The University of the State of New York

The State Education Department
State Review Officer

No. 07-043

Application of the BOARD OF EDUCATION OF THE COLTON-PIERREPONT 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

Joyce B. Berkowitz, Esq., attorney for respondent

DECISION

Petitioner, the Board of Education of the Colton-Pierrepont Central School District, appeals from a decision of an impartial hearing officer which determined that the individualized education program (IEP) recommended by its Committee on Special Education (CSE) for respondent's daughter for the 2006-07 school year was inappropriate. Respondent cross-appeals from that portion of the impartial hearing officer's decision which, among other things, determined that she failed to establish that the IEP did not adequately describe the child's present levels of performance. The appeal must be sustained in part. The cross-appeal must be dismissed.

At the commencement of the impartial hearing, the child was six years old, and she was home-schooled by respondent and received home-based occupational and physical therapy services from respondent (Oct. 12, 2006 Tr. pp. 118, 121; Oct. 13, 2006 Tr. pp. 6-8; Oct. 18, 2006 Tr. pp. 659, 665-66). The child's eligibility for special education services as a student with an orthopedic impairment is not in dispute (Joint Ex. 59 at p. 1; see 8 NYCRR 200.1[zz][9]).[1]

[1] All exhibits offered by the parties were consecutively numbered and contained in a single volume. While most of the exhibits were admitted into evidence as joint exhibits at the commencement of the impartial hearing, several documents were identified with a number and the suffix "-P" and were offered solely by respondent. The impartial hearing officer considered all of the exhibits offered by the parties (IHO Decision at p. 32). For convenience, I will simply refer to all exhibits in this decision as joint exhibits while maintaining the suffix "-P" to distinguish those exhibits that were submitted solely by respondent.

The child was born with bilateral club feet and diagnosed with distal arthrogryposis, a disorder that consists of non-progressive joint contractures and muscle weakness (Joint Exs. 9 at p. 1; 17 at p. 1; 20-P at p. 1). She has received occupational therapy (OT) services and used hand/wrist splints and ankle foot orthosis (AFOs) since infancy (Joint Ex. 17 at p. 1).[2] At six months of age, the child underwent bilateral foot surgery (Joint Ex. 20-P at p. 1).

The child began receiving Early Intervention Program (EIP) services in April 2001 (see Joint Ex. 8 at p. 1). Her September 2002 individualized family service plan (IFSP) recommended physical therapy (PT) services three times per week and OT services five times per week (Joint Ex. 8 at pp. 1, 3). At two years of age she again underwent surgery on both feet in November 2002 (Joint Ex. 10 at p. 1). In March 2003, a pre-Committee on Preschool Special Education (CPSE) meeting was held in anticipation of the child's transition from the EIP to petitioner's CPSE (Joint Ex. 15 at pp. 1, 3). The March 2003 IFSP indicated that the OT and PT therapists and the child's family would promote her gross and fine motor development through exercises, stretching and playing (Joint Ex. 15 at p. 5).

The CPSE met in both June and November 2003 (Joint Ex. 19 at p. 1). The CPSE determined that the child was eligible for special education services as a preschool student with a disability, and recommended a 12-month extended school year (ESY) program implemented according to the Board of Cooperative Educational Services (BOCES) school year calendar; and the program consisted of four weekly 60-minute sessions of home-based OT, three weekly 60-minute sessions of home-based PT and two monthly one-hour home-based social work services (Joint Ex. 18). The CPSE also recommended 52-week services "outside of the school calendar," in the form of three 30-minute home-based PT sessions per week to address the child's range of motion (ROM) needs (Joint Ex. 18).

By letter dated January 26, 2004, the home-based physical therapist requested an increase in the child's 52-week PT services to three 60-minute sessions because the 30-minute sessions were not meeting her needs and because she was scheduled for upcoming foot surgery (Oct. 12, 2006 Tr. pp. 21-22, 54; Joint Ex. 24). On January 28, 2004, the CPSE convened and changed the child's IEP to reflect the physical therapist's recommendations (Joint Ex. 25 at pp. 1, 4). The child underwent bilateral clubfoot correction/revision surgery on February 5, 2004 (Joint Ex. 28-P at p. 1).

On May 27, 2004, the CPSE met for the child's annual review (Joint Ex. 33). The recommended home-based ESY services included four 60-minute OT sessions per week, three 60-minute PT sessions per week and three one-hour social work sessions (Joint Ex. 33 at p. 3). The CPSE recommended that the child's 52-week services consist of three 30-minute PT sessions per week (Joint Ex. 33 at p. 3). For the 2004-05 school year, the CPSE recommended that the child receive home-based services including four 60-minute sessions of OT per week, three 60-minute sessions of PT per week and two monthly one-hour social work sessions (Joint Ex. 33 at p. 3). It also recommended 52-week services in the form of three 60-minute PT sessions per week (Joint Ex. 33 at p. 3).

[2] AFOs were also described in the record as "ankle foot braces" used to maintain proper foot and ankle alignment (Oct. 12, 2006 Tr. pp. 35, 38).

On April 14 and May 12, 2005, the CPSE convened for the child's annual/program review and discussed her transition to the CSE (Joint Exs. 40; 42; 48). For the child's summer 2005 ESY, summer 2005 52-week program, and the 2005-06 school year, no change was made to the child's level of OT and PT services from the 2004-05 IEP (compare Joint Ex. 33 at p. 3, with Joint Ex. 48 at pp. 1-2). During summer 2005, the CSE Chairperson requested that the Technology Resources for Education (TRE) Center conduct an assistive technology evaluation and that BOCES conduct OT and PT evaluations of the child (Joint Exs. 52, 56; see Joint Ex. 75 at p. 1). She also contacted staff from BOCES and Vocational and Educational Services for Individuals with Disabilities (VESID) to request information regarding the extent of petitioner's responsibility to provide the child with 52-week services and guidance in determining which of the child's services are "medical" and which are educational (Joint Exs. 51-53; 56; 57).

