



# The University of the State of New York

## The State Education Department State Review Officer

No. 07-092

### **Application of the BOARD OF EDUCATION OF THE MEXICO ACADEMY AND 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:**

Ferrara, Fiorenza, Larrison, Barrett & Reitz, PC, attorney for petitioner, Susan T. Johns, Esq., of counsel

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

### **DECISION**

Petitioner, the Board of Education of the Mexico Academy and Central School District, appeals from a decision of an impartial hearing officer which determined that the educational program recommended by its Committee on Special Education (CSE) for respondents' son for the 2006-07 school year was not appropriate. Respondents cross-appeal the impartial hearing officer's decision to the extent that he did not find that the goals and objectives contained in the January 2007 individualized education program (IEP) were inappropriate and further failed to grant their explicit request for additional services. The appeal must be sustained in part. The cross-appeal must be dismissed.

At the outset, three preliminary matters must be addressed. First, by letter from respondents' counsel to the Office of State Review dated August 21, 2007, respondents request recusal of the undersigned State Review Officer. Respondents' counsel contends that recusal is required because he does not believe that a decision will be unbiased and independent. In his letter, respondents' counsel cites two newspaper articles which reported either general comments or quotes from individuals that disagreed with previous decisions issued in appeals from impartial hearings. Respondents' counsel also advises that he has requested an investigation of both the undersigned and the Office of State Review. Respondents' counsel asserts that because he was

quoted in the newspaper articles and because he has requested an investigation, the undersigned must exercise recusal in this matter and all future matters in which he appears before me.

Prior to July 1, 1990, the Commissioner of Education conducted state-level reviews of impartial hearings conducted in New York. In 1990, the Legislature amended the Education Law to provide that the decisions of locally appointed hearing officers would be reviewed by a State Review Officer of the State Education Department (Educ. Law § 4404[2]). The Commissioner of Education thereafter promulgated regulatory requirements for the impartiality of State Review Officers (8 NYCRR 279.1[c]). As relevant to respondents' contentions, a State Review Officer must have no personal, economic or professional interest in the hearing which he or she is assigned to review (8 NYCRR 279.1[c][4]) and must be "independent of, and may not report to, the office of the State Education Department which is responsible for the general supervision of educational programs for children with disabilities" (8 NYCRR 279.1[c][3]). A State Review Officer shall recuse himself or herself and transfer the appeal to another State Review Officer if he or she was substantially involved in the development of a state or local policy challenged in the hearing; was employed by a party or a party's representative in the hearing; or engaged in the identification, evaluation, program or placement of the student who is the subject of the hearing (8 NYCRR 279.1[c][4]).<sup>1</sup> The statutory and regulatory schemes for state-level review in New York were held not to violate Federal law (Board of Educ. of Baldwin Union Free Sch. Dist. v. Sobol, 160 Misc.2d 539, 543-44 [Sup. Ct. Nassau County 1994]).

Here, I am not personally familiar with the parties in this case, nor do I have any personal, economic or professional interest relevant to these proceedings (8 NYCRR 279.1[c][4]). Moreover, the New York State Education Department is not a party in this matter. As set forth in their recusal request, nearly all of respondents' contentions are formed out of newspaper quotes from individuals who are of no relevance to the parties' dispute in this proceeding; however, even if they were relevant, newspaper articles do not form a basis for recusal (see Teichner v. W & J Holsteins, Inc., 161 A.D.2d 454 [1st Dep't 1990]), nor do the newspaper articles affect my opinion of the matters before me in this appeal (see generally, 22 NYCRR 100.2[a] [stating that judicial officials should not be swayed by partisan interests, public clamor or fear of criticism]). To the extent that respondents' counsel opines that he disagrees with the reasoning in previous decisions, such contentions are not relevant to a recusal inquiry. With regard to the assertions of respondents' counsel regarding his requests for an investigation, threats or attempts to sue as a means of achieving disqualification, in and of themselves, are also not a basis for recusal (see New York State Ass'n of Criminal Defense Lawyers v. Kaye, 95 N.Y.2d 556, 561 [2000]; Robert Marini Builder Inc. v. Rao, 263 A.D.2d 846, 847-48 [3d Dep't 1999]). In sum, respondents' request fails to allege any specific facts related to the parties or their dispute and thus is speculative in nature (see Levine v. Gerson, 334 F. Supp. 2d 376, 377 [S.D.N.Y. 2003]). Having given respondents' request due consideration, I find that I am able to impartially render a decision and that the provisions of 8 NYCRR 279 do not require recusal in this instance. In accordance with the forgoing, respondents' recusal request is denied.

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<sup>1</sup> The third criterion for recusal extends to cases in which a State Review Officer has been involved with "other similarly situated children in the school district which is a party to the hearing" (8 NYCRR 279.1[c][4][iii]).

Turning to the second preliminary matter, respondents submitted an affidavit signed by the student's mother with their answer and cross appeal. Here, petitioner has objected to consideration of the additional documentation on the grounds that the student's mother's affidavit is not necessary for a State Review Officer to render a decision, and that the affidavit refers to a hearsay conversation between her and a representative from the Anderson School (Anderson). Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an impartial hearing officer's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Child with a Disability, Appeal No. 06-086; Application of the Bd. of Educ., Appeal No. 06-044; Application of the Bd. of Educ., Appeal No. 06-040; Application of a Child with a Disability, Appeal No. 05-080; Application of a Child with a Disability, Appeal No. 05-068; Application of the Bd. of Educ., Appeal No. 04-068). Here, representatives from Anderson testified at the impartial hearing, and respondents were afforded an opportunity to elicit this information through testimony or documentary evidence. Furthermore, the additional documentation is not necessary in order to render a decision, and accordingly, I decline to consider it.

As for the third preliminary matter, respondents submitted an additional legal argument, dated September 9, 2007 and received by this office on September 13, 2007, asserting that the instant matter should not be dismissed as moot because the dispute has not been resolved (Resp'ts Letter dated 9/9/2007). In response, by cover letter dated September 17, 2007 and received by this office on September 19, 2007, petitioner submitted papers and documents as additional evidence for the purpose of supplementing the hearing record and demonstrating the parties' efforts to obtain an alternative residential placement for the student (Pet'r letter dated 9/17/2007). Neither party objected to these additional arguments and papers, and therefore, under the circumstances of this case, I have considered them upon review, and I agree with respondents' contention that the instant appeal is not moot.

At the time of the commencement of the impartial hearing in April 2007, the student was residing at home, and was not receiving special education services (Tr. pp. 14-15, 56, 59, 218). He has been found to meet the criteria for a diagnosis of autism and is reportedly moderately mentally retarded (Tr. p. 15). The student engages in maladaptive behaviors, including aggression, self-injury, property destruction, and elopement that interfere with his ability to interact with others in a safe and appropriate manner (Dist. Ex. 28 at p. 3). His classification and eligibility for special education services as a student with autism are not in dispute in this appeal (Tr. p. 176; Dist. Ex. 1 at p. 1; see 8 NYCRR 200.1[zz][1]).

