



# The University of the State of New York

## The State Education Department State Review Officer

No. 07-105

**Application of a CHILD WITH A DISABILITY, by his parents,  
for review of a determination of a hearing officer relating to the  
provision of educational services by the New York City  
Department of Education**

**Appearances:**

Mayerson & Associates, attorney for petitioners, Gary S. Mayerson, Esq. & Randi M. Rothberg, Esq., of counsel

Michael Best, Special Assistant Corporation Counsel, attorney for respondent, Emily R. Goldman, Esq., of counsel

### DECISION

Petitioners appeal from the decision of an impartial hearing officer which denied their request to be reimbursed for their son's tuition costs at the Rebecca School for the 2006-07 school year. Respondent cross-appeals from the impartial hearing officer's determination that it failed to demonstrate that it had offered an appropriate educational program to the student for that year. The appeal must be sustained. The cross-appeal must be dismissed.

The impartial hearing commenced on August 30, 2006, following the student's transition from the Committee on Preschool Special Education (CPSE) to the Committee on Special Education (CSE). On September 6, 2006, the impartial hearing officer issued a pendency order which required respondent to pay for the student's preschool services, including special education itinerant teacher (SEIT) services, occupational therapy (OT), speech-language services, and physical therapy (PT), as set forth in the student's December 28, 2005 individualized education program (IEP) (IHO Decision at p. 2; Parent Ex. B). Petitioners' son began attending the Rebecca School on November 2, 2006 (Tr. pp. 490-91). The Rebecca School is a school for children with neurodevelopmental delays that has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (Tr. p. 16; 8 NYCRR 200.1[d], 200.7). The student's eligibility for special education services and classification as a student with autism are not in dispute in this appeal (Dist. Ex. 7 at p. 1; Parent Ex. C at p. 1; see 34 C.F.R. § 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

A summary of the student's early history is contained in a neurodevelopmental evaluation that was conducted in spring 2006 (Dist. Ex. 11 at p. 1). The evaluator indicated that prior to April 2004, the student reportedly had been diagnosed by two pediatric neurologists as having a pervasive developmental disorder (PDD) (*id.*). The evaluator also reported that the student had received early intervention services which included applied behavioral analysis (ABA) services, as well as speech-language therapy, OT and PT (*id.*). As a preschooler, the student received 25 hours per week of home-based ABA services provided by two SEITs, and two hours of indirect services provided by a lead teacher (Dist. Exs. 8 at p. 1; 10 at p. 1; 11 at p. 1). In addition, the student received speech-language therapy five times per week and OT three times per week (Dist. Exs. 8 at p. 1; 10 at p. 1).

The student's SEITs prepared an education progress report, dated June 8, 2005, that included an evaluation of the student's cognitive, language, social-emotional, and motor development, as well as his self-help skills (Dist. Ex. 10). As reported by the SEITs, the student exhibited cognitive skills scattered between the 2.0 to 2.8 year levels, receptive and expressive language skills scattered between the 1.8 to 2.2 year levels, and social-emotional skills scattered between the 2.2 to 2.8 year levels (*id.* at pp. 2, 3, 4-5). According to his teachers, the student's limited attention span and high degree of distractibility restricted the proper implementation of programs that addressed critical cognitive skills (*id.* at p. 6). The SEITs stated that the student displayed difficulty categorizing objects and reported that it was a "great challenge" to implement the picture exchange communication system (PECS) because the student was generally uninterested in pictures (*id.* at p. 3). The SEITs noted that through discrete trials and a highly structured environment, the student's expressive language increased to more than 50 words that he used independently when prompted (*id.*). However, they expressed concern with the student's echolalia (*id.* at p. 4). Petitioners' son was noted to rely heavily on gestural and verbal prompting to improve receptive and expressive language skills (*id.* at p. 6). According to the student's SEITs, his workload emphasized the need to increase his cognitive functioning and verbal behavior (*id.* at p. 7). Recommendations by the SEITs included the continuation of 25 hours of 1:1 ABA instruction to address the student's global delays and enable him to meet educational goals; half-day preschool to assist the student with socialization skills; and the provision of SEIT and speech-language services (*id.*).

