The University of the State of New York

The State Education Department
State Review Officer

No. 07-082

Application of a CHILD WITH A DISABILITY, by his parent, for review of a determination of a hearing officer relating to the provision of educational services by the Seaford Union Free School District

Appearances:
John J. McGrath, Esq., attorney for petitioner

Ingerman, Smith L.L.P., attorney for respondent, Christopher Venator, Esq., of counsel

DECISION

Petitioner appeals from the decision of an impartial hearing officer which denied her request to be reimbursed for her son's tuition costs and related expenses at the Sappo School (Sappo) for the summer 2005 and the 2005-06 school year. Respondent cross-appeals from the hearing officer's determination that it was required to provide transportation for the student to and from Sappo for the 2005-06 school year. The appeal must be dismissed. The cross-appeal must be sustained.

At the commencement of the impartial hearing on January 29, 2007, the student was attending tenth grade at Sappo (IHO Decision at p. 4; Tr. p. 289; Dist. Ex. 14). The student attended respondent's schools from kindergarten until he was unilaterally placed at Sappo for a summer 2005 program and for the 2005-06 school year (Tr. p. 286). Sappo has not been approved by the Commissioner of Education as a school with which school districts may contract to instruct students with disabilities (8 NYCRR 200.1[d], 200.7]). Respondent's Committee on Special Education (CSE) found the student eligible for special education services as a student with a speech-language impairment (IHO Ex. 1 at p. 5; see 8 NYCRR 200.1[zz][11]). On March 27, 2002, respondent's CSE changed his classification to a student with a learning disability (IHO Ex. 1 at p. 5; see 8 NYCRR 200.1[zz][6]). Neither the student's classification nor his eligibility for special education services is in dispute in this appeal.

The student transitioned from respondent's middle school to its high school at the start of the 2004-05 school year (see Dist. Exs. 4; 5). His individualized education program (IEP) for the 2004-05 school year recommended that the student receive the services of resource room within

the collaborative (push in) model for English, math and social studies five times a week for 40 minutes (Dist. Ex. 5 at p. 1). During the 2004-05 school year, the student performed poorly, failing all of his final exams and three of four academic core classes (Dist. Ex. 11). During the 2004-05 school year, respondent's CSE conducted meetings in October and December 2004 at petitioner's behest due to her concern that her son was not adjusting to high school both academically and socially (Dist. Exs. 6; 7). It was noted that the student did not avail himself of assistance that was "available in class, learning lab, or extra help" (Dist. Ex. 6 at p. 1). Petitioner explained that her son had poor self-esteem and a difficulty expressing his needs (id.). It was recommended that the student receive counseling as an additional support (id.). Respondent's CSE discussed a more restrictive environment and rejected it as not appropriate at that time (id.).

In March 2005, the CSE convened to develop the student's IEP for the 2005-06 school year (Dist. Ex. 8). The CSE recommended that the student be placed in collaborative classes for English, math and social studies and a special class for Biology (Dist. Ex. 8 at p. 1). He was reportedly passing English and social studies, but exhibiting difficulties in science and failing math (id. at p. 3). The student's teachers reported that despite his placement in collaborative classes, learning lab, and a math lab; the student had difficulty keeping up with assignments and his report card grades were borderline or failing (id. at p. 5). Both the student's special education and math teacher voiced concern at the CSE meeting that without more intensive scholastic intervention, he would fail to meet his graduation requirements (id.). The record reflects that the CSE initially recommended the student be placed in student support classes of 15:1 for English, social studies, math, and science and a learning lab, but petitioner stated that she would prefer the student remain in collaborative classes (id.).

