University of the State of New York

The State Education Department
State Review Officer

No. 07-028

Application of the BOARD OF EDUCATION OF THE ALLEGANY-LIMESTONE CENTRAL 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:
Hogan, Sarzynski, Lynch, Surowka & Dewind, LLP, attorney for petitioner, Edward J. Sarzynski, 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 Allegany-Limestone Central School District, appeals from the decision of an impartial hearing officer which found that it failed to provide a free appropriate public education (FAPE) to the student for the 2004-05 and 2005-06 school years. Respondents cross-appeal from that part of the impartial hearing officer's decision which denied their request to be reimbursed for tuition expenses for summer 2005 and summer 2006. The appeal must be sustained. The cross-appeal must be sustained.

Preliminarily, I will address a procedural issue. Petitioner attaches to its petition electronic mailings between the impartial hearing officer and the parties regarding eliminating duplicative exhibits in the record, and requests that they be made part of the record. Respondents object. Generally, documentary evidence not presented at a hearing may be considered in an appeal from an impartial hearing officer's decision if such additional evidence could not have been offered at the time of the hearing and the evidence is necessary to enable the State Review Officer (SRO) to render a decision (Application of a Child with a Disability, Appeal No. 06-058; Application of a Child with a Disability, Appeal No. 05-020). In this case, while some of the electronic mailings could not have been offered at the time of the impartial hearing, they are not necessary for my

review and I decline to accept them (Application of a Child with a Disability, Appeal No. 06-058; Application of a Child with a Disability, Appeal No. 05-020).[1]

When the impartial hearing began in July 2006, the student was 13 years old and had completed the seventh grade at petitioner's middle school. The student's overall intellectual ability is in the low average range (Dist. Ex. 70 at p. 3). His speech and language abilities are in the low average range, while his pragmatic language abilities are within normal limits (Dist. Ex. 56 at p. 3). Behavior rating scales indicate a pattern of significant behavioral concerns related to peer relations and obsessive-compulsive behaviors (Dist. Ex. 70 at p. 7). The student has diagnoses of attention deficit hyperactivity disorder (ADHD) and Asperger's disorder with obsessive-compulsive symptoms (id. at p. 2; Dist. Ex. 8). He is classified as having autism (Dist. Ex. 111 at p. 1). His classification and eligibility for special education programs and services as a student with autism are not in dispute (8 NYCRR 200.1[zz][1]).[2]

The student received services as a preschool child with a disability (Dist. Ex. 70 at p. 2). He transitioned to petitioner's Committee on Special Education (CSE) in 1997 and was classified as speech impaired (id.). Throughout his elementary school years, he continued to receive special education and related services including individual and small group speech-language therapy which focused on articulation, expressive and receptive language, semantics, auditory processing, and pragmatics (Dist. Ex. 56 at p. 1; Parent Exs. 4; 5; 7; 8; 9; 10). In February 2003, the student's classification was changed to other health-impairment (Parent Ex. 4 at p. 1).

In February 2004, when the student was in fifth grade, the CSE met to develop the student's individualized education program (IEP) for the 2004-05 school year when the student would be in the sixth grade and entering middle school (Parent Ex. 3). The CSE recommended that the student be placed in a 12:1+1 special education class and that he participate in general education for math and science (id. at p. 3). The CSE also recommended a half-time individual aide and counseling in a small group one time per week for 30 minutes (id.). The proposed IEP included goals related to the student's social functioning, behavior, and communication needs (id. at pp. 5-6). Corresponding short-term objectives related to the student's communication and conversational deficits and were to be addressed by his special education teacher (id. at p. 6). The student was dismissed from speech-language therapy at the end of the 2003-04 school year based on respondents' request and minimal progress over a one to two year period of "consecutive management strategies" (Dist. Ex. 56 at p. 1).

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[1] I note that the record in this case includes over 340 exhibits totaling over 1400 pages. Although the impartial hearing officer and the parties attempted to eliminate duplicate and irrelevant exhibits, the record was cumbersome and still contained numerous duplicate and irrelevant exhibits. I remind impartial hearing officers of their responsibilities pursuant to state regulations which require that, prior to the hearing, the impartial hearing officer, wherever practicable, "shall enter into the record a stipulation of facts and/or joint exhibits agreed to by the parties" and that the impartial hearing officer "shall exclude evidence that he or she determines to be irrelevant, immaterial, unreliable, or unduly repetitious" (8 NYCRR 200.5[j][3][xii][b], [c]).

[2] Petitioner asserts that respondents raised improper classification as an issue and that the impartial hearing officer did not find that respondents failed to meet their burden on that issue. At the impartial hearing, respondents' attorney indicated that respondents were not disputing the classification of autism (July 12, 2006 Tr. pp. 111-12).

The student began sixth grade at petitioner's middle school in September 2004 (Parent Ex. 3 at p. 3). In approximately February 2005, the student began to exhibit increased behavioral difficulties (July 10, 2006 Tr. p. 56). The CSE convened on March 11, 2005 (Dist. Ex. 3). Meeting minutes indicated that the student struggled with peer relationships, he exhibited tactile defensiveness, and that large group settings were overly stimulating for him (id.). Meeting minutes also indicated that an occupational therapist had consulted with the student's special education teacher for suggested calming activities and techniques for focus (id.). The CSE recommended a functional behavioral assessment (FBA)[3] and a behavior contract (id.). It agreed to contact a behavior specialist from the Board of Cooperative Education Services (BOCES) to conduct an observation of the student and make recommendations (id.). Respondents' request for a summer program was discussed at the meeting, but the CSE concluded that the student did not qualify for summer programming (id.).

On March 18, 2005, petitioner's staff used physical intervention techniques with the student during a behavioral incident in which he became aggressive and destructive, kicking the teacher aide and throwing classroom furniture (Parent Exs. 97; 98).[4]

An April 1, 2005 "functional behavior worksheet" was completed based on information gathered from meetings and consultations with the student's special education teacher, school counselor, aide, the school psychologist and the student's mother (Dist. Ex. 4). It included information which identified and described the student's behavior, indicated when the student was most likely to engage in such behavior, listed the specific events or factors that triggered the behavior and suggested what the student might be trying to communicate through the behavior (id. at pp. 1-2). It also included possible intervention strategies such as managing the student's environment by establishing clear rules, teaching and enforcing the rules, and using a "cool down" or "time away" technique (id. at pp. 3-5).