Respondent's CPSE held a program review on December 28, 2005 and recommended that petitioners' son be classified as a preschool student with a disability (Parent Ex. B at p. 1). The December 28, 2005 CPSE also recommended continuation of the (direct) SEIT and indirect services, OT, and speech-language therapy as discussed above, in addition to the provision of PT for a 12-month period (*id.* at pp. 1, 2, 19).

An "aging out report" was generated by one of the student's SEITs on March 15, 2006 in anticipation of his transition to the CSE (Dist. Ex. 8). Age equivalent levels for the student's cognitive skills were reported to be within the 2.0 to 2.8 year range, with receptive language skills reported to be within the 2.2 to 2.9 year range and expressive skills reported to be within the 1.8 to 2.2 year range (*id.* at p. 6). The student's SEITs indicated that he had made "tremendous gains" since the beginning of intervention in September 2005, but continued to require 1:1 teacher support in a highly structured environment to address his delays (*id.*). Recommendations included the continuation of 1:1 ABA instruction, the provision of a highly structured classroom environment, and ten hours of home-based ABA instruction (*id.* at p. 7).

A private neurodevelopmental evaluation of the student was conducted in spring 2006 (Dist. Ex. 11). Administration of the Stanford-Binet Intelligence Scale - Fifth Edition (SB5) yielded verbal and non-verbal IQ scores of 53, based on standard scores (percentile) (quantitative description) in five domains: fluid reasoning 53 (<1) (very low); knowledge 60 (< 1) (very low); quantitative reasoning 50 (<1) (very low); visual-spatial processing 59 (<1) (very low); and working memory 68 (2) (low) (*id.* at pp. 4, 10). The student had a full scale IQ score of 51, which ranked below the first percentile and was in the very low range of intellectual functioning (*id.* at p. 4). Administration of the Beery Test of Visual Motor Integration (VMI) revealed that the student's graphomotor skills were at the two year, nine month level (*id.* at p. 6). Based on a parental report, the student's overall adaptive behavior skills were in the low range for his age (*id.*). The student's overall score of 33 on the Childhood Autism Rating Scale (CARS) placed him in the autistic range (*id.* at p. 7). In this regard, the evaluator noted that petitioners' son displayed mild to moderate behaviors consistent with an autistic spectrum disorder, such as high levels of distractibility, delayed play skills, limited social interactional abilities, and language deficits (*id.*). She stated that the 1:1 format utilized in the testing environment was essential in engaging him with tasks and maintaining his attention, and that he needed 1:1 assistance to understand instructions and verbal cues (*id.*). The evaluator further reported that although the student had made progress over the prior two years in terms of his awareness, ability to cooperate, and desire for social interaction, his intervention program had been sporadically maintained and had never reached the levels of intensive and consistent intervention necessary for the student to begin to close the gap between his current abilities and his expected developmental skills based on his chronological age (*id.* at p. 8).

Recommendations generated from the spring 2006 neurodevelopmental evaluation report included: a continuous 12-month program of intervention; 15 to 20 hours per week of 1:1 discrete trial instruction; school-based ABA services, with a notation that without this methodology the student does not learn; a home-based program; weekly parental training to promote generalization; five hours per week of speech-language therapy; an augmentative communication evaluation; five hours per week of OT emphasizing sensory integration, fine motor and graphomotor skills; two hours per week of PT for gross motor skills, balance, and coordination; and monthly interdisciplinary meetings with the student's home and school therapists, teachers, and parents to review the student's progress and modify his program (Dist. Ex. 11 at p. 9).