On August 3, 2005, the CSE subcommittee convened again to conduct a CPSE to CSE transition meeting (Joint Ex. 59 at p. 1). The CSE subcommittee determined that the child was eligible for special education services as a student with an orthopedic impairment (Joint Ex. 59 at p. 1). The proposed August 3, 2005 IEP recommended that the child continue the same frequency, duration and schedule of home-based OT and PT services until the requested OT, PT and assistive technology evaluations were completed, not to extend beyond November 1, 2005 (Joint Ex. 59 at p. 1).[3] According to the record, the child did not attend petitioner's school and respondent home-schooled the child during the 2005-06 school year (Oct. 12, 2006 Tr. pp. 50, 55; Joint Exs. 72 at p. 1; 82 at p. 1).

On September 14, 2005, BOCES staff conducted OT and PT evaluations of the child (Joint Exs. 69; 70). The OT evaluation report indicated that the child would benefit from school-based OT services to improve upper extremity/hand strength, movement, coordination and object/utensil manipulation, to improve visual-perceptual-motor skills for written work, to develop further independence in self-care tasks and to develop home programs for the child's family to carryover OT interventions (Joint Ex. 69 at p. 3). The physical therapist reported that the child's therapy goals would change from medical to educational as she transitioned to school age, and PT would address developing age appropriate gross motor skills, monitoring the fit of the AFOs, developing self-stretching and strengthening programs that used functional activities, and monitoring rehabilitation after surgery (Joint Ex. 70 at pp. 2-3).

On September 21, 2005, petitioner's school psychologist conducted a psychological evaluation of the child (Joint Ex. 72). Following administration of cognitive, academic and vocabulary screening/assessment tools as well as consultation with respondent, the school psychologist concluded that the child exhibited average cognitive and academic skills and that her receptive language and phonological awareness skills appeared to be in the "typical" range (Joint Ex. 72 at pp. 1-2, 8). The school psychologist opined that the child did not require a special class, resource room or consultant teacher services, and she stated that OT and PT would address the student's fine and gross motor needs (Joint Ex. 72 at p. 8).

On October 20, 2005, an assistive technology coordinator from the TRE Center consulted with respondent and the child's occupational therapist, physical therapist and petitioner's CSE

[3] Although Joint Ex. 59 reflects a "Draft" IEP, the record indicates that it was approved by petitioner's Board of Education (Oct. 18, 2006 Tr. p. 472).

Chairperson (Joint Ex. 75 at p. 1).[4] The assistive technology coordinator recommended that the child be provided with daily access to a computer for written expression activities and computer skill development (Joint Ex. 75 at p. 3). Specific adaptive computer components and software programs were also recommended (Joint Ex. 75 at pp. 3-5).

In November 2005, the child's family physician recommended that respondent acquire OT home health services through Medicaid at a frequency of one time per week while school was in session and five times per week during school vacations (Oct. 18, 2006 Tr. p. 515; Joint Exs. 77-P; 80 at p. 3). On November 9, 2005, the CSE reconvened to review the assistive technology evaluation report from TRE and the OT and PT evaluation reports from BOCES (Joint Exs. 80; 81). The CSE recommended adding 10 hours of assistive technology services to the child's IEP (Joint Ex. 81). The child's appropriate level of OT and PT service was discussed, and at the conclusion of the meeting the participants could not reach consensus with respect to the appropriate level of OT and PT service offered by petitioner (Joint Ex. 80 at pp. 2-4). In two separate letters, dated November 10, 2005, respondent informed the CSE Chairperson that she disagreed with the BOCES OT and PT evaluation results; she requested that an independent educational evaluation (IEE) of the child to be conducted out of state and also requested a "fair hearing" (Joint Exs. 83; 84). On or about November 16, 2005, petitioner replied to respondent's IEE request by initiating an impartial hearing to defend its BOCES OT and PT evaluation reports (Joint Ex. 86). Due to the impending impartial hearing, the child's proposed assistive technology services were not implemented (Joint Ex. 89).

A resolution session was held on November 29, 2005 (Joint Ex. 91). The child's home-based certified occupational therapy assistant (COTA) and physical therapist and the BOCES occupational and physical therapists disagreed about the frequency and duration of OT and PT services that the child should receive (Joint Ex. 91 at p. 1). It was noted that the child's family physician recommended that the child receive OT five times per week and that a consensus was needed regarding the child's medical/educational OT and PT needs (Joint Ex. 91 at p. 7). At the end of the resolution session, the CSE Chairperson recommended that the child receive 12-month OT services three times per week for 60-minute sessions and 12-month PT services three times per week for 45-minute sessions (Joint Ex. 91 at p. 7). Respondent requested that the CSE recommend that the child be provided 52-week OT services four times per week for 60-minute sessions and 52-week PT services three times per week for 60 minute sessions (Joint Ex. 91 at p. 7).

In March 2006, the child underwent surgery on her right hand/wrist (Oct. 12, 2006 Tr. p. 93; Oct. 13, 2006 Tr. p. 154). On May 19, 2006, the parties entered into a settlement agreement, which stated, among other things, that the child's home-based COTA supervisor and her physical therapist would conduct the IEEs, that the child would continue to receive OT and PT pursuant to the last agreed upon IEP dated April 14, 2005, that the child's reported latex allergy would be indicated on the upcoming IEP, that a variety of assistive technology equipment be provided and that the parties would mutually withdraw the impartial hearing requests with prejudice (Oct. 12, 2006 Tr. pp. 120-21; Joint Ex. 108).

[4] The exhibit references attendance by an occupational therapist, who is identified in the record as a certified occupational therapy assistant (Oct. 12, 2006 Tr. pp. 118).

In May 2006, the home-based COTA supervisor provided an annual report of the child's present levels of performance (Joint Ex. 106). Administration of The Test of Visual Perceptual Skills-Revised to the child when she was five years, four months old yielded a score at the 37th percentile (Joint Ex. 106 at pp. 1, 3). Administration of the Bruininks-Oseretsky Test of Motor Proficiency to the child when she was five years, nine months of age yielded a fine motor composite of four years, eleven months (Joint Ex. 106 at p. 1). The child achieved a standard score (SS) of 91 (27th percentile, 5-2 age equivalent) on the Developmental Test of Visual-Motor Integration (VMI) (Joint Ex. 106 at p. 2; see Joint Ex. 123 at p. 3). The COTA supervisor reported that the child needed to improve fine motor skills, strength, and ROM to open containers and also reported that she would continue to address the child's visual-motor skills (Joint Ex. 106 at p. 2). Proposed long-term goals and short-term objectives were provided in the OT report and the COTA supervisor recommended that the child continue to receive OT four times per week for 60-minute sessions (Joint Ex. 106 at pp. 1, 3-5).