At petitioner's request, respondent obtained an independent neuropsychological evaluation of the student in May 2005 (Dist. Ex. 9 at p. 1). Administration of the Wechsler Intelligence Scale for Children - Fourth Edition (WISC-IV) yielded a full-scale IQ score of 72, indicating that the student was functioning in the borderline range of cognitive ability (Dist. Ex. 9 at pp. 3, 6, 9). The student's summary scores across the four domains tested ranged from borderline to low average with a verbal comprehension score of 77, a perceptual reasoning score of 73, a working memory score of 83, and a processing speed score of 78 (id.). The evaluator opined that given the scope and severity of the student's combined cognitive, academic, and attentional difficulties, his continued placement within a regular education setting with support services was not adequate to meet his needs (id. at p. 7). The evaluator recommended placement of the student in a program with a small student to teacher ratio, speech-language therapy, counseling services and a structured reading approach based upon phonics, such as the Wilson Reading Method or Lindamood-Bell (id. at pp. 7-8). The evaluator also recommended teacher clarification and repetition of verbal directives/instruction to the student, presentation of new material to him in short manageable units with opportunity for review, and development and strengthening of the student's organizational and study skills such as outlining, summarizing, and highlighting of key ideas (id. at pp. 7, 9, 10). The evaluator indicated that due to the student's attention problems, impulsivity, and mental disorganization, he should be provided with small group instruction and be seated toward the front of the classroom (id. at p. 7).

Respondent's CSE reconvened on June 22, 2005, and after reviewing and considering the independent evaluator's report and recommendations, changed the student's proposed placement for the 2005-06 school year to student support classes for English, math, science, and social studies

as well as individual counseling one time per week for 40 minutes and counseling in a small group one time per week for 40 minutes (Dist. Ex. 12 at p. 1). The CSE added goals and short-term objectives related to the student's social/emotional/behavioral needs to the IEP and recommended that a speech-language evaluation take place in July 2005 (id. at p. 7). The CSE did not find the student eligible for extended school year services (ESY) (id. at p. 1).

By letter dated July 1, 2005, petitioner notified respondent's Interim Director of Special Education of her intention to place her son at Sappo for summer 2005, "in lieu of any summer services provided by" [respondent], "no sooner than 10 days from [July 1, 2005]" (Parent Ex. F).

On July 28, 2005, respondent's CSE reconvened to review the results of the student's speech-language evaluation (Dist. Ex. 14 at p. 1). The CSE amended the student's 2005-06 IEP to include individual speech-language therapy two times per week for 40 minutes and developed goals and short-term objectives to address the student's needs in the areas of speech and language (id. at pp. 1, 5, 6, 7). The CSE also added reading instruction by a consultant teacher three times per week to the student's IEP (id. at pp. 1, 5, 6). The CSE again found that the student was ineligible to receive ESY services (id. at p. 1). Petitioner rejected the program recommended by the CSE on the July 28, 2005 IEP (Tr. p. 284).

By due process complaint notice dated August 21, 2006, petitioner requested an impartial hearing, seeking reimbursement for all expenses related to specialized reading instruction received by the student at home;[1] tuition for Sappo for the summer 2005 and the 2005-06 school year; and all costs incurred transporting the student during the summer 2005 and the 2005-06 school year to and from Sappo (IHO Ex. 1).

An impartial hearing commenced on January 29, 2007 and concluded on March 13, 2007 after five days of testimony. At the impartial hearing, respondent's director of special services testified that the student support classes recommended by the CSE on the student's July 28, 2005 IEP are small classes that follow the New York State Regents curriculum (Tr. p. 57). She testified that the CSE recommended a more intensive program for the student's 2005-06 school year based on the recommendations of the May 2005 neuropsychological evaluation and because of the student's previous school year performance, stating, "it was very clear that he needed something else" (Tr. p. 58). She further testified that the level of service being recommended would address some of the difficulties that the student had experienced in ninth grade by providing him with more one-to-one instruction, smaller classes, and modified materials (Tr. p. 66). She stated that the same curriculum is followed as in the regular education classes, but at a slower pace that can be more individualized to a student's needs because of the small setting (Tr. p. 57). She testified that the work is modified, simplified textbooks are used, and the student support class is taught by a special education teacher with an assistant in the room (id.). She indicated that the maximum number of students in the room is 15 but that the average number of students in the class is usually 8 to 10 (Tr. pp. 43-44). She also testified that the consultant teacher who would have provided the student with reading instruction was certified in Wilson, which she stated is a sequential phonetic approach to decoding and reading (Tr. pp. 62-63). In addition to working on decoding, the consultant teacher

[1] A review of the hearing record reveals that this claim was not raised at the impartial hearing nor was it adjudicated by the impartial hearing officer.

would also work on reading comprehension with the student as well as sight words if needed (Tr. p. 64).