At 22 months of age, the student was diagnosed as having a speech-language impairment (Dist. Ex. 49 at p. 2). In 1992, he was placed in a "special services preschool setting" (id.). While a part-time student at the preschool, the student was found to have met the criteria for a diagnosis of autism at which point he became a full-time student in the program (id.). He has been attending school in petitioner's district since kindergarten (id.).

During the period of September 5, 2001 through August 5, 2002, the student was in fifth grade and he exhibited 54 documented incidents of physical aggression, violence, and property damage (Dist. Ex. 8 at pp. 3-4). His episodes of aggression consistently included physically

grabbing arms and legs, pulling hair, pinching, biting, spitting, and charging and pushing of adults working with him (id. at pp. 1-2). The episodes occurred across all aspects of the school day and across various settings and environments (id.). On occasion, he reportedly displayed these same behaviors toward other students who were in close proximity to him (id. at p. 2).

When the student was 12 years old in April 2002, administration of the Kaufman Brief Intelligence Test (K-BIT) yielded an IQ composite score of 40 (Dist. Ex. 6 at pp. 4, 6). The student's receptive vocabulary was measured by the Peabody Picture Vocabulary Test–Third Edition (PPVT-III) and yielded a standard (and percentile) score of 40 (1st) indicating that his basic vocabulary was below the developmental level of a typical student his age (id.).

In September 2002, the student exhibited violent behavior and was subsequently placed on out-of-school suspension for three days (Dist. Ex. 10 at p. 1). A meeting was convened on September 13, 2002 to review the incident (Dist. Ex. 11). Meeting attendees included, among other individuals, respondents, a psychologist from the Central New York Developmental Service Office (CNY DSO), the student's teacher, and the CSE Chairperson (id.). The September 2002 meeting attendees recommended that petitioner's psychologist conduct a classroom observation and that the student's functional behavioral assessment (FBA) and behavior intervention plan (BIP) be updated following the psychologist's observation (id. at p. 1).

On May 28, 2003, the CSE convened for the student's annual review and development of his IEP for the 2003-04 school year (Dist. Ex. 13). The May 2003 IEP stated that during the first third of the 2002-03 school year, the student was extremely aggressive; however, at times, he completed academic work in both individual and group settings (id. at p. 10). The proposed IEP further stated that as the school year progressed, the student increasingly avoided work by hiding in a corner of the classroom or by exhibiting extreme aggression (id.). In the area of social development, he only interacted with adults and inconsistently expressed his wants and needs (id.). He required full assistance to follow the classroom routine, but reportedly tolerated that assistance inconsistently during structured and unstructured activities (id.). In light of his inability to communicate, the student was frequently aggressive toward staff and, on occasion, toward his fellow students (id. at p. 11). The May 2003 CSE recommended placement in a Board of Cooperative Educational Services (BOCES) 12:1+4 special class with a 1:1 aide (id. at p. 2). Related service recommendations for the student included two 30-minute sessions of adaptive physical education (APE) in a group per week, one 30-minute session of occupational therapy (OT) in a group per week, three 30-minute sessions of speech-language therapy in a group per week, and two weekly 30-minute 1:1 sessions of speech-language therapy (id. at pp. 2-3).<sup>2</sup> The May 2003 CSE determined that the student was eligible for extended school year (ESY) services (id. at pp. 5, 12), and developed goals and short-term objectives to address the student's needs in pragmatic skills, expressive and receptive language, socialization and behavior, assistive technology, and prevocational skills (id. at pp. 13-27).

On April 21, 2004, petitioner's CSE reconvened for the student's annual review and development of his program for the 2004-05 school year (Dist. Ex. 15). The present levels of

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<sup>2</sup> The May 2003 IEP does not indicate the size of the group in which he was to receive his related services (Dist. Ex. 13).

performance and individual needs in the April 2004 IEP indicated that the student demonstrated the ability to use picture symbols and verbalizations to communicate his wants and needs, but that he did not consistently utilize a mode for interacting (*id.* at p. 4). The April 2004 IEP stated that the student participated in large group activities with his 1:1 assistant by his side; however, he preferred to work alone with the 1:1 assistant (*id.*). The student could locate and type numbers and letters on a keyboard, type words from a sample with cues, and write his own name with a writing utensil (*id.* at p. 5). For the 2004-05 school year, the April 2004 CSE recommended placement in a 12:1+4 BOCES special class with a 1:1 aide (*id.* at p. 1). Related service recommendations for the student consisted of two weekly 40-minute sessions of APE in a group of three, one 1:1 30-minute session of OT per week, three weekly 30-minute sessions of speech-language therapy in a group of three, and two weekly 1:1 30-minute sessions of speech-language therapy (*id.*). The April 2004 IEP also provided for transportation on a mini bus with an aide (*id.*). In addition, the student's eligibility for ESY services continued (*id.*). With respect to his management needs, the April 2004 IEP noted that the student's aggression had decreased significantly from the previous school year; however, he continued to exhibit inappropriate social interactions with staff on a daily basis (*id.* at pp. 4-5). The April 2004 CSE developed goals and short-term objectives to address the student's deficits in receptive and expressive language, reading, math, socialization and behavior, augmentative communication, and prevocational skills (*id.* at pp. 8-20).

In June 2004, the student exhibited two instances of inappropriate contact with his school bus driver (Dist. Ex. 16). On September 13, 2004, the student exhibited three separate acts of violence against school staff and a fellow student, and he was subsequently suspended from school for one day (Dist. Ex. 17). Following these incidents, petitioner updated the student's FBA and BIP on September 15, 2004 (Dist. Ex. 18). On September 23, 2004, the student again exhibited acts of violence against school staff and he subsequently received a five-day out-of-school suspension (Dist. Ex. 19).

On September 24, 2004, petitioner's CSE Chairperson met with respondents, the student's teachers and related service providers, the BOCES supervisor, and providers from the CNY DSO to discuss the student's increasingly unpredictable and aggressive behavior (Dist. Ex. 21 at p. 1). Meeting participants agreed, pursuant to respondents' request, that a residential placement was appropriate to meet the student's special education needs at that time (Tr. p. 484; Dist. Ex. 21 at p. 1). On September 30, 2004, a subcommittee of petitioner's CSE convened to amend the student's IEP to reflect the changes to his program discussed during the September 24, 2004 meeting (Dist. Exs. 21 at p. 1; 22 at p. 1). The September 30, 2004 meeting notes indicated that the student's special education services would be changed from a 12:1+4 program in a BOCES setting to homebound instruction while a residential placement was explored (Dist. Ex. 22 at p. 4). For the interim period, the September 2004 CSE subcommittee proposed homebound instruction five times per week for two hours per day in addition to five weekly 30-minute home-based sessions of speech-language therapy (*id.* at pp. 1, 4).

On November 15, 2004, the CSE reconvened and amended the September 2004 IEP to gradually increase the student's homebound instruction to five and a half hours per day (Dist. Ex. 26 at p. 1). During November 2004, the CSE Chairperson contacted 15 residential schools outside of New York State regarding a placement for the student (Dist. Ex. 30).