On May 30, 2006 the home-based physical therapist conducted a PT reevaluation of the child (Joint Ex. 114). The evaluation report stated that the child's PT program focused on ROM, strengthening, balance, endurance and functional skill development (Joint Ex. 114 at p. 1). The physical therapist indicated that the child and her family carried over gross motor skills on a daily basis, especially on the days that she did not receive therapy (Joint Ex. 114 at p. 1). Administration of an assessment identified in the record as the Peabody Gross Motor Scales-II while the child was wearing her AFOs yielded a stationary subtest score of 51 months, a locomotion subtest score of 34 months and an object manipulation subtest score of 37 months (Joint Ex. 114 at p. 4).[5] In general, the child demonstrated good muscle grading which was within normal limit ROM in her hips and knees, but she had poor to trace muscle grading and limited ROM in her ankles (Joint Ex. 114 at p. 2). Functionally, the physical therapist reported that the child used equipment or devices for mobility with minimal supervision and that she transferred independently (Joint Ex. 114 at p. 3). She required her braces in order to "go longer distances" (Joint Ex. 114 at p. 3). She was able to maintain or change position for educational activities without physical assistance, but she required physical assistance "in regards [sic] to her fine motor/visual motor skills" (Joint Ex. 114 at p. 3). According to the physical therapist, the child was able to tolerate all stimuli, make choices, organize, initiate tasks, attend, follow directions and demonstrate functional self-monitoring skills (Joint Ex. 114 at p. 3). It was recommended that the child receive two 60-minute PT sessions per week according to a 12-month schedule (see Joint Ex. 120).

Following the CSE Chairperson's request to conduct a review of the child's records, on May 31, 2006, an allergy specialist reported that he could not "characterize" the child's allergy from the limited amount of information before him (Oct. 18, 2006 Tr. p. 530; Joint Ex. 119 at p. 2). He indicated that a test identified in the record as the "RAST" would provide an objective assessment of a latex allergy (Joint Ex. 119 at p. 3). He stated that there is "very little" latex in most school situations and that the treatment for latex allergy is to avoid it (Joint Ex. 119 at pp. 2-3). He provided general latex precautions including eliminating latex from the classroom and cafeteria and providing medication such as an EpiPen or oral antihistamine if an accidental exposure occurred (Joint Ex. 119 at p. 3). He stated that the precautions outlined in the letter

[5] The record suggests that the assessment referenced in the May 2006 PT reevaluation report is the Peabody Developmental Motor Scales-2 (see Joint Ex. 70 at p. 2).

"would safeguard the child and permit [her] participation" in all "phases" of school (Joint Ex. 119 at p. 3).

The CSE convened on June 8, 2006 for an annual review of the child's program (Joint Exs. 122-24). The CSE determined that the child was eligible for the ESY services of OT three times per week for 45-minute sessions and twice weekly PT for 60-minute sessions (Joint Exs. 123 at p. 2; 124). For the 2006-07 school year, the child's recommended program consisted of general education with a full time 1:1 teacher assistant, OT three times per week for 45-minute sessions, twice weekly PT for 60-minute sessions, ten hours per year of assistive technology services, adaptive physical education and a bus monitor (Oct. 18, 2006 Tr. p. 506; Joint Exs. 122 at p. 9; 123 at p. 1). At the CSE meeting respondent expressed her disagreement with the OT and PT recommendations and the recommended placement at petitioner's school due to the child's latex allergy and concern regarding who would address the child's stretching and ROM needs (Joint Exs. 122 at pp. 6, 8-10; 124).

The CSE Chairperson anticipated the child's potential 2006-07 enrollment at school, and by letter dated June 14, 2006, she informed respondent of petitioner's plans to address the child's needs related to the child's latex allergy and her diagnosis of arthrogryposis (Joint Ex. 125).

By letter dated June 30, 2006, respondent requested an impartial hearing and alleged petitioner failed to make an individualized determination of OT and PT services, failed to provide adaptive physical education, failed to adequately describe the child's physical management needs, failed to provide supports for school personnel, failed to provide parent counseling and training, failed to provide special transportation, failed to consider respondent's concerns, failed to update the child's academic present levels of performance, and failed to "perform" pursuant to the May 19, 2006 settlement agreement (Joint Ex. 1).

After the June 2006 CSE meeting, a physician who specializes in orthopedics assessed the child on July 6, 2006 at the request of her family physician (Joint Ex. 131-P). The orthopedic specialist recommended that the child receive OT and PT services five days per week and that the child's family take an active role and receive training to execute the stretching and ROM regimen (Joint Ex. 131-P).

On July 14, 2006, petitioner responded to the due process complaint notice (Joint Ex. 2). By letter dated August 2, 2006, respondent removed the issues of failure to provide adaptive physical education, failure to provide parent counseling and training, and failure to consider respondent's concerns and academic needs of the child from their impartial hearing request (Joint Ex. 3). Respondent also provided consent for BOCES occupational and physical therapists to conduct OT and PT reevaluations of the child, due to their concern that the child regressed because of a lack of therapy for the two weeks between the end of the 2005-06 school year and the start of summer school (Joint Exs. 3; 139; 147).

On August 14, 2006, BOCES physical and occupational therapists conducted PT and OT reevaluations of the child (Joint Exs. 149; 153). By letters dated September 21, 2006, BOCES physical and occupational therapists provided the CSE Chairperson with information regarding concerns about the child's regression of skills (Joint Exs. 155; 156).

An impartial hearing was held on October 12, 13 and 18, 2006, and testimony was provided by the child's former and current physical therapists, her COTA, independent PT and OT

evaluators, the child's chiropractor, her family physician, the CSE Chairperson and respondent. Documents, photographs and an audio recording of the June 8, 2006 CSE meeting were also entered into evidence.