The CSE reconvened on April 4, 2005 (Dist. Exs. 5; 6). Meeting minutes indicated that the CSE reviewed the functional behavior worksheet, trial behavior plan, and observations and input from the BOCES behavior specialist (Dist. Ex. 5 at p. 1). The meeting minutes further indicated that the student's most problematic behavior was his use of force to get what he wanted (id.). Large group settings seemed to trigger the behavior (id.). Meeting minutes also indicated that respondents informed the CSE that the student had been taken off medication used for his obsessions and compulsions, and that he began exhibiting behavior problems around the same time (id.). The CSE recommended that the student's individual aide be increased to full time, that he remain in general education classes to avoid a potentially upsetting change of routine, and that the trial behavior plan be continued (id. at pp. 1, 2). The CSE discussed extended school year (ESY) services for summer 2005 and recommended that the student be observed for regression after an

[3] A functional behavioral assessment means the process of determining why a student engages in behaviors that impede learning and how the student's behavior relates to the environment. It shall include, 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 probably consequences that serve to maintain it (8 NYCRR 200.1[r]).

[4] District staff used physical intervention techniques with the student approximately 10 times between March and June 2005 during behavioral incidents in which he became aggressive or destructive (Parent Exs. 96, 98, 99, 120).

upcoming break (id. at p. 2). The CSE also agreed to contact a behavior consultant and have the BOCES behavior specialist conduct another observation of the student (id.).

The BOCES behavioral specialist observed the student on April 28, 2005 for two hours (Dist. Ex. 7). She noted that the student was concerned about whether his classmates were following directions and working on the assigned task (id. at pp. 2-3). After the observation, she met with the student's special education teacher and counselor to gather additional information and discuss possible interventions and strategies (id.).

By letter dated May 17, 2005 to the student's special education teacher, the student's physician indicated that the student had an autism spectrum disorder and that despite medications, the student was prone to difficult behaviors (Dist. Ex. 14). The student's physician further indicated that using physical intervention when the student became upset would likely cause the student to lose further control (id.). He stated that when the student's behavior was "severe enough that self harm, harm to others or significant destruction of property is likely, he needs to be managed by being put in a 'safe room,' where he cannot do any damage, and monitored there until he calms down." (id.).

In a behavior observation report dated May 19, 2005, the behavior consultant obtained by petitioner reported that she observed very intense behaviors with long durations which put the student at risk of injuring himself or others (Dist. Ex. 16 at p. 3). She indicated that she reviewed the existing behavior plan, discussed strategies with petitioner's staff, considered respondents' concerns and made several recommendations including an emergency 20-day plan to be used until the end of the school year to address the student's behavior (id. at pp. 3-5). The observation report also included a daily schedule, a list of rules, and a reward system (id. at pp. 7-11).

In a spring 2005 letter to the CSE chairperson, a private psychologist who had met twice with the student and his parents for consultation indicated that the student required an "educational program in the summer to minimize regression of progress" (July 10, 2007 Tr. p. 82; Dist. Exs. 8; 226 at p. 3). He further indicated that "this is a critical time for [the student] to receive specialized treatment to improve social skills and emotional coping mechanisms" (Dist. Ex. 8). The private psychologist recommended referral to a program that specialized in the treatment of autism spectrum disorders and that would also provide the family and school district with consultation (id.).

The CSE convened on May 20, 2005 and developed the student's IEP for the 2005-06 school year (Dist. Ex. 18). Meeting minutes indicated that the CSE discussed the existing behavior plan and indicated that it would be "fine tuned" based on suggestions from the behavioral consultant (id. at p. 1). Meeting minutes characterized the student's behaviors as attention-seeking and an effort to gain control (id.). The CSE designated a room as a cool down space (id.). The IEP developed as a result of the meeting provided for a 12:1+1 special education class with an individual aide (Dist. Ex. 19). It included goals for socialization and behavior and the services of a behavioral consultant for 40 hours per year (id. at pp. 5, 6).

An end of the year report card indicated that the student achieved passing grades in all subjects, including general education subjects (Parent Ex. 102). His grades ranged from 88 in reading to 65 in Spanish and were generally in the mid 70s and 80s (id.).

The student attended the Connections Program (Connections)[5] for summer 2005 (Parent Ex. 138 at p. 1). Connections is described as an intensive summer treatment program designed to foster the social and communicative development of children with Asperger's disorder (Parent Ex. 144 at pp. 46-47).

The student began seventh grade at petitioner's middle school in September 2005 (Dist. Ex. 19 at p. 3). A speech-language evaluation report dated November 30, 2005 indicated that results of testing showed no regression in the student's speech and language abilities and that his test scores were consistent with results from a January 2004 evaluation (Dist. Ex. 56 at p. 3). The student's articulation and pragmatic language abilities were found to be within normal limits for his age (id.). His speech was intelligible and no articulation errors were noted (id.). The evaluator reported that the student was able to understand the use of language for informing, demanding, and requesting and he was able to follow simple rules for conversation (id.). He demonstrated difficulty with formulating ideas, choosing correct words, and organizing them into a verbal message (id.). The evaluator did not recommend speech-language therapy for the student and opined that his exhibited weakness in semantics and expressive communication skills could be addressed through classroom content and counseling (id.).

An occupational therapy evaluation was conducted over three sessions in November and December 2005 due to respondents' concerns about the student's pencil grasp and tactile defensiveness (Dist. Ex. 58 at p. 1). An occupational therapy evaluation report dated December 5, 2005 indicated that the student achieved standardized test scores in the average range, consistent with scores achieved in 2003 and 2004 (id. at pp. 1, 4). The occupational therapist recommended occupational therapy services on a consultative basis for a "sensory diet" of heavy work/movement activities to address the student's sensory difficulties (id. at p. 4). She also recommended a physical therapy evaluation (id.).