In December 2004, the student was accepted into a 12:1+4 special ungraded class at the Maryhaven Center of Hope (Maryhaven), a residential school program (Dist. Ex. 31). On January 4, 2005, the CSE reconvened to amend the student's IEP to reflect the residential placement that had been secured for him at Maryhaven (Dist. Ex. 32 at pp. 1, 5). Related service recommendations were comprised of one 1:1 30-minute session of OT per week to be delivered at BOCES as well as five 1:1 30-minute sessions of speech-language therapy per week (id. at p. 1).

On February 18, 2005, at the request of Maryhaven, the CSE convened for a 30-day review of the student's program and services (Dist. Ex. 33 at p. 1). Documentation developed by Maryhaven staff indicated that the student's adjustment to his new placement was slow and that he preferred to be alone rather than interact with staff or peers (id. at p. 5). He occasionally sought out classroom staff to read or sing a song with him (id.). The student reportedly worked best when a reinforcer was visually presented to him (id.). He required short and simple directions, lessons of short duration, and frequent reinforcers to stay on task (id.). The CSE amended the student's IEP to include two 1:1 30-minute sessions of OT per week, three 1:1 30-minute sessions of speech-language therapy per week, and two 30-minute sessions of speech-language therapy per week in a group of five (id. at p. 2). The February 2005 IEP included goals and short-term objectives to address his needs in reading, writing, math, science, social studies, health and physical education, prevocational skills, communication, and activities of daily living (id. at pp. 8-26).

A quarterly progress report from Maryhaven for the third quarter of the 2004-05 school year indicated that the student was exhibiting at least some progress on many of the short-term objectives in his IEP and the report anticipated that he would achieve 28 out of 38 objectives related to academics (Dist. Ex. 34 at pp. 1-11). Goals and short-term objectives to address the student's receptive, expressive, and pragmatic deficits were not initiated (id. at pp. 12-14). A fourth quarter progress report indicated that the student did not master any of his IEP goals and short-term objectives by the time he left Maryhaven (id. at pp. 19-33). The student remained at Maryhaven until June 2005, when respondents removed him and placed him at Tradewinds Education Center (Tradewinds) reportedly because its location was closer to their home (Tr. pp. 485-86, 490-91; Dist. Ex. 35).

On June 20, 2005, the CSE convened to modify the student's residential placement, conduct an annual review, and formulate his program for the 2005-06 school year (Dist. Ex. 36). In the area of academic/educational achievement, the June 2005 IEP indicated that Maryhaven staff reported the student demonstrated a slight increase in his receptive and expressive language abilities, responded to his written name, and behaved compliantly when he wanted a reward (id. at p. 3). The student reportedly did not respond to his spoken name (id.). Maryhaven staff also reported to the June 2005 CSE that the student had adjusted well to the placement until April 2005, when he exhibited difficulty with a new classmate (id.). The June 2005 CSE recommended placement in a 6:1+3.5 special residential class at Tradewinds (id. at p. 1). The June 2005 IEP indicated the student's continued eligibility for ESY services (id.). Related service recommendations included two 1:1 30-minute sessions of OT per week, three 30-minute 1:1 sessions of speech-language therapy per week, as well as two weekly 30-minute sessions of speech-language therapy in a group of five (id.). The June 2005 CSE developed goals and short-term objectives with Maryhaven staff and determined that they would be used by Tradewinds until the student's 30-day review after entering that facility (id. at p. 4).

An FBA and BIP were completed by Tradewinds on June 28, 2005 (Dist. Ex. 40 at pp. 3-10). Psychotropic medications were reportedly used with the student in the past but were not prescribed at the time of his admission to Tradewinds (id. at p. 2). The student had difficulty transitioning into his new program and exhibited episodes of aggression, elopement, self-abuse and self-stimulation (Dist. Ex. 41 at pp. 2, 5). The student's aggressive behavior reportedly resulted in injury to himself, other students, and staff (id. at p. 2). On August 19, 2005, the student was again prescribed a psychotropic medication (id. at p. 5).

On September 26, 2005, respondents met with Tradewinds representatives and raised concerns regarding their son's increasingly aggressive behavior (see Tr. p. 487; Dist. Ex. 37 at p. 1). September 2005 meeting notes indicated that respondents expressed a general displeasure with the Tradewinds program citing concerns about the "ineffectiveness" of interventions and the appropriateness of the residential placement (Dist. Ex. 37 at p. 1). Meeting notes further indicated that a CSE meeting would be requested to discuss a "day placement" for the student, Tradewinds would contact respondents on a weekly basis regarding their son's progress and provide respondents with at least two opportunities per week to observe the student in school and the residence, the student's FBA would be updated, and that the student would continue to be followed at a psychiatric clinic (id. at p. 2).

By letter dated September 30, 2005 to the CSE Chairperson, respondents requested an "emergency" CSE meeting to discuss the appropriateness of their son's placement at Tradewinds (Dist. Ex. 38).

As part of an updated FBA dated October 17, 2005, Tradewinds recommended that the student be discharged from the facility, in light of his "extremely violent and aggressive behaviors and the significant differences in treatment philosophies that exist between [respondents] and the Tradewinds program" (Dist. Ex. 41 at p. 3).

On October 20, 2005, the CSE convened for review of the student's program at the request of respondents and Tradewinds staff (Dist. Ex. 42). The October 2005 meeting minutes indicated that the student's father stated the program was going in the right direction academically if agreement could be reached regarding the student's BIP and that he continued to believe that a residential program was more appropriate for the student than a home setting (id. at pp. 23, 25-27). The October 2005 CSE agreed to adjust the student's BIP, and at respondents' request, refer him back to Maryhaven (id. at pp. 23, 25, 27-28). The October 2005 CSE determined that the student would remain at Tradewinds in the interim (id. at p. 28).

On October 25, 2005, petitioner referred the student back to Maryhaven (Dist. Ex. 43 at p. 1). In a notice dated November 21, 2005, Maryhaven rejected the student's referral, stating that the student needed a more structured environment (id. at p. 2). On December 20, 2005, the CSE convened to continue reviewing the student's program and services as well as consider Maryhaven's rejection of the student (Dist. Ex. 46 at p. 8). The December 2005 CSE determined that the student would remain at Tradewinds until an alternative residential placement that would accept the student could be identified (id.). During January and February 2006, the CSE Chairperson sent referrals to two residential placements, both of which declined to accept the student (Dist. Ex. 47 at pp. 1-2, 5-7).

On February 2, 2006, the Tradewinds interdisciplinary treatment team conducted a semiannual review of the student (Dist. Ex. 48). Respondents participated by telephone (*id.* at p. 1). The student was reported to have made "great gains" in speech therapy, where he was participating more, and successfully following directions (*id.* at p. 3). At the residence, his behavioral problems had reportedly decreased and he was willing to spend more time around his peers (*id.* at pp. 3, 9). Members of the treatment team reported that at school, the student was developing coping skills, understanding what was expected of him, and communicating his wants and needs (*id.* at p. 3). A report from the student's behavior specialist assistant, in conjunction with data collected, indicated that since the frequency of the student's home visits had decreased in January, his episodes of aggression and temper tantrums decreased significantly (*id.* at pp. 9-10).