By decision dated April 2, 2007, the impartial hearing officer, upon reviewing the PT evaluations of the child, gave greater weight to the recommendations of the evaluator who had had more extensive contact with the child and the independent evaluator did not consistently use the child's AFOs during testing (IHO Decision at p. 20). The impartial hearing officer also relied upon the evaluation conducted in October 2006, finding that the results reflected consistent progress. Based upon these findings, the impartial hearing officer determined that respondent established that the weekly frequency of PT services should remain at three 60-minute sessions per week.

The impartial hearing officer also determined that respondent established that OT should remain at its current level because, unlike the child's service provider, the independent evaluator did not typically place the AFOs on the child's legs and preferred to delegate warm up, stretching and ROM activities to an aide (IHO Decision at p. 22). The impartial hearing officer determined that reducing OT services would leave "a gap in services without a safety net for the [s]tudent's continued progress" and ordered the continuation of four 60-minute OT sessions per week (IHO Decision at p. 22).

The impartial hearing officer disagreed with petitioner that 12-month services were appropriate, finding that respondent "made her case for the status quo" of 52-week services and that petitioner did not otherwise persuade him that a reduction to 12-month services was appropriate.[6] The impartial hearing officer relied upon the longstanding status of the 52-week PT and OT services in the child's previous IEP and the lack of proof "that 52 weeks is inappropriate, or rather that a twelve month program is appropriate" (IHO Decision at p. 23). He also relied on the unique nature of the child's condition, such as age and functional limitations, instead of focusing on regression to determine that the child should receive 52-week services (IHO Decision at p. 23).

The impartial hearing officer also anticipated that new PT and OT service providers would be substituted and directed that the IEP include detailed protocols in a "specific comprehensive plan" for continuity of PT and OT services (IHO Decision at p. 24). The impartial hearing officer also expressed his view that respondent should "program this Student for transition services in the broadest sense of the word," and that, among other things, the CSE should reconvene, consult with relevant physicians, develop a training program and redraft the IEP to include details regarding the child's disability (IHO Decision at p. 24, 25). The impartial hearing officer also directed that if services were altered in the future, the services must be better "coordinated and documented" in the IEP (IHO Decision at p. 25). The impartial hearing officer also directed that the IEP must be very specific, and that aspects of day-to-day issues confronting the child must be particularized in the IEP (IHO Decision at pp. 25-26).

The impartial hearing officer also concluded that respondent failed to establish that the child's present levels of performance were not adequately described in the IEP or that the child's

[6] The parties do not dispute that "52-week services" means providing the child with her regularly scheduled OT and PT services during school breaks and other periods in which school would not be in session during a typical 12-month ESY.

allergy to latex warranted greater intervention than offered by petitioner. He also determined that the following issues did not amount to a denial of a free appropriate public education (FAPE):[7] the failure to identify the training needed and person responsible for the child's use of AFOs; the failure to address the child's fatigue and pain; the failure to address the child's need for numerous therapies during the day and frequent admissions to the hospital; failure to incorporate a plan for "absences of pain management"; failure to provide supports for petitioners staff; and, the failure to provide special transportation. Finally, the impartial hearing officer declined to exercise jurisdiction to enforce the parties' previous settlement agreement.

Petitioner appeals those portions of the impartial hearing officer's decision holding that respondent made a prima facie case and failed to rebut it, and asserts that he erred by annulling the CSE recommendation to reduce the frequency of PT and OT services and decreasing the ESY services from 52-week to 12-month services. Petitioner challenges the impartial hearing officer's order to redraft the IEP to include additional information, arguing that his order contained several vague directives and inconsistencies, and that he directed respondent to provide relief with regard to issues that were not raised at the impartial hearing. Petitioner also contends that the impartial hearing officer erred by finding that the CSE failed to consider the recommendation of the COTA. Petitioner also asserts that the impartial hearing officer misread the Commissioner's Regulations regarding ESY services insofar as he incorrectly applied them to this case.

Respondent answers, denying petitioners allegations and requesting that the impartial hearing officer's decision with respect to the inadequacy of the 2006-07 IEP be upheld. Although contending that a State Review Officer lacks jurisdiction over issues upon which the impartial hearing officer rendered commentary, respondent agrees with petitioner that the impartial hearing officer addressed the following issues that were not raised at the hearing: redrafting the IEP to include specifics for implementing the current level of services, transition to the school environment, gaps occasioned by changing service providers; better coordination when altering services in the future; identification of who is responsible for providing services; identification of the individual responsible for stretching the child; future IEPs; inclusion of cautionary statements in future IEPs. Respondent also admits that the evidence establishes that she does not intend to send the child to be educated in school by petitioner.

Respondent also cross-appeals, contending that the impartial hearing officer erred by determining that she did not carry her burden of proof regarding her claim that the IEP inadequately described the child's physical and management needs with regard to her arthrogryposis and latex allergy. She also argues that the impartial hearing officer erred in declining to accept jurisdiction

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[7] 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].

over her claims regarding the parties' settlement agreement. In its answer to the cross-appeal, petitioner asserts that respondent should not be permitted to claim that the child was denied a FAPE with regard to the child's physical and management needs because she offered no complaint at the time she participated at the June 2006 CSE meeting. Petitioner further argues that the child's condition has improved since the 52-week services were first recommended. Petitioner also questions the diagnostic accuracy and severity of the child's latex allergy, contending that some of documentary evidence is based upon respondent's anecdotal reports. Lastly, petitioner argues that the impartial hearing officer correctly declined jurisdiction over the claim related to the parties' settlement agreement.

The central purpose of the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) is to ensure that students with disabilities have available to them a FAPE (20 U.S.C. § 1400[d][1][A]; see Schaffer v. Weast, 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 written IEP (20 U.S.C. § 1401[9][D]; 34 C.F.R. § 300.17[d];[8] see 20 U.S.C. § 1414[d]; 34 C.F.R. § 300.320; Gagliardo v. Arlington Cent. Sch. Dist., 2007 WL 1545988, at *1-*2 [2d Cir. May 30, 2007]).

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., 471 F.Supp.2d 415, 419 [S.D.N.Y. 2007]).