A psychological evaluation of the student was conducted by petitioner's school psychologist over four sessions in December 2005 (Dist. Ex. 70 at p. 1). The student's cognitive ability, as measured by the Woodcock-Johnson III Tests of Cognitive Abilities (WJ-III COG), fell in the low average range and was reported to be consistent with his prior evaluation in June 2003 (id. at pp. 3-4). Administration of the Woodcock-Johnson III Tests of Achievement (WJ-III ACH) yielded scores in the average to low average range with the exception of oral language skills (id. at p. 7). The evaluator opined that, based on the student's cognitive ability, he was performing at predicted levels in reading, mathematics, and written expression, but was performing significantly lower in the area of oral language (id.). Behavior rating scales completed by the student's special and general education teachers indicated a pattern of significant behavioral concerns related to peer relations, obsessive-compulsive behaviors, focusing, and sensory problems (id.).

The CSE met on December 20, 2005 and reviewed the student's evaluations (Dist. Ex. 75). It recommended that the student remain in a 12:1+1 special class with an individual aide (id. at p.

[5] I note that throughout the record the summer program is referred to alternately as Connections or "Summit." The director refers to the program as Connections. In this decision the summer program will be referred to as Connections. The Connections Program was developed by researchers and clinicians from the University at Buffalo, Summit Educational Resources, and Canisius College in Buffalo, New York.

5). It added to the student's IEP a "skill streaming" curriculum to address individual language needs (id. at p. 6).

The student began seeing a private psychologist in January 2006 for therapy and to confirm his diagnosis of Asperger's disorder (July 12, 2006 Tr. pp. 139-40). The psychologist saw the student for approximately four sessions that occurred both alone and with respondents (July 12, 2006 Tr. pp. 138-39).

In a January 19, 2006 physical therapy evaluation report, the physical therapist indicated that the student presented as physically independent in most of his daily gross motor activities (Dist. Ex. 99 at p. 3). She noted that the student showed some impairment with the quality of his movements in ambulation and running activities, but that he did not demonstrate difficulty with or inability to perform tasks required of him in classroom daily activities (id.). She further noted that the student was able to safely negotiate the school environment and that his physical impairments did not interfere with his daily education (id.). She recommended that the student not receive a school physical therapy program (id.).

The CSE convened again on February 3, 2006 (Dist. Ex. 111). It changed the student's classification to autism and continued to recommend that he be placed in a 12:1+1 special education class with an individual aide, group counseling once per week for 30 minutes and the services of a behavioral consultant once per week (id. at pp. 1, 5). It continued the goals to address the student's behavior and socialization needs using the "skill streaming" curriculum (id. at pp. 6-8). It also recommended behavioral consultant services for respondents for the purposes of parent counseling and training and established annual goals for respondents (id. at pp. 5, 7). A behavior plan was attached to the February 2006 IEP (id. at pp. 10-12).

The CSE met on March 31, 2006 for the student's annual review and to recommend a program for the 2006-07 school year (Dist. Ex. 166). Meeting minutes indicated that the student addressed the CSE and that he requested that it consider placing him in an increased number of general education classes (Dist. Ex. 167 at p. 1; Parent Ex. 161). The student's special education teacher, school counselor and the behavior consultant working with petitioner's staff all reported that the student had made progress with his social skills and behavior with the structured routine that was in place for him (Dist. Ex. 167 at p. 2; Parent Ex. 161). The student's general education science teacher reported that the student was doing well socially but not academically (Dist. Ex. 167 at p. 3; Parent Ex. 161). The CSE discussed the student's participation in general education and ultimately recommended that the student's placement be changed to general education with direct consultant teacher services for the 2006-07 school year (Dist. Ex. 167 at pp. 3-6; Parent Ex. 161). The student's goals and objectives were discussed and revised, as was his behavior plan (Dist. Ex. 167 at pp. 3-5; Parent Ex. 161). The CSE also determined that the student would be at risk of regression without an ESY program for summer 2006 and the minutes reflected that the CSE would reconvene later in the spring to determine the student's summer program (Dist. Ex. 167 at p. 7; Parent Ex. 161). In April 2005, the CSE Chairperson began contacting respondents to schedule the next meeting (Dist. Ex. 177).

On May 31, 2006, respondents filed a request for a due process hearing which was received by petitioner on June 2, 2006 (July 10, 2006 Tr. p. 12; Dist. Ex. 1). Respondents raised numerous procedural and substantive issues including the failure of petitioner to provide a FAPE, to provide

an IEE, to provide appropriate ESY services for summer 2005 and summer 2006, to conduct an appropriate FBA, to develop an appropriate behavioral intervention plan (BIP),[6] to provide services as required by 8 NYCRR 200.13,[7] and to provide a class profile for the 2005-06 school year. The relief they requested included "annulment of the IEP," granting of an IEE, reimbursement for summer 2005 services, payment for summer 2006 services, provision of an appropriate FBA, development of an appropriate BIP, provision of appropriate parent counseling and training, inclusion of consultant services to address the student's social and management needs and provision of the 2005-06 class profile. Petitioner responded to the due process hearing request on June 9, 2006 (Dist. Ex. 2).

The CSE reconvened on June 9, 2006 to complete the student's annual review (Dist. Ex. 202). The CSE discussed the draft IEP developed at the March 2006 CSE meeting specifically in reference to the student's present levels of performance, behavior plan, counseling services, and social skills training (Dist. Ex. 199 at pp. 1-4; Parent Ex. 160). The CSE also discussed an ESY program for summer 2006 (Dist. Ex. 199 at pp. 4-8; Parent Ex. 160). At the suggestion of respondents' private psychologist, the CSE recommended that the student attend a general education summer school in a neighboring school district for math and English language arts (Dist. Ex. 199 at p. 6; Parent Ex. 160). An individual aide, behavior consultant services, transitional services, counseling and transportation were to be provided by petitioner (Dist. Ex. 199 at pp. 6-7; Parent Ex. 160). The IEP was revised to reflect additional changes requested and suggestions made by respondents and their private psychologist (Dist. Ex. 199 at pp. 1-4; Parent Ex. 160), and parent counseling and training was increased to two hours per month (Dist. Ex. 199 at p. 7; Parent Ex. 160).