A special education teacher from respondent's high school testified that within the student support classes teachers can use different types of learning materials and therefore can use high interest reading material that is at a lower reading level so that "nobody falls behind" (Tr. pp. 117-18). She explained that due to the small size of student support classes, teachers have more "leeway" with assignments and due dates, which alleviates anxiety for students (Tr. p. 117). She further testified that based on her experience with the student in ninth grade, the student support classes would be appropriate for him. The teacher explained that a smaller class with fewer students and distractions would help with his attention problems and the curriculum could be modified to a great extent (Tr. p. 119). She further testified that the student needed to practice his language, reading and writing skills, and he would have more time to do so in a smaller class (id.). Recalling the last three years that she has worked in respondent's district, the teacher indicated that she has had no more than eight students in her student support classes (Tr. p. 145).

The independent evaluator who completed a neuropsychological evaluation of the student testified that the student had problems with auditory processing or language related functions, phonological processing; and that he exhibited difficulties with visual spatial processing, attention, concentration, and executive skills (Tr. pp. 411-12). The independent evaluator testified that his definition of a small class is 8 to 12 students with 2 teachers allowing for greater individualization of instruction, which is more consistent with the student's needs (Tr. pp. 431, 446). He also testified that the student is disorganized in the way he approaches tasks and requires individualized supervision to help him develop strategies (Tr. p. 417). He further testified that the student's problems in listening and auditory comprehension affect his reading comprehension and that the student has spent a lot of effort learning how to read words but loses sight of what he reads (Tr. p. 421).

By decision dated June 5, 2007, the impartial hearing officer determined that: a) respondent failed to offer petitioner's son a free appropriate public education (FAPE)[2] for the 2004-05 school year; b) respondent offered to provide petitioner's son a FAPE for the 2005-06 school year, therefore petitioner was not entitled to tuition reimbursement for 2005-06 school year; c) petitioner failed to demonstrate that the 2005-06 summer classes at SAPPO were designed to prevent regression, therefore petitioner was not entitled to reimbursement for tuition or transportation for summer 2005; d) petitioner failed to meet her burden in demonstrating that the 2005-06 school year program at Sappo provided educational benefit; and e) respondent was responsible for

[2] 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]).

transportation costs to Sappo for the 2005-06 school year because the program at Sappo was "sufficiently like the program envisioned in the IEP" (IHO Decision at p. 19).

Petitioner appeals from the impartial hearing officer's decision to the extent that it found that respondent offered the student a FAPE for the 2005-06 school year and that Sappo was not an appropriate placement for the student[3].

Respondent cross-appeals from the impartial hearing officer's determination requiring reimbursement of petitioner's transportation costs to Sappo for the 2005-06 school year. Petitioner did not file an answer to respondent's cross-appeal.[4] Respondent does not cross-appeal that portion of the impartial hearing officer's decision that found that respondent failed to offer petitioner's son a FAPE for petitioner's son for the 2004-05 school year. It is well settled that an impartial hearing officer's decision is final and binding upon the parties unless appealed to a State Review Officer (34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[j][5][v]). Consequently, the impartial hearing officer's finding that respondent failed to offer petitioner's son a FAPE for the 2004-05 school year, is final and binding (Application of a Child with a Disability, Appeal No. 07-070; Application of a Child with a Disability, Appeal No. 07-026; Application of a Child Suspected of Having a Disability, Appeal No. 06-092; Application of a Child with a Disability, Appeal No. 06-085; Application of a Child with a Disability, Appeal No. 04-024; Application of a Child with a Disability, Appeal No. 03-108; Application of a Child with a Disability, Appeal No. 02-100; Application of a Child with a Disability, Appeal No. 02-073).