The IDEA directs that, in general, an impartial hearing officer's decision must be made on substantive grounds based on a determination of whether the child received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 130 [2d Cir. 1998]; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist.,

[8] 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.

873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192).

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

The 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]).

Because the adequacy of the June 2006 IEP is disputed by the parties, I will first turn to respondent's contention that she established that the IEP inadequately described the child's physical management needs related to her arthrogryposis. The June 2006 IEP described the child as having average language, phonemic awareness and cognitive skills and specified her adaptive skill abilities, such as dressing and undressing, turning lever faucets, hygiene and self-feeding skills (Joint Ex. 123 at p. 3). The June 2006 IEP identified the child's diagnosis of arthrogryposis and how it affected her fine and gross motor skills (Joint Ex. 123 at pp. 1-5). Specifically, the child's present level of fine motor skills and needs contained in the IEP match those reflected in the May 9, 2006 COTA supervisor's OT annual present level of performance report (compare Joint Ex. 106 at pp. 1-3, with Joint Ex. 123 at p. 3). Similarly, information about the child's present level of gross motor skills and needs reflects the May 30, 2006 home-based physical therapist's PT reevaluation report (compare Joint Ex. 114 at pp. 1, 4-5, with Joint Ex. 123 at pp. 4-5).[9] I note that the present levels of performance contained in the June 2006 IEP were provided by the therapists who were selected by respondent pursuant to the May 2006 settlement agreement (Joint Exs. 106; 108 at p. 1; 114). Both therapy reports were reviewed and discussed at the CSE meeting with the evaluators present (Joint Exs. 122 at pp. 2-5; 124). The present levels of performance were contained in a draft IEP and used by the parties at the June 2006 CSE during the meeting and were read aloud in their entirety by the CSE Chairperson (Joint Ex. 124). On numerous occasions during the meeting, the CSE Chairperson paused and asked meeting participants if there was agreement regarding the descriptions of the child's present levels of performance or if additional information should be added (Joint Exs. 122 at pp. 4-6; 124). Both respondent and her attorney asked questions and offered suggestions that resulted in changes to the recommended IEP (Joint Exs. 122 at pp. 4-6; 123 at pp. 2-5). At the conclusion of the CSE's discussion regarding the child's

[9] The May 2006 PT reevaluation report states that the child achieved a stationary subtest score of 51 months; the June 2006 IEP states her score on that subtest was 55 months (Joint Exs. 114 at p. 4; 123 at p. 4).

present levels of performance, petitioner's attorney stated that unless the CSE heard otherwise, it would assume that the child's special education needs were identified (Joint Ex. 124). Neither respondent nor her attorney offered additional information or concerns pertaining to the child's present levels of performance (Joint Ex. 124). After the CSE meeting, a copy of the IEP was sent to respondent and her attorney, who did not contact petitioner regarding their concerns or objections until the impartial hearing request was initiated (Oct. 18, 2006 Tr. pp. 489-90). In addition, I note that petitioner informed respondent about its plan to provide adult support to address the child's transportation, dressing, building navigation and personal care needs (Joint Ex. 125).

In view of the forgoing, I concur with the impartial hearing officer that respondent was an active participant at the June 2006 CSE meeting (see IHO Decision at p. 26). Both respondent and her attorney provided commentary regarding the proposed present levels of performance that were developed by the CSE and incorporated into the child's June 2006 IEP. I disagree with respondent's claim that the June 2006 IEP failed to adequately describe the child's physical management needs insofar as they relate to her diagnosis of arthrogryposis (Joint Ex. 123), and I find that respondent did not persuasively establish that the IEP failed to adequately identify the child's present levels of performance (8 NYCRR §§ 200.1[ww][3][i][a]-[d], 200.4[d][2][i]; O'Toole v. Olathe Dist. Schs. Unified Sch. Dist. No. 233, 144 F.3d 692, 703-04 [10th Cir. 1998]; Application of the Bd. of Educ., Appeal No. 04-031; compare Application of the Bd. of Educ., Appeal No. 02-025, with Application of a Child with a Disability, Appeal No. 04-046).

Turning next to respondent's argument that the June 2006 IEP inadequately described the child's physical management needs related to her purported latex allergy, the June 2006 IEP indicated that adult support in the form of a 1:1 teacher assistant would be provided to meet the child's latex allergy, health and safety and transition to public school needs (Joint Ex. 123 at p. 1). The CSE Chairperson testified that the 1:1 teacher assistant would be trained in how to respond if the child had an allergic reaction (Oct. 18, 2006 Tr. pp. 506-07). A team consisting of the child's parents, doctors and school "committee" would develop a plan that indicated who should be contacted, what medications would be administered in what order, and when 911 would be called (Oct. 18, 2006 Tr. pp. 506-07; Joint Ex. 125 at p. 1). At its June 2006 meeting, the CSE discussed the child's medical records that reported her latex allergy, the allergist's recommendations contained in his May 31, 2006 letter and, at length, respondent's concerns about petitioner's ability to provide a safe learning environment (Joint Exs. 122 at pp. 6, 9-10; 124; see Joint Ex. 119). The CSE Chairperson and petitioner's attorney stated that at a minimum, the recommendations provided by the allergist would be followed, in addition to development of a specific plan that involved staff training on the implementation of the allergist's recommendations and also accommodations for the child (Joint Exs. 122 at pp. 9-10; 124; see Joint Ex. 125 at p. 1). The record reflects that the child demonstrated infrequent allergic reactions; however, the reactions could not solely be attributed to contact with latex and her physician documented the latex allergy based on parental report (Oct. 12, 2006 Tr. pp. 61-62, 141-43, 158-59; Oct. 18, 2006 Tr. pp. 533-37). Respondent also predicted that efforts to acquire additional evaluative data regarding the source of the allergy would either be unsuccessful or would require a high risk of harm to the child due to difficulties that medical practitioners previously encountered with peripheral intravenous access during the child's surgery in 2004 (Oct. 18, 2006 Tr. pp. 676-77; Joint Exs. 27-P; 28-P; 29-P; 122 at p 6). Respondent also reported that, during the child's recent hand surgery, intravenous access was achieved through the top of the child's wrist, although the record does not reveal the duration of the antibiotic treatments administered during that procedure (Oct. 18, 2006 Tr. pp. 677-

78). Notwithstanding the source of the child's allergy, the record is clear that she plays with friends, attends appointments in office settings, goes to restaurants and engages in skiing and other activities without a reaction (Oct. 12, 2006 Tr. pp. 55-58, 167-168; Oct. 18, 2006 Tr. pp. 455-57, 534-35, 672, 679). The child's family physician testified that, despite having an allergy, the child does not need to be confined to her home and is capable of going out into the community (Oct. 18, 2006 Tr. pp. 535-36).