On June 15, 2006, the CSE Chairperson notified respondents that their son was accepted into the summer school program at a neighboring school district (Dist. Ex. 213). By electronic mail dated June 19, 2006, the student's father informed the CSE Chairperson that the student's mother had spoken with the principal at the neighboring school district and as a result of the conversation the principal would be rescinding his acceptance of their son for the summer school program (Dist. Ex. 215). By letter and electronic mail dated June 28, 2006, the CSE Chairperson informed respondents that their son was accepted into the summer school program at another neighboring school district (Dist. Exs. 222; 223). By letter, facsimile, and electronic mail dated June 28, 2006, respondents rejected the proposed summer school program at that neighboring school district and informed petitioner of their intent to unilaterally place their son at the Connections Program (Connections) at public expense (Dist. Ex. 226 at p. 1).

The student began attending Connections in July 2006 (Parent Ex. 163 at p. 5). The impartial hearing began on July 10, 2006 and ended on October 24, 2006 after four days of testimony. The impartial hearing officer rendered her decision on February 26, 2007. She found, among other things, that petitioner did not provide a FAPE to the student for the 2004-05 and

[6] A behavioral intervention plan means a plan that is based on the results of a functional behavioral assessment and, at a minimum, includes a description of the problem behavior, global and specific hypotheses as to why the problem behavior occurs and intervention strategies that include positive behavioral supports and services to address the behavior (8 NYCRR 200.1[mmm], see also 8 NYCRR 201.2[a]).

[7] 8 NYCRR 200.13 speaks to educational programs for students with autism.

2005-06 school years. She also found that petitioner denied the student a FAPE for summer 2005 and summer 2006. However, she found that respondents did not meet their burden regarding their request for reimbursement for tuition for the summer programs. The impartial hearing officer annulled the "2006-07 IEP" and, among other things, ordered the development of an appropriate IEP with measurable goals and objectives to comply with 8 NYCRR 200.13 and to meet all of student's special education needs including a "written commitment" that district staff will carefully and accurately create and maintain records of implementation of services. She further ordered the development of an appropriate FBA and BIP with full participation by respondents. In addition, the impartial hearing officer ordered the CSE to either arrange for prompt payment of or reimbursement for the IEE, or to initiate an impartial hearing. She further ordered the CSE to "provide 'additional services' as requested by [respondents]." The impartial hearing officer also determined that respondents were entitled to a more timely response to their request for a class profile for the 2005-06 school year.

Petitioner appeals from the impartial hearing officer's decision. It requests that I annul those portions of the impartial hearing officer's decision and orders which were rendered in favor of respondents. Specifically, it requests that I annul the impartial hearing officer's determination that respondents met their burden that the district failed to provide a FAPE during the 2004-05 and 2005-06 school years. Petitioner also requests that I annul the impartial hearing officer's determinations that it failed to conduct an appropriate FBA, that it failed to develop an appropriate BIP, that it failed to provide parent counseling and training, and that it failed to timely provide respondents with a 2005-06 class profile. Petitioner further requests that I annul the impartial hearing officer's order annulling the 2006-07 IEP and requiring the CSE to convene to develop an appropriate IEP including a written commitment that district staff will carefully and accurately create and maintain records of implementation of services. In addition, petitioner requests that I annul the impartial hearing officer's order to provide additional services and to develop an appropriate FBA and BIP with full participation of respondents, as well as annul her references to district staff as "unrepentant" and her characterization of their conduct in using physical intervention with the student as "misconduct."[8] Respondents cross-appeal from the impartial hearing officer's denial of their request for reimbursement for the services they obtained for their son for summer 2005 and 2006.

The central purpose of the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482)[9] 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

[8] Petitioner does not appeal from that part of the impartial hearing officer's decision "which involved the IEE" (see Pet. ¶ 29).

[9] On December 3, 2004, Congress amended the IDEA, effective July 1, 2005 (see Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647 [2004]). Some of the relevant events in the instant appeal took place prior to the effective date of the 2004 amendments to the IDEA, and therefore the provisions of the IDEA 2004 do not apply. The newly amended provisions of IDEA 2004 apply to the relevant events that took place after the July 1, 2005 enactment date. Citations in this decision are to the newly amended statute unless otherwise noted.

needs, provided in conformity with a written IEP (20 U.S.C. § 1401[9][D]; 34 C.F.R. § 300.17[d];[10] see 20 U.S.C. § 1414[d]; 34 C.F.R. § 300.320).[11]

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 (Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if a procedural violation is alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the child, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; Matrejek v. Brewster Cent. Sch. Dist., 2007 WL 210093, at *2 [S.D.N.Y. Jan. 9, 2007]).

The IDEA directs that, in general, an impartial hearing officer's decision must be made on substantive grounds based on a determination of whether the child received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 130 [2d Cir. 1998]; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195,

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

[11] The term "free appropriate public education" means special education and related services that--

(A) have been provided at public expense, under public supervision and direction, and without charge;

(B) meet the standards of the State educational agency;

(C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and

(D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

(20 U.S.C. § 1401[9]).

quoting Walczak, 142 F.3d at 130 [citations omitted]; see Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192).

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs, establishes annual goals related to those needs, and provides for the use of appropriate special education services (Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

The burden of persuasion in an administrative hearing challenging an IEP is on the party seeking relief (see Schaffer, 126 S. Ct. at 531, 536-37 [finding it improper under the IDEA to assume that every IEP is invalid until the school district demonstrates that it is not]).