In March 2006, Tradewinds conducted a psychoeducational evaluation of the student (Dist. Ex. 49). According to the evaluation report dated March 31, 2006, the evaluator attempted administration of the Comprehensive Test of Nonverbal Intelligence (CTONI), but due to the student's lack of focus and participation, the test was discontinued (*id.* at p. 6). Administration of the Wide Range Achievement Test 3 (WRAT 3) yielded scores within the early elementary school level in sight vocabulary, arithmetic, and spelling (*id.*). The student was able to read several words presented, was able to count dots and ducks when prompted by the examiner, and count from one through twenty (*id.* at p. 7). The evaluator administered the Vineland Adaptive Behavior Scales (Vineland) to school and residential staff who worked with the student and resultant scores yielded an adaptive behavior composite of <20 indicating the student was in the profoundly mentally retarded range of adaptive functioning (*id.* at pp. 6-7). The evaluator opined that this was an underestimate of the student's ability and that he was more accurately functioning in the "severe" mentally retarded range (*id.* at p. 7). The evaluator recommended that staff present the student with new rhyming books and alternate reading every other page to him, prevent him from withdrawing, provide him with additional reinforcements to participate, use social stories with him on a daily basis to stress appropriate classroom behavior, and place more demands on him to encourage independence in the home and residential settings (*id.* at pp. 7-8).

On April 24, 2006, respondents reportedly withdrew their consent for administration of psychotropic medication to the student and requested immediate titration from his current medication (Dist. Ex. 51 at p. 1). In a letter dated May 3, 2006, Tradewinds informed respondents that as a result of the "premature" discontinuation of the student's medication, it was necessary to review with respondents and the CSE what treatment options might need to be intensified while a more appropriate placement was sought (*id.*). On May 4, 2006, the student reportedly attacked his classroom teacher and another staff person and required transportation by ambulance to the local hospital for evaluation to assess and address his agitated state (*id.* at p. 2). By letter dated May 12, 2006, the Division Director of School Age Programs at Tradewinds informed respondents of their intent to discharge the student due to respondents' withdrawal of consent for use of psychotropic medication (Dist. Ex. 52 at p. 1).

On May 16, 2006, the CSE convened for a reevaluation review of the student's program (Dist. Ex. 53). May 2006 CSE meeting notes stated that the meeting was held at the request of Tradewinds staff to discuss discharging the student from the program and to determine the next step for identifying another residential setting for the student (*id.* at pp. 8, 33). The May 2006 CSE



recommended the continuation of his residential placement at Tradewinds in a 12:1+4 special class and related services of two 1:1 30-minute sessions of OT per week, three 30-minute 1:1 sessions of speech-language therapy per week, and two 30-minute sessions of speech-language therapy in a group of five per week until the student's discharge from Tradewinds on June 16, 2006 (id.).

On May 23, 2006, the Tradewinds treatment team working with the student convened to discuss his pending discharge and determine what services he would require prior to and upon discharge from their program (Dist. Ex. 55). Respondents were invited but did not attend this meeting (id. at p. 1). Treatment team meeting notes indicated that since the discontinuation of the student's medication, he had exhibited increased aggression and a decrease in participation in therapy, his classroom, and the residence (id. at p. 2). The treatment team recommended that the student continue to receive a sensory integration program, therapies, health services of a primary care physician, psychiatric services, behavior support planning, a highly structured education program, and placement in an intensive residential and educational program more consistent with his parents' philosophy of treatment (id.).

On May 25, 2006, the student was accepted at Anderson (Dist. Ex. 54). The Commissioner of Education has approved Anderson as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

On June 19, 2006, a CSE meeting was requested by the CSE Chairperson to review the student's program and services listed on his IEP for the 2006-07 school year and to adjust his program according to Anderson's requirements (Dist. Ex. 56 at p. 8). The June 2006 CSE proposed a 12-month residential placement at Anderson in a 6:1+3 special class (id. at p. 3). Related service recommendations consisted of one 1:1 30-minute session of OT per week, one 1:1 30-minute session of speech-language therapy per week, and one 30-minute session of speech-language therapy per week in a group of five (id. at p. 4). On June 28, 2006, respondents enrolled the student at Anderson (Tr. p. 75).

On August 18, 2006, a speech-language evaluation of the student was conducted at Anderson (Dist. Ex. 57 at p. 10). The evaluator reported that the student's language skills were assessed through observation and the use of formal assessment instruments (id.). According to the evaluation report, the student's communication skills were assessed by observation in a variety of naturally occurring routines during his school day and administration of a test identified in the hearing record as the Peabody Picture Vocabulary Test (Form B) (id.). The evaluator concurred with prior reports that the student appeared sensitive to environmental sounds (id.). Administration of the Peabody Picture Vocabulary Test (Form B) yielded a receptive language standard (and age equivalent) score of 40 (three years) indicating a significant delay in receptive language skills (id.). Informal observation by the evaluator in a variety of contexts and occasions indicated that the student could follow simple commands such as "come here" and "sit down please" (id.). In the area of expressive language, the evaluator reported that the student initiated one-word utterances and imitated single words modeled during administration of the test (id.). He initiated short phrases and simple sentences when communicating something he desired such as "computer please," "I want to watch video," and "I want to go to the bathroom" (id.). The evaluator reported that program staff indicated that the student expressed his need to use the bathroom by removing a picture icon from the bathroom door and by giving it to a staff member (id.). The evaluator used

a "first-then" picture strip to obtain the student's participation when administering the Peabody Picture Vocabulary Test (*id.*). Through staff interviews and direct observation, the evaluator assessed the student's pragmatic language skills and reported that he tended to avoid eye contact when being greeted in the school setting or when his therapist attempted to engage him in short social discourse (*id.* at p. 11). However, at other times, staff observed the student giving intermittent or fleeting glances of visual contact with a communicative partner (*id.*). The evaluator opined that the student exhibited an inconsistent pattern of communication and recommended that he receive 1:1 speech-language therapy, one time per week for 30 minutes and group speech-language therapy one time per week in a language rich environment (*id.*).<sup>3</sup>

A 30-day clinical summary from the student's behavior specialist dated August 30, 2006 stated that baseline frequency data gathered since admission on the student's problem behaviors indicated that he exhibited physical aggression on an average of four times per day in school and two and a half times per day in the residence; self-injurious behavior on an average of 0.43 times per day in school and 0.67 in the residence; and elopement on an average of 1.1 times per day in school and 0.9 times per day in the residence (Dist. Ex. 57 at p. 14). The behavior specialist reported that the student also exhibited ritualistic behaviors for which he had started a trial of psychotropic medication (*id.*). The behavior specialist interviewed the student's teacher aide and residential supervisor to complete the Vineland Adaptive Behavior Scales - Second Edition (VABS-II) which yielded an adaptive behavior composite score of 34, and standard scores of 35 in communication, 30 in daily living skills, and a total score of 40 in the socialization domain (Dist. Ex. 58 at pp. 2-3).