Under the circumstances, I agree with the impartial hearing officer's conclusion that the child's allergy does not require a level of intervention greater than that offered by petitioner, and that the child's needs were adequately described and understood by the participants at the June 2006 CSE meeting (IHO Decision at p. 27). I find that respondent has not established that the June 2006 IEP inadequately described the child's physical management needs as it relates to her reported latex allergy. Moreover, I cannot conclude that respondent is entitled to assert her claim that petitioner failed to offer appropriate services with respect to the child's allergy and at the same time insist that the CSE must base its recommendations regarding the child's needs on dated surgical records (Joint Exs. 27-P; 28-P; 29-P), an inconclusive evaluation by an allergist who recommended further testing (Joint Exs. 100; 102; 107; 115) and medical documentation from the child's treating physician which relied solely upon reports from respondent (Oct. 18, 2006 Tr. p. 536; Joint Exs. 14; 54; 99; see Dubois v. Connecticut State Bd. of Educ., 727 F.2d 44, 48 [2d Cir. 1984] [holding that "[b]efore a school system becomes liable under the Act for special placement of a student, it is entitled to up-to-date evaluative data"]; see also P.S. v. Brookfield Bd. of Educ., 353 F.Supp.2d 306 [D.Conn. 2005], aff'd, 186 Fed.Appx. 79 [2d Cir. 2006].

With respect to petitioner's challenge to the impartial hearing officer's decision annulling various aspects of the June 2006 IEP, I disagree with the impartial hearing officer's determination that the CSE inappropriately reduced the frequency and duration of child's PT and OT services. The impartial hearing officer in part relied on a comparison of PT evaluation scores from evaluations that occurred both before and after the June 2006 CSE meeting (IHO Decision at pp. 18-21). Numerous courts have held that the determination of appropriateness "is necessarily prospective in nature; we therefore must not engage in Monday-morning quarterbacking guided by our knowledge of [the child's] subsequent progress … but rather consider the propriety of the [program] with respect to the likelihood that it would benefit [the child] at the time it was devised" (J.R. v. Bd. of Educ. of Rye Sch. Dist., 345 F. Supp. 2d 386, at 395-96 [S.D.N.Y. 2004]). As further described below, I find that the CSE's recommendations for OT and PT services, at the time they were devised in the June 2006 IEP, were reasonably calculated to enable the child 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 June 2006 IEP recommended additional time for the child to complete classroom assignments that have a fine motor component (Joint Ex. 123 at p. 5). OT annual goals and short term instructional objectives contained in the child's June 2006 IEP were taken directly from the COTA supervisor's report, discussed at the CSE meeting, and when necessary, modifications were made (compare Joint Ex. 106 at pp. 3-5, with Joint Ex. 123 at pp. 7-10; see Joint Exs. 122 at p. 7; 124). The child's PT annual goals and short-term objectives were also reviewed by the CSE, and as previously noted, suggested changes were made at the meeting (Joint Exs. 122; 124). The CSE determined that the child was eligible for summer 2006 ESY and 2006-07 school year services consisting of OT three times per week for 45-minute sessions and PT two times per week for 60-minute sessions (Joint Exs. 123 at pp. 1-2; 124) and considered whether the child should be provided 52-week or 12-month ESY services.

Turning specifically to the CSE's recommended program of two 60-minute PT sessions per week, the record indicates that the CSE relied on the September 2005 BOCES PT and the May 2006 home-based PT evaluation reports as well as discussion with the evaluating therapists when it made its PT service recommendation (Joint Exs. 122 at p. 1-3; 123 at p. 6; 124). The home-based physical therapist, who recommended that the child continue to receive three 60-minute sessions of PT per week at the June 2006 CSE meeting, testified that the first thing she does with the child during a session is perform ROM activities in order to put the AFOs on the child's feet (Oct. 12, 2006 Tr. pp. 28-29, 43-44). She stated that without the ROM activities the child would not be able to tolerate wearing her AFOs, which were necessary to enable her to participate in functional activities (Oct. 12, 2006 Tr. p. 31). The record indicates that respondent was trained in proper "stretching" techniques and successfully implemented ROM activities in order to place the child's AFOs on her (Oct. 12, 2006 Tr. pp. 48-50, 106).[10] The home-based physical therapist testified that 80% of the time when she arrived for a PT session, the child was wearing her AFOs, having been "stretched" by respondent prior to her arrival (Oct. 12, 2006 Tr. p. 69). At least four days per week, respondent or a family member stretched the child enough to put on her AFOs (Oct. 12, 2006 Tr. pp. 72-73). According to the home-based physical therapist, respondent "always" put on the child's AFOs correctly (Oct. 12, 2006 Tr. p. 75).