The central purpose of the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482)[5] 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, 546 U.S. 49, 51 [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];[6] see 20 U.S.C. § 1414[d]; 34 C.F.R. § 300.320).

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[3] I note that multiple facts and dates contained within the petition do not correspond with the facts and dates contained within the hearing record. For example, there are multiple references in the petition alleging that the impartial hearing officer rendered decisions with respect to the 2006-07 school year; however, the scope of the impartial hearing was the 2004-05 school year, the summer 2005, and the 2005-06 school year. Although there are inconsistencies within the petition, petitioner has clearly set forth allegations for which she challenges the impartial hearing officer's decision (see 8 NYCRR 279.4[a]).

[4] Notwithstanding petitioner's failure to answer the cross-appeal, I am required to examine the entire hearing record and make an independent decision based on the entire hearing record (see Arlington Cent. Sch. Dist. v. State Review Officer, 293 A.D.2d 671 [2d Dep't 2002]; 20 U.S.C. § 1415[g]; 34 C.F.R. § 300.514[b][2][i]).

[5] 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). Citations contained in this decision are to the newly amended statute, unless otherwise noted.

[6] 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. For convenience, citations in this decision refer to the regulations as amended because the regulations have been reorganized and renumbered.

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]). 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; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the child a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 C.F.R. § 300.148).

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 427 F.3d at, 192). 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., 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, 546 U.S. at 59-62 [finding it improper under the IDEA to assume that every IEP is invalid until the school district demonstrates that it is not]).

With respect to her claims regarding the student's summer 2005 program, petitioner contends that by not considering whether her son would experience substantial regression over summer 2005, the CSE committed a procedural violation that substantively violated the student's rights under the IDEA. Petitioner also contends that there was sufficient documentation in the student's educational record to support the possibility that he would substantially regress. Petitioner's contentions are not persuasive.

Students shall be considered for ESY services in accordance with their need to prevent substantial regression (8 NYCRR 200.6[j]; see Application of the Bd. of Educ., Appeal No. 04-102). Substantial regression is the inability of a student 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 New York State Department of Education's Office of Vocational Education Services for Individuals with Disabilities (VESID) has determined that as a general guideline, a review period of eight weeks or more would indicate that substantial regression has occurred (see Application of a Child with a Disability, Appeal No. 05-114; VESID, "Extended School Year Programs and Services Questions and Answers," Question 1 [2006]).[7] I agree with the impartial hearing officer that petitioner did not meet her burden in proving that her son would suffer substantial regression if he did not receive special services during an ESY.

Respondent's director of special services testified that a discussion took place at the July 28, 2005 CSE meeting regarding summer services, and that the IEP stated "ineligible" for ESY services because the CSE believed that the student would not "fall back so many months" that it would "take him up to, say November, to catch up to where he was" (Tr. p. 103). Reports completed by the student's academic teachers in June 2005 indicated the student was achieving failing or borderline grades in mathematics, earth science, and English, and fair to average grades in social studies (Dist. Ex. 10 at pp. 1-4, 6). The student's math teacher reported that the student often did not complete his homework and therefore did not practice the concepts being taught and that he could put forth more effort by attending extra help (id. at p. 1). The student's science teacher reported that the student had completed no homework all year and that during instruction the student involved other students in activities unrelated to the lesson (id. at p. 2). The student's

[7] Although the current VESID website (2006) states "eight weeks or more," this standard was the same in 2005, when petitioner's son was placed into the summer 2005 program at Sappo. See VESID website address at: http://www.vesid.nysed.gov/specialed/publications/policy/esy/qa2006.htm.

learning lab teacher reported that although she asked the student to come in for extra help every day, he had done so only five or six times during the school year (id. at p. 3). The student's English teacher reported that he did not consistently complete homework and was often disruptive and inappropriate in class (id. at p. 5). The student's global studies teacher reported that the student would get upset when asked to proofread or correct his work (id. at p. 6).