A September 6, 2006 report from the student's special education teacher indicated that she attempted to administer the "Wechsler Individual Achievement Test" to the student on six separate occasions (*id.* at p. 1). The special education teacher reported that the student would attend to and perform tasks for up to 15 minutes (*id.*). He required long intervals before responding to questions and was not always able to express himself clearly (*id.*). The teacher also reported that the student would "pinch" the exam book rather than answering questions (*id.*). Further attempts to administer the testing instrument resulted in the student's outright refusal and avoidance behaviors (*id.*). The special education teacher opined that the student's strengths and abilities could not be properly measured by standardized tests, but that he was curious about his environment and once engaged, he would attend to a task for 15 to 20 minutes with frequent redirection and prompting (*id.*). He reported that the student enjoyed and gained information from picture books, knew and identified most body parts, counted to 20 accurately, knew his own first and last name, and knew that school lunch took place at noon (*id.*). The student did not know his correct age or birth date and did not know the time for gym, school store, or dismissal (*id.*).

On September 8, 2006, Anderson conducted an OT evaluation of the student (Dist. Ex. 57 at p. 12). The evaluator reported that a formal evaluation was not possible due to the student's "extreme behaviors" and difficulty adjusting to Anderson's program (*id.*). Through observation of the student in his classroom and the OT treatment space, the evaluator determined that the student demonstrated intact range of motion and strength in all extremities and was able to negotiate the

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<sup>3</sup> The evaluator did not indicate the size of the group in her recommendation for group speech-language therapy (Dist. Ex. 57 at p. 11).

school environment successfully (id.). The student was able to manipulate classroom materials, open containers, and manipulate closures for dressing (e.g., zippers) (id.). The evaluator reported that the student was extremely sensitive to noise and tactile sensation and exhibited oral defensiveness (id.). The evaluator's recommendations included one weekly 1:1 session of OT to address improvement of the student's sensory processing skills and completion of the Adolescent/Adult Sensory Profile (id. at p. 13). In addition, the evaluator recommended refinement of the student's sensory diet to improve his proprioceptive, tactile, and oral processing (id.).

On September 8, 2006, a 30-day IEP review and CSE meeting took place at Anderson (Dist. Exs. 57; 59). Respondents, Anderson staff members and the student's related service providers were in attendance and the CSE Chairperson and a parent representative participated via telephone (Dist. Exs. 57 at p. 1; 59 at p. 2). September 2006 CSE meeting notes stated that the student had a difficult time transitioning to Anderson, but that he was slowly showing progress and beginning to adjust to the program (Dist. Ex. 57 at p. 2). Meeting discussion notes also indicated that the student's performance in school, the residence, speech-language therapy, and OT was discussed, as were the types of activities in which he would be participating or "working on" in each area (id.). Respondents provided information regarding reinforcers for the student and requested a formal goal for the student to respond to his name (id.). Goals and corresponding short-term objectives were developed based on the information that was provided and reviewed at the meeting (Dist. Exs. 57 at pp. 4-9; 59 at pp. 17-19). The September 2006 IEP continued the student's program as proposed in the June 2006 IEP, but added one weekly 30-minute session of OT in a group of five (id. at p. 8).

An undated clinical summary for the quarter ending September 2006 indicated that baseline data showed that in school the student was exhibiting an increase in physical aggression and self-injurious behavior and a decrease in elopement (Dist. Ex. 61 at p. 7). In the residence, he was exhibiting a slight increase in self-injurious behavior, a slight decrease in elopement, and the student's incidences of physical aggression had remained stable since baseline data was taken (id.). A behavior support plan, which incorporated a functional assessment of the student's behavior, was developed for the student and approved by Anderson's behavior management committee on November 17, 2006 (Dist. Ex. 60).

During fall 2006, the student's violent behaviors reportedly increased (Tr. p. 194). By e-mail dated December 12, 2006, respondents withdrew their consent to medicate the student and asked Anderson staff to take him off medication as soon as possible (Tr. p. 195; Dist. Ex. 66 at pp. 1-2). By letter dated December 14, 2006 to the CSE Chairperson, Anderson's IEP Coordinator recommended that the student be referred to an alternate placement (Dist. Ex. 63). The IEP Coordinator explained that Anderson had "exhausted all its options, by way of supports," and further stated that staff agreed that the student's educational and behavioral needs could not be met at Anderson (id.). By letter dated December 14, 2006 to the Executive Director at Anderson, the student's family physician requested that Anderson consider "continuing with the student" at Anderson and "follow[ing] through with the behavioral management program" developed in November 2006 once the student was tapered off medication (Dist. Ex. 62 at pp. 2-3). The physician stated that in the past the student's behavior had become more violent while taking antidepressant or antipsychotic medications and that the student was known to respond well to

behavioral modification (id. at p. 2). In a letter dated December 29, 2006 to the CSE Chairperson, Anderson's IEP Coordinator reiterated the necessity for the CSE to promptly seek an alternate placement for the student and stated that Anderson would continue to keep the student at the facility during the interim (Dist. Ex. 66 at p. 1).

On January 4, 2007, the student was taken from Anderson to a psychiatric hospital due to "out of control behavior" (Dist. Ex. 67). On or about January 6, 2006, respondents removed their son from Anderson (Tr. p. 218; see Dist. Ex. 68).<sup>4</sup> Respondents notified the CSE Chairperson that they had removed their son from Anderson "due to concerns about his immediate health and safety" (Dist. Ex. 68). Respondents further requested that, at the CSE meeting scheduled for January 12, 2007, the CSE provide recommendations for an immediate safe and appropriate placement for their son or provide him with homebound instruction in accordance with his IEP (id.).

On January 12, 2007, pursuant to Anderson's request, the CSE reconvened for a review of the student's program (Dist. Ex. 69; Parent Ex. K).<sup>5</sup> January 2007 meeting notes indicated that the purpose of the meeting was to consider a more structured setting for the student (Dist. Ex. 69 at p. 9). The January 2007 IEP noted that the student's challenging behaviors had escalated during the summer (id. at p. 4). According to the January 2007 IEP, the student's behaviors decreased when medication was introduced; however, respondents requested that their son's medications be tapered, which reportedly exacerbated his aggressive behaviors (id.). The January 2007 CSE meeting participants concurred that Anderson was no longer appropriate to meet the student's educational needs; however, Anderson staff indicated they were willing to maintain his program at Anderson until other arrangements were made (Tr. pp. 40-41, 60, 92; Dist. Ex. 69 at p. 9; Parent Ex. K). Anderson staff also indicated that extra supports would be implemented, in the event that the student returned to that setting (Tr. p. 209; Parent Ex. K). Although the student's father agreed with the January 2007 CSE's recommendation to locate another residential placement for his son, respondents did not want their son to return to Anderson (Tr. pp. 96, 206, 246, 257-58; Parent Ex. K).<sup>6</sup> A number of alternative placements were mentioned during the January 2007 CSE meeting, including one alternative presented by an Anderson staff member and a list of potential placements suggested by the student's father (Tr. p. 248; Parent Ex. K). The CSE recommended the student continue at Anderson while an alternative residential placement was sought (Dist. Ex. 69 at p. 27; Parent Ex. K). The hearing record does not indicate that meeting participants discussed homebound instruction as an interim option (Parent Ex. K). Goals and objectives and related

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<sup>4</sup> The student's father testified that he believed that respondents removed their son from Anderson on January 7, 2007 (Tr. p. 218).