As noted above, petitioner asserts that the impartial hearing officer erred in finding that respondents met their burden of proof that it failed to provide a FAPE to the student for the 2004-05 and 2005-06 school years. I will address the 2004-05 school year first. The impartial hearing officer determined that the student was denied a FAPE during the 2004-05 school year because the IEPs developed for the 2004-05 school year did not include services required by 8 NYCRR 200.13, and did not contain pragmatic speech goals and services.[12]

The IDEA was amended in 2004 with an effective date of July 1, 2005. The IDEA 2004 amendments added an explicit limitations period for filing a due process hearing request and also added explicit accrual language. IDEA 2004 requires that, unless a state establishes a different limitations period under state law, a party must request a due process hearing within two years of when the party knew or should have known about the alleged action that forms the basis of the complaint (20 U.S.C. § 1415[f][3][C]; see also 20 U.S.C. § 1415[b][6][B]; Educ. Law § 4404[1][a]). Absent clear congressional intent, a newly enacted federal statute of limitations does not operate retroactively (see Landgraf v. USI Film Products, 511 U.S. 244, 280 [1994]; In re Enterprise Mortgage Acceptance Co., 391 F.3d 401 [2d Cir. 2005] [holding that the limitations period in the Sarbanes-Oxley Act of 2002 did not have the effect of reviving stale claims]; Application of a Child with a Disability, Appeal No. 06-083). Prior to the IDEA 2004 amendments, the IDEA did not prescribe a time period for filing a request for an administrative due process hearing and a one-year limitations period was applied in New York (M.D. v. Southington Bd. of Educ., 334 F.3d 217, 221-22 [2d Cir. 2003]; Application of the Bd. of Educ., Appeal No. 02-119). A claim accrues when the complaining party knew or should have known of the injury involved, i.e., the inappropriate education (Southington, 334 F.3d at 221). Here, the record shows that the IEPs for the 2004-05 school year were developed as a result of CSE meetings in February 2004 and April 2005 (Dist. Ex. 6; Parent Ex. 3). The April 2005 IEP was provided to respondents on April 5 and April 14, 2005 (Parent Exs. 23; 25). Respondents' due process request

[12] I note that respondents' due process hearing request refers to the February 3, 2006 IEP in asserting its claim that such services were not being provided. I further note that respondents do not raise pragmatic skills in their due process request and that the student's pragmatic skills are within normal limits (Dist. Ex. 56 at p. 3).

is dated May 31, 2006 and was received by petitioner on June 2, 2006 (July 10, 2006 Tr. p. 12), over one year after respondents knew or should have known of the alleged injury, in this case the alleged failure to include certain services on their son's IEP. Accordingly, I find that respondents' claim regarding petitioner's failure to provide services required by 8 NYCRR 200.13 during the 2004-05 school year is untimely (see Application of a Child with a Disability, Appeal No. 06-083).

The impartial hearing officer also found that the student was denied a FAPE during the 2004-05 school year because an FBA and a BIP were not properly developed, and the use of physical intervention techniques was not authorized by the student's IEPs and was otherwise inappropriate. A functional behavior worksheet was completed and behavior plans were developed as a result of CSE meetings in March through May 2005 (Dist. Ex. 6; Parent Ex. 3). Applying a one-year statute of limitations as explained above, I find that respondents' claims relating to an FBA and a BIP during the 2004-05 school year are untimely (see Application of a Child with a Disability, Appeal No. 06-083).

Even if respondents' claims were timely, I would not find that the student was denied a FAPE for failure to conduct a formal FBA and develop an appropriate BIP during the 2004-05 school year. In the case of a child whose behavior impedes his or her learning or that of others, the CSE shall consider, when appropriate, strategies, including positive behavioral interventions, and supports to address that behavior (20 U.S.C. § 1414[d][3][B][i] [1997]; see 34 C.F.R. § 300.324[a][2][i]; see 8 NYCRR 200.4[d][3][i]). The record shows that in approximately February 2005, the student began to exhibit increased behavioral difficulties (July 10, 2006 Tr. p. 56). At the March 11, 2005 CSE meeting, in addition to recommending an FBA and a behavior contract, the CSE recommended and agreed to contact a BOCES behavior specialist for observations and recommendations (Dist. Ex. 3). On March 18, 2006, the student engaged in behavior during which petitioner's staff used physical intervention techniques (Parent Ex. 120 at p. 33). On April 1, 2005, a functional behavior worksheet was completed (Dist. Ex. 4). As noted above, the functional behavior worksheet was based on information gathered from meetings and consultations with the student's teacher, school counselor, aide, the school psychologist and the student's mother (id.). It included information which identified and described the student's behavior, indicated when the student was most likely to engage in such behavior, listed the specific events or factors that triggered the behavior and what the student might be trying to communicate through the behavior (id.). It also recommended possible intervention strategies including managing the environment by establishing clear rules, teaching and enforcing the rules and a "cool down" or "time away" technique (id.). The record shows that the CSE met again on April 4, 2005 and reviewed the functional behavior worksheet, the trial behavior plan and observations and input from the behavior specialist (Dist. Ex. 5). The CSE agreed to continue the behavior plan and continue to keep a daily log of behavior (id.). The CSE also agreed to contact a behavior consultant and have the BOCES behavior specialist conduct another observation (id.).

The record further shows that the BOCES behavior specialist conducted an observation of the student on April 28, 2005 (Dist. Ex. 7). She recommended various strategies and interventions (id.). She referred to the behavior plan developed by the student's teacher and counselor and indicated that it was designed to help the student gain control of his behavior and emotions (id.). The behavior consultant conducted an observation of the student on May 16, 2005 (Dist. Ex. 16). The CSE met on May 20, 2005 to review the student's behavior plan and consider the suggestions of the BOCES behavior specialist and the behavior consultant (Dist. Ex. 18). The CSE agreed to

the 20-day plan recommended by the behavior consultant (id.). In addition, pursuant to the recommendations made by the behavior consultant, the student's list of rules was made "concrete and graphic" to provide him with visual reminders of the rules he was following and breaking (July 11, 2006 Tr. p. 15).

The record shows that the CSE met three times in three months at the end of the 2004-05 school year (Dist. Exs. 3; 5; 18). Respondents attended each meeting, and at the April and May meetings were accompanied by a parent advocate (Parent Exs. 61; 63). At the April and May meetings, the behavior plan was discussed and modified (Dist. Exs. 5 at p. 1; 18 at p.1). Based on the foregoing, I find that petitioner considered strategies, including positive behavioral interventions and supports to address the student's behavior.