On May 31, 2006, the student was reevaluated by respondent's school psychologist to develop an appropriate 2006-07 placement because the student was aging out of his home-based preschool special education services (Parent Ex. F at p. 1). Petitioners' son was reportedly unable to complete any subtests on the Wechsler Preschool and Primary Scale of Intelligence - Third Edition (*id.* at pp. 1, 2). Academic testing showed significant delays in all areas (*id.* at p. 3). In addition to noting that petitioners' son was active and distractible, the school psychologist indicated that the student had significant language delays, displayed poor eye contact, and had significant impairments in focusing, communication, relatedness, and social interactions (*id.*). The school psychologist concluded that the student would benefit from a small class program with "much support" and close supervision (*id.* at p. 4).

A speech-language progress report dated June 17, 2006, noted that the student communicated his needs through one to three word utterances and gestures (Dist. Ex. 7 at p. 2). The evaluator opined that petitioners' son had improved his ability to request items, label objects, and make verbal requests more consistently, and had expanded his expressive lexicon (*id.*). The

level of the student's echolalia had also decreased (id.). The evaluator noted that the student's receptive language skills had improved over the prior few months, but indicated that he did not respond to his name as often as should be expected and that his attention span was short at times (id.). Petitioners' son was noted to present with apraxic characteristics and, at times, had difficulty imitating words from the clinician (id.). The student also displayed fleeting eye contact and did not initiate conversation with the clinician unless he wanted an item in the room (id.). For summer 2006 and the 2006-07 school year, the evaluator recommended the continuation of individualized 45-minute speech-language therapy sessions five times per week (id. at p. 3).

An OT progress report dated June 20, 2006 indicated that the student presented with delays in fine motor and gross motor skills, as well as cognitive-perceptual and sensory-perceptual delays (Dist. Ex. 6). The report further noted that the student was dependent for some aspects of activities of daily living (id.). Consistent with the evaluative data discussed above, the student's occupational therapist reported that the student required prompting to remain on task (id.).

Respondent's CSE convened on June 20, 2006 and classified petitioners' son as a student with autism (Parent Ex. C at p. 1). The CSE recommended that the student be placed in a 6:1:1 special class in a specialized school for a 12-month period (id. at pp. 1-2). Individualized speech-language therapy was recommended for 30-minute sessions five times per week (id. at p. 18). Individualized PT was recommended for 30-minute sessions twice per week, and individualized OT was recommended for 30-minute sessions three times per week (id.).

In a final notice of recommendation (FNR) addressed to the student's mother dated July 27, 2006, respondent's placement officer recommended placement at two schools and identified the special education services being offered to petitioners' son (Dist. Ex. 3). In an undated handwritten notation on the FNR, the student's mother indicated that the program offered was "very inappropriate" and that she had requested an impartial hearing to continue her son's pendency program (id.).

The student's mother requested an impartial hearing by due process complaint notice dated August 15, 2006 (Parent Ex. A). She asserted that: respondent failed to provide her son with a timely site specific placement, which in turn deprived her of the opportunity to observe the recommended program until September 2006; the June 2006 CSE was improperly composed; the annual goals developed by the June 2006 CSE were not appropriate; and her son's PT goals appeared to have been drafted for another student (id.).

The impartial hearing convened on August 30, 2006. On September 6, 2006, the impartial hearing officer issued a pendency order directing respondent to pay for the student's preschool services, as set forth in the student's December 28, 2005 IEP (IHO Decision at p. 2; Parent Ex. B).

On October 19, 2006, the student's mother amended her due process complaint notice and advised respondent that petitioners would be immediately enrolling their son at the Rebecca School for the remainder of the 2006-07 school year (Parent Ex. E). In addition to requesting that the impartial hearing officer direct respondent to pay tuition directly to the Rebecca School, the student's mother alternatively proposed settling the matter, such that respondent would pay her son's tuition directly to the Rebecca School, and provide transportation and related services (id. at p. 2). The student's mother asserted that the pendency services currently provided to her son were inadequate and that respondent had not offered her son an appropriate placement despite her

requests (id. at pp. 1-2). In addition, the amended complaint asserted that the student's mother had visited every school program recommended for her son, that two of the 6:1:1 classes recommended by respondent were full, that there were no plans to open a third class, and that there were "no guarantees" regarding related services (id. at p. 2). During the impartial hearing, the student's mother testified that her son began attending the Rebecca School on November 2, 2006 (Tr. pp. 490-91).