<sup>5</sup> Parent Ex. K is an audio recording of the January 2007 CSE meeting recorded by the student's father (Tr. pp. 209-10).

<sup>6</sup> During the period of January 2007 through April 2007, petitioner's CSE Chairperson contacted seven residential placements, which included schools outside of New York State, in an attempt to locate an appropriate residential placement for the student (Dist. Exs. 70; 72). At the time of the impartial hearing in April 2007, petitioner's CSE had yet to secure a residential placement for the student (Tr. pp. 105-07, 127).

service recommendations were carried over from the student's September 2006 IEP (Dist. Ex. 69 at pp. 4, 11-13).

By due process complaint notice dated February 14, 2007, respondents commenced an impartial hearing, asserting that petitioner failed to offer their son a free appropriate public education (FAPE)<sup>7</sup> during the 2006-07 school year (Dist. Ex. 1). Respondents requested annulment of the 2006-07 IEP, development of a new IEP that recommended an appropriate placement, additional services to remedy a deprivation of instruction to the student, provision of homebound instruction to the student until an appropriate placement could be provided, and payment by petitioner of respondents' attorney fees and associated costs (id. at p. 2).

On March 5, 2007, a resolution session convened, however the parties were unable to reach a settlement (Dist. Ex. 5). On April 25, 2007, an impartial hearing convened and after three days of testimony, concluded on April 27, 2007. On May 3, 2007, the impartial hearing officer rendered a decision with respect to the issue of the student's pendency placement, finding that the May 2006 IEP established the student's pendency placement.<sup>8</sup> In a decision on the merits of respondents' claims dated July 7, 2007, the impartial hearing officer determined that the June 2006 and September 2006 IEPs were appropriate to meet the student's special education needs, and accordingly offered him a FAPE (IHO Decision at pp. 15-17). However, regarding the appropriateness of the January 2007 IEP, the impartial hearing officer determined that the January 2007 IEP denied the student a FAPE, noting that, "it was simply a mistake for the CSE to continue the student at Anderson" (id. at p. 17).<sup>9</sup> The impartial hearing officer found that on January 6, 2007, in light of concerns for their son's health and safety, respondents withdrew their son from Anderson because they had lost respect for the placement (id.). Although he described the January 2007 CSE's decision to maintain the student at Anderson as "well-intentioned," the impartial hearing officer stated that it was not designed to confer an educational benefit on the student (id. at p. 18).

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<sup>7</sup> The term "free appropriate public education" means special education and related services that-

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

(20 U.S.C. § 1401[9]).

<sup>8</sup> On July 25, 2007, a decision in an interlocutory appeal was rendered which annulled the impartial hearing officer's May 3, 2007 pendency decision and determined that the student's September 2006 IEP constituted his pendency placement (Application of the Bd. of Educ., Appeal No. 07-061).

<sup>9</sup> Inasmuch as neither party appeals the impartial hearing officer's findings with respect to the appropriateness of the June 2006 and September 2006 IEPs, that part of the decision is final and binding (34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[j][5][v]; see Application of a Child with Disability, Appeal No. 07-012).

The impartial hearing officer noted that respondents had not presented him with a clear picture of what additional services would be appropriate to remedy the denial of a FAPE, and accordingly, declined to make an explicit order of additional services (*id.* at pp. 18-19). Nevertheless, in response to their request for additional services, as "provisional relief," he ordered petitioner to provide three 30-minute sessions of home-based speech-language therapy per week, two 30-minute sessions of home-based OT per week, two hours per day of special education instruction in reading, writing and math, in addition to two monthly sessions of parent counseling in conformity with 8 NYCRR 200.13, until petitioner secures a residential placement for the student (*id.* at p. 19).<sup>10</sup> He further ordered petitioner to provide an appropriate placement within 45 days of his order (*id.*). Lastly, the impartial hearing officer ordered that in the event that petitioner was unable to locate an appropriate placement for the student within 45 days, then petitioner must pay the tuition and related expenses at an appropriate school of respondents' choice (*id.*).

This appeal ensued. Petitioner contends that the impartial hearing officer erred in finding that the recommendations made by the January 2007 CSE resulted in a denial of a FAPE to the student. Petitioner contends that the impartial hearing officer erred by ordering related services and instructional programming in the student's home as provisional relief until an alternative placement is secured. Petitioner also challenges the impartial hearing officer's orders directing petitioner to secure a placement for the student within 45 days, and directing petitioner to pay the student's tuition and related expenses at an appropriate private school of respondents' choice if petitioner does not secure a placement within 45 days.<sup>11</sup>

Respondents cross-appeal the impartial hearing officer's findings and assert that he should have determined that the goals and objectives contained in the January 2007 IEP were vague and immeasurable, further resulting in a denial of a FAPE to the student. While petitioner contends that the impartial hearing officer improperly ordered additional or compensatory services, respondents argue that the impartial hearing officer erred by not making an explicit award of additional services. Respondents further claim that the student should receive a minimum of two hours of academic instruction per day and the greater of all of the related services required by 8 NYCRR 200.13 or those enumerated in his IEP.

For the reasons set forth herein, I am constrained to agree with the impartial hearing officer's finding that the January 2007 CSE's decision to maintain the student at Anderson, albeit a temporary decision, was not reasonably calculated to confer an educational benefit on the student.

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<sup>10</sup> The impartial hearing officer's decision does not indicate whether the two hours per day of special education instruction were to be provided in the student's home (IHO Decision at p. 19).

<sup>11</sup> The parties filed additional papers with the Office of State Review. In a letter received by the Office of State Review on September 13, 2007, respondents advised that they had requested a second impartial hearing and contend that none of the issues raised in the instant appeal are moot. On September 19, 2007, the Office of State Review received a copy of a letter dated September 13, 2007 from petitioner to respondents identifying potential residential placements for the student, along with a letter dated August 23, 2007 from respondents and a letter dated September 10, 2007 from Easter Seals New Hampshire.

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, 546 U.S. 49 at 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];<sup>12</sup> see 20 U.S.C. § 1414[d]; 34 C.F.R. § 300.320).

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., 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).

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<sup>12</sup> 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.

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 51, 58 [finding it improper under the IDEA to assume that every IEP is invalid until the school district demonstrates that it is not]).

I will first address respondents' assertion that the impartial hearing officer should have found that the goals and objectives contained in the January 2007 IEP were inadequate, thus denying the student a FAPE. Specifically, they contend that the goals were substantively inappropriate and were not reasonably calculated to confer an educational benefit on the student. As discussed further below, I disagree and find that respondents did not meet their burden to establish that the goals and objectives contained in the January 2007 IEP were inappropriate.

An IEP must include a statement of measurable annual goals (34 C.F.R. § 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). For students with a disability who take alternate assessments aligned to alternate achievement standards, an IEP must include a description of benchmarks or short-term objectives (34 C.F.R. § 300.320[a][2][ii]; 8 NYCRR 200.4[d][2][iv]).