I note that the behavioral supports continued through the 2005-06 school year. When the behavior consultant met with the student's team weekly to review his behavior of the prior week, concerns and transition problems were discussed and the student's behavior plan was modified as needed (July 11, 2006 Tr. p. 15). The behavior consultant testified that the student's behavior plan was modified continuously to be more appropriate, concrete, and specific so the student was better aware of his role and the consequences to his behavior (id. at p. 16). Respondents were kept apprised of the student's behavior by electronic mail at the end of the morning and at the end of the day and through daily behavior reports sent to them when the student's behavior had reached a certain "infraction level" specified on his behavior plan (id. at p. 18; Dist. Exs. 103; 106; Parent Ex. 147).

I also find that the impartial hearing officer's determination with respect to petitioner's use of physical intervention techniques is not supported by the record. I first note that all but one of the incidents during which physical intervention techniques were used occurred between March and May 2005 (Parent Exs. 98; 99; 120). Applying a one-year statute of limitations as explained above, I find that respondents' claims relating to the physical intervention techniques that occurred between March and May 2005 are untimely. The remaining and final incident during which physical intervention techniques were used occurred on June 2, 2005.

Petitioner argues that the impartial hearing officer should not have made a determination on respondents' claim regarding physical intervention techniques because it will have no actual impact on the parties. Under the circumstance presented in this appeal, I agree. The dispute between the parties in an appeal must at all stages be "real and live," and not "academic," or it risks becoming moot (see Lillbask v. State of Conn. Dep't of Educ., 397 F.3d 77, 84 [2d Cir. 2005]). In general, appeals dealing with issues such as desired changes in IEPs, specific placements, and implementation disputes are moot at the end of the school year because no meaningful relief can be granted (see, e.g., Application of the Bd. of Educ., Appeal No. 06-044; Application of the Bd. of Educ., Appeal No. 05-058; Application of a Child with a Disability, Appeal No. 04-027; Application of a Child with a Disability, Appeal No. 00-037; Application of the Bd. of Educ., Appeal No. 00-016; Application of a Child with a Disability, Appeal No. 96-37. Administrative decisions rendered concerning school years since expired may no longer appropriately address the current needs of the student (Application of a Child with a Disability, Appeal No. 04-007). A claim may not be moot, however, despite the end of a school year for which the child's IEP was written, if the conduct complained of is "capable of repetition, yet evading review" (see Honig v.

Doe, 484 U.S. 305, 318 [1988]; Lillbask, 397 F.3d at 84-85; Daniel R.R. v. El Paso Indep. Sch. Dist., 874 F.2d 1036 [5th Cir. 1989]; Application of a Child with a Disability, Appeal No. 04-038).

The exception applies only in limited situations (City of Los Angeles v. Lyons, 461 U.S. 95, 109 [1983]), and is severely circumscribed (Knaust v. City of Kingston, 157 F.3d 86, 88 [2d Cir. 1998]). Controversies are "capable of repetition" when there is a reasonable expectation that the same complaining party would be subjected to the same action again (Weinstein v. Bradford, 423 U.S. 147, 149 [1975]). To create a reasonable expectation of recurrence, repetition must be more than theoretically possible (Russman v. Bd. of Educ., 260 F.3d 114, 120 [2d Cir. 2001]). Mere speculation that the parties will be involved in a dispute over the same issue does not rise to the level of a reasonable expectation or demonstrated probability of recurrence (id.).

Here, the record shows that physical intervention techniques were used with the student beginning in March 2005, with the last incident occurring on June 2, 2005 (Parent Exs. 96; 98; 99; 120). The record also shows that during this time period, a BOCES behavior specialist and consultant observed the student and recommended various strategies to address the student's behavioral difficulties (Dist. Exs. 7; 16). In addition, a behavior plan was developed in April 2005 and has been continually modified (July 11, 2006 Tr. p. 15; Dist. Exs. 5 at p. 1; 18 at p. 1; 167 at pp. 3-5; 199 at pp. 1-4). Further, the student's counselor began to use a social skills training curriculum with the student in March 2005 that addressed his identified social and communication deficits (July 11, 2006 Tr. pp. 229, 241-42). In addition, the record reflects that medication changes during spring 2005 were considered a factor in the student's behavioral difficulties (July 10, 2006 Tr. pp. 232-33; Dist. Ex. 5 at p. 1; Parent Ex. 139 at pp. 12, 13).

The record further shows that after June 2, 2005 there were no incidents during which physical intervention techniques were used. I note that the student's special education teacher implemented daily social skills instruction with the student during the 2005-06 school year (July 11, 2006 Tr. p. 88). I further note that the student made progress socially and behaviorally throughout the 2005-06 school year and his placement was changed from a 12:1+1 special class to full time general education with direct consultant teacher services for the 2006-07 school year (Dist. Ex. 167 at pp. 3-6). Given the supports that petitioner put in place at the end of the 2004-05 school year when the student's behavior began to escalate and the fact that behavioral supports were continued during the 2005-06 school year and no physical intervention techniques were used, I am unable to find that there is a reasonable expectation that the parties will be involved in a dispute over the same issue.

Even if the claim were not moot, I would still conclude that the impartial hearing officer's findings with respect to petitioner's use of physical intervention techniques are not supported by the record. Respondents failed to show how the physical intervention techniques denied their son a FAPE. Having so determined, it is not necessary to address petitioner's other assertions relating to the use of physical intervention techniques by its staff.

I will now address whether petitioner offered a FAPE to the student for the 2005-06 school year. The impartial hearing officer determined that the student also was denied a FAPE during the 2005-06 school year because the IEPs developed for the student for the 2005-06 school year did

not include services required by 8 NYCRR 200.13,[13] and they did not contain pragmatic speech goals and services. The record shows that for the 2005-06 school year, IEPs were developed in May and December 2005, and February 2006 (Dist. Exs. 19; 75; 111).