The BOCES physical therapist, who evaluated the child in September 2005 and participated in the June 2006 CSE meeting, recommended that the child receive two 60-minute sessions of PT per week and testified that as long as she was stretched and wore her AFOs, the child exhibited good gross motor skills (Oct. 13, 2006 Tr. pp. 78-79, 86, 88; Joint Ex. 122 at p. 1). She stated that when the child was younger, the focus of PT was on stretching but as the child reached school age, the focus was more on functional activities that she will participate in while at school (Oct. 13, 2006 Tr. pp. 84, 98-99). The BOCES physical therapist concurred with the home-based physical therapist that respondent was able to perform stretching activities in order to put on the child's AFOs (Oct. 13, 2006 Tr. p. 122; see Oct. 12, 2006 Tr. pp. 48-49). She stated that the child was functionally independent within the home and community environments and in her opinion, there was no reason to continue with the "extended" frequency and duration of therapy (Oct. 13, 2006 Tr. pp. 123-24). The June 2006 CSE discussed that the child's 1:1 teacher assistant could be trained to implement the necessary stretching activities prior to her PT sessions (Joint Exs. 122 at p. 8; 124). I disagree with the impartial hearing officer's reasoning that that the CSE's PT service recommendation was not appropriate because the service provider spent more time with the child than the evaluator. Rather than showing that the child could receive greater benefits with increased services, respondent was required to demonstrate that the IEP offered by the June 2006 CSE was not reasonably calculated to provide educational benefits to the child. The record reflects that respondent was fully capable of adequately stretching the child in order to put on her AFOs, which were necessary for her to access the educational environment (Oct. 12, 2006 Tr. pp. 48-50, 106, 112-113), and respondent offered no persuasive reasoning why a 1:1 aide could not be trained to assist the child with stretching when she attended school. Accordingly, respondent did not show that a reduction of one session of PT per week denied the child a FAPE.

Turning to the CSE recommendation for the child's OT services, I also disagree with the impartial hearing officer's determination that following the recommendation of the BOCES occupational therapist would result in a "gap in service without a safety net for the [child's]

[10] The terms “ROM” and “stretching” were used interchangeably in the record (Oct. 12, 2006 Tr. p. 36; Oct. 13, 2006 Tr. p. 12).

continued progress" (IHO Decision at p. 22). The COTA who provided the child's home-based OT service testified that respondent was compliant with follow through of the child's stretching, handwriting, positioning, fine motor and self-help activities (Oct. 12, 2006 Tr. pp. 118, 121, 130). At the June 2006 CSE meeting, the COTA stated that the child's skills would not regress if stretching was performed by someone who was "qualified" and trained to do it (Oct. 12, 2006 Tr. pp. 185). The COTA testified that respondent was qualified to perform stretching and ROM activities although she did not stretch the child as "aggressively" as the therapists do (Oct. 12, 2006 Tr. p. 189). The child's family physician testified that he was aware that respondent engaged in stretching of the child's limbs, and agreed that the child's family must take an active role in her stretching and ROM regimen (Oct. 18, 2006 Tr. p. 547). He stated that the child's need for daily "services" could be provided by a combination of licensed therapists and a trained parent, and that a "lay" person could be trained to perform activities that the licensed therapist does (Oct. 18, 2006 Tr. pp. 569-70).

The COTA spent approximately 15 minutes per 60-minute OT session on stretching activities (Oct. 12, 2006 Tr. p. 147). The BOCES occupational therapist testified that the June 2006 CSE recommended a decrease in OT services because stretching was a substantial part of each session (Oct. 13, 2006 Tr. pp. 144, 174-75). She opined that the COTA's focus on stretching, strengthening and ROM activities would not be the majority of what she does with a student (Oct. 18, 2006 Tr. p. 391). She stated that in a school setting, her role is to support the child's academic participation and independence and that she would train someone else to perform stretching on a daily basis (Oct. 13, 2006 Tr. p. 148; Oct. 18, 2006 Tr. pp. 393-94). She testified that the stretching could be conducted prior to the OT session so that the occupational therapist could focus on functional activities (Oct. 13, 2006 Tr. p. 175). The BOCES occupational therapist testified that the frequency and duration of OT service recommended by the June 2006 CSE would address the child's needs (Oct. 13, 2006 Tr. p. 175). I note that petitioner informed respondent that all staff members responsible for the child would be trained and would consult weekly with the occupational and physical therapists to "properly assist with [the child's] care and stretching" (Joint Ex. 125 at p. 2). The record reflects that individuals other than COTAs or occupational therapists could be trained to adequately stretch the child and it was respondent's stated intention to conduct the necessary staff training if the child were enrolled (Oct. 13, 2006 Tr. pp. 165-66, 176). With stretching completed prior to the occupational therapist's arrival, the OT sessions could then focus on the child's skill development (Oct. 18, 2006 Tr. p. 491). Based on the information in the record, I find that respondent did not demonstrate how the June 2006 CSE's recommendation regarding the frequency of OT service and use of the 1:1 aide was inappropriate in light of the child's needs.

With regard to the impartial hearing officer's decision to continue the child's 52-week program duration for OT and PT sessions because of "the unique nature of the student's condition," I find that he did not apply the appropriate legal standard and that the record established that the child would not substantially regress if OT and PT were reduced as recommended by the CSE. The parties do not dispute the child's need for an ESY program. Students shall be considered for ESY services and/or programs if they exhibit the need for a service and/or program provided in a structured learning environment of up to 12 months duration in order to prevent substantial regression as determined by the CSE (8 NYCRR 200.6[j][v]). "Substantial regression" is further defined as "a student's inability to maintain developmental levels due to a loss of skill or knowledge during the months of July and August of such severity as to require an inordinate period of review at the beginning of the school year to reestablish and maintain IEP goals and objectives mastered at the end of the previous school year" (8 NYCRR 200.1[aaa]).

The June 2006 CSE recommended that the child receive 12-month PT service rather than 52-week PT service (Joint Ex. 123 at p. 2). The home-based physical therapist stated that the child needed daily stretching that was sufficient to put on her orthotics and that the main goal is maintaining the child's use of her AFOs (Joint Exs. 122 at p. 10; 124). She also stated that the child has excellent skill retention and that as long as she was stretched and wore her AFOs, the child's skills would not regress over a two week break (Oct. 12, 2006 Tr. pp. 34-35, 75-76; Joint Exs. 122 at p. 10; 124). At the meeting, the home-based physical therapist stated that respondent is capable of stretching the child and, as stated above, the record indicates this was sufficient in order for the child to wear the orthotics (Oct. 12, 2006 Tr. pp. 48-50, 106; Joint Exs. 122 at p. 10; 124). Based on the information in the record, I find that respondent has not established that the CSE failed to offer PT services in accordance with the child's need to prevent substantial regression.