The goals and short-term objectives included in the student's January 2007 IEP were developed at the student's September 2006 30-day IEP review and CSE meeting in which respondents participated (Dist Exs. 59 at p. 7; 69 at p. 11). The September 2006 meeting notes indicated that the student's present levels of performance in school, residence, speech-language therapy, and OT were discussed and that respondents provided information to the Anderson staff regarding their son's skills, things he found reinforcing, some of his dislikes, and that they requested a formal goal for the student to respond to his name (Dist Ex. 59 at p. 22). The meeting discussion notes also stated that the types of activities the student would be participating in or "working on" in each area were reviewed (id.). For example, in class, the student would be working on leading an activity, making deliveries using a cart, and telling the story of what is happening in a photo; at the residence, he would work on showering and carrying his laundry; in speech, he would work on following directions related to participating in a teacher directed activity and responding to his name; and in OT, he would work on completing functional tasks and asking for sensory items to help him self regulate (Dist. Exs. 59 at p. 22; 69 at pp. 11-12). The hearing record further reflects that respondents actively participated in the September 2006 CSE meeting and that the goals and objectives on the student's proposed IEP are directly based on the discussions held during that meeting (Dist. Ex. 59 at pp. 17-19, 22). Under the circumstances presented herein, the hearing record shows that the short-term objectives as written provide sufficient specificity to enable the student's teacher, residential staff, and respondents to understand the CSE's expectations with respect to each goal and what the student would be working on over the course of the school year (see W.S. ex rel. C.S. v. Rye City Sch. Dist., 2006 WL 2771867 [S.D.N.Y. 2006]; Application



of the Bd. of Educ., Appeal No. 04-031; Application of a Child with a Disability, Appeal No. 03-102; Application of the Bd. of Educ., Appeal No. 02-025; Application of a Child with a Disability, Appeal No. 99-92). Accordingly, the evidence does not persuasively demonstrate that the goals and objectives developed for the student as set forth in the January 2007 IEP were vague, immeasurable or contributed to a denial of a FAPE to the student.

Turning next to petitioner's contention that the impartial hearing officer erred in finding that the recommendations made by the January 2007 CSE resulted in a denial of a FAPE to the student, as more fully described below, the hearing record reflects that a series of events occurred that hampered the CSE from fully considering all of the placement options for the student, which contributed in part to petitioner's failure to meet its affirmative obligation to offer the student a FAPE. The hearing record shows that both parties and Anderson staff agreed that Anderson was no longer appropriate to meet the student's special education needs (Tr. p. 92; Dist. Ex. 63; Parent Ex. K). Both Anderson staff and respondents agreed that the student's safety and the safety of other students had become an issue of paramount concern as the student's self-injurious and aggressive behaviors had increased in number and in frequency (Parent Ex. K). By letter dated December 14, 2006, Anderson advised the CSE Chairperson that it could no longer meet the student's needs, and recommended referral to an alternate placement (Dist. Ex. 63). By letter dated December 29, 2006, Anderson's IEP coordinator notified the CSE Chairperson that Anderson would maintain the student there and provide additional supports for him while an alternative placement was secured (Dist. Ex. 66). In early January 2007, the student was involved in a behavioral incident and he was brought to a psychiatric hospital (Tr. p. 375; Dist. Ex. 67; Parent Ex. K). Respondents removed their son from Anderson shortly after that incident (Tr. p. 218; Dist. Ex. 68). By e-mail dated January 6, 2007, to the CSE Chairperson, the student's mother notified petitioner's CSE that respondents had removed their son from Anderson, and further advised her that they planned to proceed with the CSE meeting scheduled for January 12, 2007 (Dist. Ex. 68). She requested that petitioner's CSE provide "recommendations for an immediate safe and appropriate placement" for her son (*id.*). If petitioner's CSE could not do so, then the student's mother asked the CSE Chairperson to provide homebound instruction as an alternative (*id.*). The hearing record reflects that no action or communications were taken by the CSE following respondents' removal of their son from Anderson until after the January 12, 2007 CSE meeting (see Dist. Exs. 72; 73).

At Anderson's request, the CSE convened on January 12, 2007 (Dist. Ex. 69; Parent Ex. K). The hearing record reveals that both parties and Anderson staff concurred that Anderson could not meet the student's educational needs and it was no longer an appropriate residential placement for him; however, notwithstanding this conclusion the CSE nevertheless recommended that the student continue there while an alternative appropriate residential placement was identified (Tr. p. 125; Parent Ex. K). Inconsistent with its conclusion that Anderson was no longer an appropriate residential placement, the CSE continued to recommend Anderson as the most appropriate placement for the student until a more appropriate recommendation could be made (Parent Ex. K). Despite previous correspondence from Anderson indicating that it had exhausted all of its options in terms of supports and could no longer meet the student's needs (Dist. Ex. 63), Anderson agreed at the January 2007 CSE meeting to put additional supports in place in the event of the student's return. It appears that the January 2007 CSE did not discuss with any specificity what type of additional supports would have been utilized by Anderson to keep the student safe (Tr. pp. 96,

209, 494; Parent Ex. K). Furthermore, petitioner's CSE Chairperson testified that she did not further explore what supports would be offered to the student, because the student's father adamantly opposed his son's return to Anderson (Tr. p. 494).

In addition, a number of alternative placements were identified during the January 2007 CSE meeting, including one alternative presented by an Anderson staff member and a list of potential placements suggested by the student's father (Tr. p. 248; Parent Ex. K). However, I find that petitioner's CSE made no efforts contemporaneously with the January 2007 CSE meeting to further explore or discuss these proposed placements (see Parent Ex. K). Although respondents had previously requested homebound instruction for their son, petitioner's CSE did not consider that request for the interim period and considered only the interim recommendation of returning the student to Anderson while a successor residential placement was secured (id.).<sup>13</sup> Furthermore, the January 2007 CSE's failure to further inquire about the additional supports needed to ensure the student's safety at Anderson and other placement alternatives is particularly troubling, given that his safety was a primary issue of concern (Parent Ex. K). Additionally, in light of respondents' request for homebound instruction, the January 2007 CSE had an obligation to discuss homebound instruction as a viable placement alternative (id.). The hearing record also does not indicate that the CSE discussed identifying another emergency interim placement for the student, while seeking a successor placement (id.). Moreover, I note that, although no alternate residential placement had been secured and there was consensus that Anderson was not appropriate for the student, no further CSE meetings were convened after the January 2007 CSE meeting to continue discussing placement alternatives while a more appropriate residential placement was identified (Tr. pp. 126-27). In accordance with the foregoing, petitioner's failure to make necessary inquiries regarding supports to be used to maintain the student's safety at Anderson, or consider any alternatives to residential placement at Anderson during the interim period persuades me that the CSE inappropriately reached a placement recommendation without considering the full panoply of information before it and therefore failed to offer a FAPE. Consequently, I find that these failures ultimately resulted in a denial of a FAPE to the student.