The May 2005 IEP classified the student as having an other health-impairment and recommended that he be placed in a 12:1+1 special education class with an individual aide, group counseling once per week for 30 minutes and a behavioral consultant once per week (Dist. Ex. 19). It included goals and corresponding objectives to address the student's behavior (id.). The December 2005 IEP continued to classify the student as having an other health-impairment and continued to place him in a 12:1+1 special education class with an individual aide, group counseling once per week for 30 minutes and a behavioral consultant once per week (Dist. Ex. 75). It included goals to address the student's behavior and socialization needs using the "skill streaming" curriculum (id.). A behavioral plan was attached to the December 2005 IEP (id.). The February 2006 IEP changed the student's classification to autism and continued to recommend that he be placed in a 12:1+1 special education class with an individual aide, group counseling once per week for 30 minutes and a behavioral consultant once per week (Dist. Ex. 111). It continued the goals to address the student's behavior and socialization needs using the "skill streaming" curriculum (id.). It also recommended behavioral consultant services for respondents for the purposes of parent counseling and training and established annual goals for respondents (id.). A behavior plan was attached to the February 2006 IEP (id.).

The impartial hearing officer found that the record demonstrated that petitioner did not provide parent counseling and training (see 8 NYCRR 200.13[d]). I disagree. The CSE Chairperson testified that during the 2005-06 school year she spent time with the student's mother on various subjects including the autism regulations (July 10, 2006 Tr. pp. 162-63). She further testified that respondents were provided notices for different community presentations on autism and related subjects (July 10, 2006 Tr. p. 163). Training was also provided to respondents in December 2005 regarding physical intervention techniques (Dist. Exs. 48; 50; 51; 73 at p. 14). The behavior consultant testified that from February to June 2006 she met with respondents on three separate occasions for approximately one hour and a half on each occasion (July 11, 2006 Tr. pp. 26-27). She also indicated that typically she would review the student's behavior plans with respondents and discuss their concerns (id.). The record reveals that the behavior consultant was also in frequent contact with respondents via electronic mail concerning various matters including clarification of the role of school personnel and explanation of behavior management strategies used with the student at school such as the stress thermometer, social stories, and the point system included in his behavior plan (Parent Exs. 141; 142). Moreover, the record reveals that daily behavior reports which identified behavioral concerns at school were sent to respondents for follow up intervention and discussion at home and for follow up discussion between respondents and the classroom teacher (Parent Ex. 147). Social skills worksheets were provided to respondents for their use at home to address problems with their son's behavior (Parent Ex. 141 at p. 1).

[13] I note that at the December 2005 CSE meeting, the student's father inquired whether the services set forth in 8 NYCRR 200.13 could be waived (Dist. Ex. 72 at p. 12).

I also disagree with the impartial hearing officer's finding that the record demonstrated that petitioner did not provide instructional services to meet the individual language needs of the student (see 8 NYCRR 200.13[a][4]). The school counselor testified that she provided services to the student in the classroom once per week for 30 minutes which included the "skill streaming" curriculum (July 11, 2006 Tr. pp. 223-24). The record indicates that this curriculum includes direct instruction and role plays to teach interpretation of body language, maintaining appropriate proximity to others, peer interaction, as well as use of simple polite language (e.g. thank you) (July 11, 2006 Tr. p. 242). I note that the student's counselor began to use the "skill streaming" curriculum with the student in March 2005 to address his social and communication needs and that the student's special education teacher also implemented this curriculum with the student (July 11, 2006 Tr. pp. 225, 229, 241-42). The student's special education teacher testified that during the 2005-06 school year she provided social skills instruction to the student five times per week for 30 minutes (July 11, 2006 Tr. p. 88).

The impartial hearing officer also found the 2005-06 IEPs failed to include pragmatic speech goals and services. She identified pragmatic services as individual language instruction pursuant to 8 NYCRR 200.13, speech-language therapy and "additional direct social skills counseling." I first note that the student's pragmatic skills are within normal limits (Dist. Ex. 56 at p. 3). Nevertheless, the record shows that petitioner did provide services to address pragmatic language. As discussed above, I have determined that petitioner provided appropriate language instruction to the student. With respect to speech-language therapy, as noted above respondents requested that speech-language therapy be discontinued in 2004 (Dist. Ex. 56 at p. 1). When the student was evaluated in November 2005, the speech-language therapist found no regression and therapy was not recommended (id. at p. 3). The therapist noted weaknesses in semantics and expressive communication skills, which she indicated could be addressed through classroom content and "skill streaming" activities (id.). With respect to counseling, the 2005-06 IEPs provided for group counseling once per week for 30 minutes. The school counselor testified that she provided services to the student in the classroom once per week for 30 minutes which in addition to the "skill streaming" curriculum included other social skills curricula (July 11, 2006 Tr. pp. 223-24). Having determined that petitioner provided appropriate services to meet the student's language deficits, I find that respondents are not entitled to the remedy of additional services.

I now turn to petitioner's other claims. The impartial hearing officer found that respondents were entitled to a more timely response to their request for a class profile for the 2005-06 school year. Neither the IDEA nor Article 89 of the Education Law require a school district to prepare a class profile or to provide a class profile to parents within a certain time frame. The record shows that petitioner provided a class profile to respondents in June 2006 (Dist. Ex. 213 at p. 1). Respondents did not challenge the class composition at the impartial hearing. I note that the class profile shows that the student was grouped for instructional purposes with other students having similar individual needs (id. at pp. 2-5; see 8 NYCRR 200.6[g]).

Petitioner also appeals the impartial hearing officer's order annulling the 2006-07 IEP. I agree with petitioner that, with the exception of summer 2006, the appropriateness of the 2006-07 IEP was not an issue at the impartial hearing and the 2006-07 IEP should not have been annulled. Petitioner also appeals the impartial hearing officer's order to develop an appropriate IEP including "a written commitment that District staff will carefully and accurately create and maintain records

of implementation of services and modifications." Given that the issues at the impartial hearing related to the 2004-05 and 2005-06 school years, those school years have ended, an IEP has been developed for the student for the 2006-07 school year and that IEP was not an issue at the impartial hearing, I must annul this order.

I now turn to respondents' cross-appeal. Respondents cross-appeal from the impartial hearing officer's denial of their request for tuition reimbursement for summer 2005 and summer 2006. A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a child by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359 [1985]; Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Cerra, 427 F.3d at 192). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (Burlington, 471 U.S. at 370-71). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the child a FAPE (id.; see 20 U.S.C. § 1412[a][10][C][ii]; 34 C.F.R. § 300.148).