With respect to OT services, the June 2006 CSE recommended that the child receive a program of 12-month rather than 52-week OT services (Joint Ex. 123 at pp. 1-2). At the meeting, the COTA and her supervisor recommended that the child continue to receive 52-week services for stretching and endurance purposes; however they acknowledged that if the child were stretched by a trained person during school breaks, there would not be a substantial regression of skills (Joint Ex. 124). As noted previously, the COTA indicated that respondent was capable of completing stretching and ROM activities (Oct. 12, 2006 Tr. p. 189). The BOCES occupational therapist stated that she would not expect to see any regression if a stretching regimen was used with the child during a two week break from OT service, and she opined that the child's skills would not be substantially "lost" if the interventions that the therapist used were carried over during school vacations (Oct. 13, 2006 Tr. pp. 165-66, 176). The CSE Chairperson testified she believed that, at the June 2006 CSE meeting, the COTA agreed that there should be no regression of skills if the child was stretched during breaks from services (Oct. 18, 2006 Tr. pp. 415, 492-93, 622-23). Based on the information before the June 2006 CSE, I conclude that its recommendation of 12-month OT services was appropriate to prevent substantial regression and that respondent did not prove that the child needed 52-week OT services.

I also concur with petitioner's claim that the impartial hearing officer's decision incorrectly directed relief with regard to redrafting the IEP to include specifics for implementing the current level of services, transition to the school environment, gaps occasioned by changing service providers; better coordination when altering services in the future; identification of who is responsible for providing services; identification of the individual responsible for stretching the child; future IEPs; and inclusion of cautionary statements in future IEPs. Under the 2004 amendments to the IDEA, the party requesting an impartial hearing may not raise issues at the impartial due process hearing that were not raised in its original due process request unless the original request is amended prior to the impartial hearing (20 U.S.C. § 1415[c][2][E]), or the other party otherwise agrees (20 U.S.C. § 1415[f][3][B]). At least initially, the party requesting an impartial hearing determines the issues to be addressed by the impartial hearing officer (Application of a Child with a Handicapping Condition, Appeal No. 91-40). It is also essential that the impartial hearing officer disclose his or her intention to reach an issue which the parties have not raised as a matter of basic fairness and due process of law (Application of a Child with a Handicapping Condition, Appeal No. 91-40). In this case, the parties do not dispute that the impartial hearing officer addressed the issues described above in his decision and that the issues were not raised by the parties. Accordingly, I will annul those portions of the impartial hearing officer's decision that directed relief with respect to issues that were not raised by the parties.

I now turn to respondent's contention that the impartial hearing officer erred in declining to exercise jurisdiction to enforce the parties' prior settlement agreement. The impartial hearing officer correctly declined to enforce the parties' settlement agreement. The Commissioner's regulations provide that settlement agreements "shall be enforceable in any State court of competent jurisdiction or in a district court of the United States" (8 NYCRR 200.5[j][2][iv]). The regulations do not confer jurisdiction to enforce settlement agreements upon impartial hearing officers. Accordingly, I find respondent's contention is without merit.

Lastly, I note respondent admits in her answer that she intends to continue home schooling the child while requesting IEP services from petitioner (Answer ¶ 17; see Oct. 18, 2006 Tr. pp. 720-21). The record also shows that there has been some continuing confusion over the extent of petitioner's responsibility to provide services to the child (Oct. 18, 2006 Tr. pp. 612-618; Joint Ex. 57 at p. 2).[11] While it is unnecessary to decide this issue in light of my determination that the June 2006 IEP was appropriate, I note that implementing respondent's requested remedy would have required that I direct petitioner to continue providing IEP services to a child who will not be enrolled in a public or non-public school. The Official Analysis of Comments to the revised IDEA regulations indicates that

> [a] few commenters requested revising § 300.133 to include home-schooled children with disabilities in the same category as parentally-placed private school children with disabilities.
>
> Discussion: Whether home-schooled children with disabilities are considered parentally-placed private school children with disabilities is a matter left to State law. Children with disabilities in home schools or home day cares must be treated in the same way as other parentally-placed private school children with disabilities for purposes of Part B of the Act only if the State recognizes home schools or home day cares as private elementary schools or secondary schools.
>
> (Expenditures, 71 Fed. Reg. 46594 [August 14, 2006]).[12]

Accordingly, the IDEA only requires that home-schooled students receive special education services to the same extent that other parentally-placed private school students receive services (see, e.g., Educ. Law § 3602-c), and only if home schools are recognized under state law as private elementary (34 CFR § 300.13) or secondary schools (34 CFR § 300.36).

The provision of IEP services to a home-schooled student educated pursuant to the Commissioner's regulations is not authorized under the IDEA or New York law because home schools are not recognized in New York as private elementary or secondary schools (8 NYCRR 100.10). The Commissioner of Education has also determined that home-school students are not enrolled in nonpublic schools for purposes of Education Law § 3602-c (see Appeal of Ando 45 Educ. Rep. 523 [2006] [holding that a home-school student may not receive career education

[11] A guidance document on home instruction referenced at the impartial hearing (Oct. 18 2006 Tr. p. 612) appears to be in conflict with controlling New York statutory provisions and recent Commissioner decisions regarding the provision of IEP services to students who are not enrolled in a public or nonpublic school.

[12] The Analysis of Comments is consistent with the interpretation of the 1999 regulations (see 64 Fed. Reg. 12406, 12602).

services though BOCES; Appeal of Pope, 40 Educ. Rep. 473 [2001] [finding that a home-school student may not participate in driver education classes that are offered to students enrolled in the public school]. I concur with the Commissioner's decision that the Legislature has not authorized partial attendance at a public school except under limited circumstances (see Appeal of Ando 45 Educ. Rep. at 524).

I have examined the parties remaining contentions and find that they are without merit.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the impartial hearing officer's decision dated April 2, 2007 is hereby annulled to the extent that it indicates that the PT and OT services recommended by the CSE in the June 2006 IEP were inadequate; and

IT IS FURTHER ORDERED that the impartial hearing officer's decision dated April 2, 2007 is annulled to the extent that it directed petitioner to revise the June 2006 IEP or include specific statements in future IEPs.

Dated: **Albany, New York**
June 14, 2007

PAUL F. KELLY
STATE REVIEW OFFICER