With regard to respondents' claim that the impartial hearing officer should have made an explicit award of additional services, I find that the impartial hearing officer's decision contained confusing terminology; however, respondents are not entitled to additional relief because their contention that additional services were denied is belied by the substantive relief actually awarded by the impartial hearing officer. The impartial hearing officer noted that because respondents had not provided him with a clear picture of what additional services would be appropriate to remedy the denial of a FAPE to the student, he declined to make an explicit order of additional services, and instead, fashioned an order of "provisional relief," until petitioner found a residential placement for the student (IHO Decision at p. 19). Respondents' due process complaint notice does not specifically describe what additional services they believe would remedy the denial of a FAPE to the student (Dist. Ex. 1 at p. 2). Respondents also did not elaborate on their request for additional services during the impartial hearing. I also note that as "provisional relief," the impartial hearing officer specifically ordered petitioner to provide the student with three weekly

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<sup>13</sup> Although the parties did not agree that Anderson was an appropriate placement for the student while a more structured placement was found, the hearing record does reveal that the parties agreed that the student required a more suitable residential placement (Tr. pp. 246, 484-85).

home-based 30-minute sessions of speech-language therapy in addition to two 30-minute sessions of home-based OT, as well as two hours of special education instruction per day (IHO Decision at p. 19). The impartial hearing officer also ordered petitioner to provide respondents with two monthly sessions of parent counseling (*id.*). "[T]he administrative appeal process is available only to a party which is 'aggrieved' by an IHO's determination" (*Cosgrove v. Bd. of Educ.*, 175 F. Supp. 2d 375, 385 [N.D.N.Y. 2001]). Only a party aggrieved by an impartial hearing officer's decision may appeal to a State Review Officer (34 C.F.R. § 300.514[b][1]; 8 NYCRR 200.5[k]; Application of a Child with a Disability, Appeal No. 02-007; Application of a Child with a Disability, 99-029). Further, a State Review Officer is not required to determine issues which are no longer in controversy or to review matters which would have no actual effect on the parties (Application of a Child with a Disability, Appeal No. 02-011; Application of a Child with a Disability, Appeal No. 98-73; Application of a Child Suspected of Having a Disability, Appeal No. 95-60). In this case, to the extent that respondents request the relief that was awarded by the impartial hearing officer, I find that they are not aggrieved by the impartial hearing officer's order of "provisional" relief (Application of a Child with a Disability, Appeal No. 07-066). Therefore, respondents' contention is without merit.

I now turn to respondents' related argument that, as additional services, the student should receive a minimum of two hours of daily academic instruction together with the greater of all of the related services as set forth in 8 NYCRR 200.13 or those listed in his IEP.<sup>14</sup>

Section 200.13 of the Regulations of the Commissioner of Education (Section 200.13) applies to students with a classification of autism and to students who may be classified with another disability and also meet the criteria for classification as a student with autism (8 NYCRR 200.13). Although related services are not specifically addressed under Section 200.13, this section provides for instructional services to meet the language needs of a student with autism and for parent training and counseling that assists them in performing appropriate follow-up intervention activities at home (see 8 NYCRR 200.13[a][4]; see also 8 NYCRR 200.13[d]; 8 NYCRR 200.1[kk]).<sup>15</sup> Section 200.13 does not address the provision of OT services.

In this case, the September 2006 IEP recommended that the student receive one 1:1 30-minute session of OT per week, one 30-minute session of OT per week in a group of five, one 1:1 30-minute session of speech-language therapy per week, and one 30-minute session of speech-language therapy per week in a group of five (Dist. Ex. 59 at p. 8). The September 2006 IEP also addressed the student's expressive language needs through instruction in the classroom as evidenced by the goals and short-term objectives related to the student leading an activity and guiding his peers to complete the activity as well as identifying an activity and its steps from a

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<sup>14</sup> Respondents did not identify the IEP to which they refer. For purposes of this decision, I have considered the related services as listed in the September 2006 IEP, the last unchallenged IEP. Nevertheless, I note that the related services recommendations listed in the January 2007 IEP were continued from the September 2006 IEP.

<sup>15</sup> Parent training and counseling means assisting parents in understanding the special needs of their child; providing parents with information about child development; and helping parents to acquire the necessary skills that will allow them to support the implementation of their child's IEP (8 NYCRR 200.1[kk]).

photograph or illustration (*id.* at p. 19). The IEP did not recommend parent counseling and training.

As discussed previously, the impartial hearing officer ordered that, until a residential placement is secured, the student be provided with two hours per day of special education instruction; two 30-minute sessions of OT per week at home; three 30-minute sessions of speech-language therapy per week at home; and two sessions of parent counseling per month (IHO Decision at p. 19). Furthermore, the student's September 2006 IEP also contained goals and corresponding short-term objectives that would be implemented by the special education teacher and that are related to his expressive language needs (Dist. Ex. 59 at p. 19). I find that under the circumstances of this case, respondents' contention lacks merit because the impartial hearing officer ordered more intensive services than those set forth in either Section 200.13 or the student's September 2006 IEP.

Next I will address petitioner's assertion that the impartial hearing officer erred by ordering petitioner to secure an appropriate placement for the student within 45 days or, failing that, pay tuition and related expenses at an appropriate school of respondents' choice. Under the circumstances of this case, I find it was proper for the impartial hearing officer to order petitioner to provide an appropriate residential placement within a 45-day compliance timeframe. The hearing record reflects that petitioner received authorization from the New York State Department of Education for out-of-state referral of the student on January 16, 2007 and that since that date the CSE has referred the student to at least seven residential schools (Dist. Ex. 74). Petitioner identified two residential schools that indicated they would accept the student (Letter from Pet'r to Resp'ts dated 9/13/07). I note also that the CSE continues to pursue an appropriate residential placement for the student that is acceptable to respondents (*id.*). However, I find that it was improper for the impartial hearing officer, based on the evidence before him, to direct that petitioner pay the tuition and related expenses at an appropriate school of respondents' choice if an appropriate school is not offered by petitioner. There is insufficient evidence in the record showing that respondents have found a residential placement that is appropriate. Absent a determination, based upon evidence in the hearing record, that such a placement has been identified and is in fact appropriate, the impartial hearing officer exceeded his jurisdiction and erred in making such an order (see Burlington, 471 U.S. at 370-71).

In light of the foregoing, I will direct the parties to reconvene a CSE meeting to consider educational placement options for the student. Petitioner shall continue to pursue both in-state and out-of-state placement options as well as pursue assistance from the New York State Education Department in identifying emergency interim placement options, as appropriate. Petitioner shall provide the "provisional" educational services as directed by the impartial hearing officer. I strongly encourage the parties to work cooperatively, expeditiously, and in good faith to ensure that the student receives appropriate services.

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

**THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.**

**THE CROSS-APPEAL IS DISMISSED.**

**IT IS ORDERED** that the July 7, 2007 decision of the impartial hearing officer is annulled to the extent that it ordered petitioner to pay tuition and related expenses at a placement of respondents' choice in the event that petitioner did not secure an appropriate residential placement within 45 days; and

**IT IS FURTHER ORDERED** that unless the parties otherwise agree, the CSE shall, within 45 calendar days from the date of this decision, obtain additional evaluative data pertaining to the student if deemed necessary, convene a CSE meeting, recommend an appropriate educational placement for the student and take appropriate and reasonable steps to facilitate placement in the recommended setting.

**Dated:**           **Albany, New York**  
                          **October 19, 2007**

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**PAUL F. KELLY**  
**STATE REVIEW OFFICER**