The independent evaluator who completed a neuropsychological evaluation of the student in May 2005 noted in his report that although the student was cooperative throughout the testing "both effort and motivation were deemed minimal" (Dist. Ex. 9 at p. 3). At the impartial hearing, the independent evaluator testified that he perceived the student as "a boy who was poorly motivated, kind of beaten down by his learning problems" and that "poor attention …often translates into poor motivation" (Tr. pp. 425, 427). The independent evaluator also testified that the student was capable of average work as evidenced by subtest scores he achieved on the Woodcock-Johnson Tests of Achievement - Third Edition (WJ-III) administered in May 2005; citing by way of example, the student's percentile scores of 42 in letter word identification, 22 in math calculation, 20 in math quantitative concepts, and 25 in spelling (Tr. p. 428). He further testified that although the student has difficulty learning information, he seemed to retain the information once he learned it (Tr. p. 415).

I am not persuaded that the impartial hearing officer ignored the evidence of substantial regression indicated by a comparison of the student's report cards in June 2005 and October 2005. Petitioner contends that the student's grades in October 2005 show severe drops in all academic subject areas as compared with his report card the previous June (Pet. ¶13). The record show that the student's final grades for the 2004-05 school year were 58 in English, 67 in global history, 53 in math, and 34 in earth science (Dist. Ex. 11), while his first quarter grades for the 2005-06 school year were 94 in English, 90 in global studies, 96 in math, and 92 in living environment (science) (Parent Ex. P). Therefore, the evidence indicates that the student's academic performance improved rather than regressed.

Based on the record before me, I find that it was not established that the student required ESY services to prevent substantial regression. Petitioner cites the student's poor academic record as evidence of substantial regression. However, the record does not show that the student lost skills or knowledge or that he was unable to maintain developmental levels without services during July and August 2005.

The impartial hearing officer also found that petitioner failed to meet her burden of proof that respondent failed to offer the student a FAPE for the 2005-06 school year. The impartial hearing officer found that the "mistakes of the prior years" were corrected in the 2005-06 IEP, and that all of the recommendations of the evaluators and CSE professionals were placed in the IEP (IHO Decision. p. 14). I agree.

The hearing record shows that respondent's CSE first convened to develop the student's IEP for the 2005-06 school year on March 23, 2005 (Dist. Ex. 8). The CSE then reconvened on June 22, 2005, after receipt of the independent neuropsychological evaluation (Dist. Exs. 9, 12).

The record demonstrates that the CSE reviewed and considered the independent evaluator's report and implemented his recommendations; changing the student's proposed placement for the 2005-06 school year and recommending counseling services (Dist. Ex. 12 at p. 1). The CSE added

goals and short-term objectives related to the student's social/emotional/behavioral needs to the IEP and recommended that a speech-language evaluation take place in July 2005 (id. at p. 7).

The record further shows that after respondent's CSE was notified by petitioner that she did not agree with the June 22, 2005 IEP, the CSE met again on July 28, 2005 to review the results of the student's speech-language evaluation (Dist. Ex. 14 at p. 1). The CSE again amended the student's 2005-06 IEP, this time to include individual speech-language therapy and goals and short-term objectives to address the student's needs in the areas of speech and language (id. at pp. 1, 5, 6, 7). The CSE also added reading instruction by a consultant teacher three times per week to the student's IEP (id. at pp. 1, 5, 6). I agree with the impartial hearing officer that respondent's CSE offered to provide a FAPE to the student for the 2005-06 school year by creating IEPs which implemented the recommendations made in both the neuropsychogical evaluation and the speech-language evaluation and conferred education benefit upon the student. Therefore, petitioner is not entitled to tuition reimbursement at Sappo for the 2005-05 school year.