Petitioner did not appeal from the impartial hearing officer's finding that it denied a FAPE to the student for summer 2005 and summer 2006. Accordingly, respondents have prevailed on the first criterion for an award of tuition reimbursement. With respect to the second criterion for an award of tuition reimbursement, respondents must show that the services they obtained are appropriate. The record shows that the student has diagnoses of ADHD and Asperger's disorder with obsessive-compulsive symptoms and has identified needs in socialization and communication (Dist. Ex. 70 at p. 2; Parent Ex. 2 at p. 3). Behavior rating scales indicate a pattern of significant behavioral concerns related to peer relations and obsessive-compulsive behaviors (Dist. Ex. 70 at p. 7; Parent Ex. 2 at p. 3). The student is prone to more emotional responses and behaviors such as crying or getting angry in the school setting, and is noted to have significant problems with his social self-confidence, with making and keeping friends, and with sensitivity to criticism (Dist. Ex. 70 at p. 5; Parent Ex. 2 at p. 3). He exhibits deficits in his expressive communication skills and semantics and in his ability to use verbal skills to maintain positive relationships, to interact appropriately in group situations, to respond appropriately to environmental social cues, to respond appropriately to the feelings of others, to make and keep friends, and to adjust his behavior to the demands of the social situation (Dist. Exs. 56 at p. 3; 70 at p. 6; Parent Ex. 2 at p. 3).

The student attended Connections for summer 2005 and 2006. Connections is described in the record as a highly structured six-week summer treatment program designed to target and promote the specific social and communicative skills that characterize children with Asperger's Disorder (Parent Ex. 144 at pp. 46-47). Documentary evidence reflects that the treatment approach used is based on research that indicates that children with social deficits benefit from instruction focused on the content and style of social interaction (id. at p. 47). Specific cognitive and/or behavioral strategies are implemented to develop higher-level skills as well as to reduce maladaptive behavior (id.).

Connections is a full day program consisting of four 70-minute treatment cycles that include 20 minutes of intensive structured social skills instruction, followed by a 40 minute therapeutic activity, and 10 minute debriefing (id.). The program is comprised of five components,

which include a social skills program, a behavioral program, face and affect recognition, therapeutic activities, and parent training (Parent Exs. 142 at p. 23; 144 at p. 48). In the social skills component students learn the precise behavioral sequence for a given social skill, observe the skill being modeled by program counselors, role-play the skill themselves, and receive feedback (Parent Ex. 144 at p. 48). The behavioral component is based on a response-cost system that reinforces the occurrence of target social behaviors and appropriate behavior and provides a consequence for engagement in inappropriate behavior or failure to demonstrate an appropriate social behavior (id.). The face and affect recognition component provides specific structured activities to increase recognition and interpretation of facial expression and feelings associated with a range of emotions (id.). The therapeutic activities component includes tasks and games to promote interest expansion, pragmatic language development, cooperation, and social skills (id. at p. 49). Parents participate in weekly parent education sessions (Parent Ex. 142 at p. 23).

The director of Connections indicated in an electronic mailing dated June 13, 2006 that the program was an "excellent fit" for the student as the program was specifically designed to work on the social deficits presented by children with Asperger's disorder and that the program had been beneficial for the student during summer 2005 based on clinical observation and analysis of pre and post rating scales (Parent Ex. 138 at p. 1). Petitioner's school psychologist testified that he had spoken with the director of Connections and opined that it was "a good program" and that the student could benefit from it (July 10, 2006 Tr. p. 233). He further testified that at Connections the students work in small groups on very specific social skills and are provided with instruction and opportunity for role-play (id. at p. 234). Petitioner's school psychologist also testified that the student had many social deficits, including difficulty with peer relations and personal space, which interfered with school and opined that these social deficits affected his ability to participate in general education more than his academic deficits (id.). Given the nature of the student's deficits, I find that respondents have demonstrated the appropriateness of the services they obtained in summer 2005 and summer 2006 to meet their son's needs.

The final criterion for an award of tuition reimbursement is that respondents claim is supported by equitable considerations (see 20 U.S.C. § 412[a][10][C]; Carmel Cent. Sch. Dist. v. V.P., 373 F. Supp. 2d 402, 416 [S.D.N.Y. 2005], aff'd, 2006 WL 2334140 [2d Cir. 2006]; Frank G., 459 F.3d at 363-64). Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; Mrs. C. v. Voluntown, 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 [noting that "[c]ourts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required"]). Such considerations "include the parties' compliance or noncompliance with state and federal regulations pending review, the reasonableness of the parties' positions, and like matters" (Wolfe v. Taconic Hills Cent. Sch. Dist., 167 F. Supp. 2d 530, 533 [N.D.N.Y. 2001], citing Town of Burlington v. Dep't of Educ., 736 F.2d at 773, 801-02 [1st Cir. 1984], aff'd, 471 U.S. 359 [1985]). Parents are required to demonstrate that the equities favor awarding them tuition reimbursement (Carmel, 373 F. Supp. 2d. at 417). Having found that respondents did not demonstrate that the services they selected for their son for summer 2005 and summer 2006 were appropriate, the impartial hearing officer did not determine whether equitable considerations supported respondents' claim. There is no evidence that respondents withheld information or otherwise failed to cooperate with petitioner. There is no dispute over whether respondents complied with mandated notice requirements (see 20 USC 1415[a][10[c][iii]). Accordingly, I find

that equitable considerations support respondents' claim for reimbursement for summer 2005 and summer 2006.

THE APPEAL IS SUSTAINED.

THE CROSS-APPEAL IS SUSTAINED.

IT IS ORDERED that the impartial hearing officer's decision is annulled consistent with this decision;

IT IS FURTHER ORDERED that petitioner shall reimburse respondents for tuition expenses for summer 2005 and summer 2006 upon submission of proper proof of payment.

Dated: **Albany, New York**
May 18, 2007

PAUL F. KELLY
STATE REVIEW OFFICER