Having determined that the student was not denied a FAPE for summer 2005 and the 2005-06 school year, it is not necessary for me to consider the appropriateness of Sappo or whether the equities support petitioner's claim for tuition reimbursement (see Mrs. C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; Application of a Child with a Disability, Appeal No. 07-049; Application of a Child with a Disability, Appeal No. 07-030).

I now turn to respondent's cross-appeal regarding the award of transportation costs. With respect to his tuition reimbursement analysis under the second Burlington/Carter criterion, the impartial hearing officer determined that he did not have sufficient evidence to evaluate student's educational progress during the period he attended Sappo (IHO Decision at pp. 15-16). Respondent contends that the impartial hearing officer's finding with regard to the second Burlington/Carter criterion precludes an award of transportation costs.

Independently of federal requirements under the IDEA, the New York Education Law provides, in relevant part, that a board of education:

> shall provide suitable transportation up to a distance of fifty miles to and from a nonpublic school which a child with a handicapping condition attends if such child has been so identified by the local committee on special education and such child attends such school for the purpose of receiving services or programs similar to special educational programs recommended for such child by the local committee on special education (Educ. Law § 4402[4][d]).

This provision does not apply when the student does not attend the private school for the purpose of receiving special education services similar to those recommended by the CSE (Application of a Child with a Disability, Appeal No. 07-073). If the nonpublic school does not offer a student any special education services whatsoever, a district is not responsible for providing transportation to the private school under section 4402(4)(d) of the Education Law (see Application of a Student with a Disability, 33 Educ. Dep't. Rep 712, Decision No. 13,209 [1994]; Application of a Student with a Disability, 32 Educ. Dep't. Rep 467, Decision No. 12,888 [1993]; Application of a Child with a Disability, 30 Educ. Dep't. Rep 424, Decision No. 12,522 [1991]).

In this case, testimony elicited from Sappo's director and the student's teacher shows that Sappo provided petitioner's son with Orton-Gillingham instruction, which is a phonologically based reading program that is consistent with the recommendation of the CSE (Tr. pp. 464-65). Sappo provided the student with counseling and a small student-to-teacher ratio (Tr. pp. 542, 561), which is analogous to the CSE's recommendations. Sappo also provided some additional accommodations to assist the student with his learning such as modified classroom tests, modified homework, and a modified curriculum (Tr. pp. 529, 532, 546).

Significantly, however, the program the student received at Sappo was dissimilar to the program offered by respondent's CSE. As a result of the student's difficulties in a less restrictive inclusive setting during the prior school year, respondent's CSE recommended daily classroom instruction by a special education teacher in a non-general education setting and provision of speech-language services. In contrast, the student's class at Sappo was comprised of both special education and non-special education students and was taught by a general education teacher (Tr. pp. 499, 506-07). Furthermore, the student received direct instruction from a special education teacher one time per month only (Tr. p. 501), and a special education teacher "corroborated" with the classroom teacher (Tr. pp. 500-01). This "corroboration" was defined in the record as helping to develop and modify the program as well as participating on a child study team which met weekly to oversee the program (id.). Moreover, Sappo did not provide the student with the recommended speech-language therapy (Tr. p. 541). Under the circumstances presented in this case, I find that the services and program that were provided to petitioner's son at Sappo for the 2005-06 school year are distinguishable from those recommended by respondent's CSE on July 28, 2005, to the extent that they were not similar to the services and program recommended by respondent's CSE. For the forgoing reasons, I annul the impartial hearing officer's order directing respondent to reimburse petitioner for transportation costs that she incurred during the 10-month 2005-06 school year.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS SUSTAINED.

IT IS ORDERED, that the impartial hearing officer's decision is annulled to the extent that it ordered reimbursement for transportation costs for the 2005-06 school year.

Dated: **Albany, New York**
September 4, 2007

PAUL F. KELLY
STATE REVIEW OFFICER