The impartial hearing concluded on June 19, 2007, after five days of testimony. By decision dated August 5, 2007, the impartial hearing officer found that respondent failed to offer petitioners' son a free appropriate public education (FAPE)<sup>1</sup> for the 2006-07 school year because: 1) respondent failed to conduct an observation and functional behavioral assessment (FBA)<sup>2</sup> for the student which precluded the June 2006 CSE from developing an appropriate IEP (id. at p. 14); 2) the June 2006 IEP either recommended inappropriate goals or omitted goals in areas of substantial need for the student (id. at p. 17); 3) petitioners were denied an opportunity to view respondent's recommended placement and review that placement at the June 2006 CSE meeting prior to the beginning of the 2006-07 school year (id. at p. 18); 4) the June 2006 IEP did not include parent counseling and training (id. at pp. 18-19); 5) respondent failed to follow recommendations from the student's reports and evaluations; and 6) respondent failed to fully incorporate the recommendations of the student's SEITs and other providers which caused the CSE to make inappropriate recommendations on the student's IEP (id. at pp. 12, 22).

The impartial hearing officer further found that petitioners did not follow recommendations from the student's reports and evaluations when they obtained private services for their son (IHO Decision at pp. 23, 27). He also found that the functional emotional assessment scale (FEAS) conducted by the Rebecca School essentially ignored cognitive, language, and academic skill development in favor of reviewing developmental levels which lacked measurable standards, lacked specific descriptions of the student's functioning, and used numbers ascribed to various categories that were meaningless except to Rebecca School staff (id. at p. 28). As such, the impartial hearing officer found that the private school services that petitioners obtained for their son were not appropriate, and denied tuition reimbursement (id. at pp. 29, 30). The impartial hearing officer further found that although he did not need to address the issue, equitable

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<sup>1</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 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]).

<sup>2</sup> A functional behavioral assessment means the process of determining why a student engages in behaviors that impede learning and how the student's behavior relates to the environment. It shall include, but is not limited to, the identification of the problem behavior, the definition of the behavior in concrete terms, the identification of the contextual factors that contribute to the behavior (including cognitive and affective factors) and the formulation of a hypothesis regarding the general conditions under which a behavior usually occurs and probable consequences that serve to maintain it (8 NYCRR 200.1[r]).

considerations favored petitioners (*id.* at p. 29). The impartial hearing officer directed respondent to have its CSE: 1) perform an observation and an FBA of the student; 2) convene a duly constituted CSE that includes participation by the student's current special education teacher and/or provider, where appropriate and if reasonably possible; and 3) develop appropriate recommendations for the 2007-08 school year, including among other things, the provision of an appropriate amount of 1:1 instruction in ABA or a similar methodology (*id.* at p. 30).

Petitioners appeal from that part of the impartial hearing officer's decision which found that the program provided by the Rebecca School was not appropriate.

Respondent cross-appeals that part of the impartial hearing officer's decision which determined that respondent failed to offer the student a FAPE. Respondent claims that: 1) the June 2006 CSE was properly composed and reviewed sufficient evaluative data; 2) petitioners had a meaningful opportunity to participate in the review process; and 3) the program and placement recommended for the student were appropriate and timely. Respondent further asserts that the impartial hearing officer properly found that petitioners failed to demonstrate that the Rebecca School offered an appropriate program for the student, but erred by finding that equitable considerations favored petitioners.

In their answer to the cross-appeal, petitioners contend that respondent failed to: 1) properly assess their son's then "present levels"; 2) conduct an FBA; 3) consider sufficient information to develop an appropriate program for their son; 4) offer a specific placement at the June 2006 CSE meeting; 5) meaningfully consider petitioners' requests; and 6) properly develop the student's goals and objectives at the June 2006 CSE meeting with petitioners' full participation. Petitioners further allege that the recommended goals and objectives were generic and not individualized, the student's placement recommendation was not made by the CSE, and respondent's recommended placement did not offer individual parent training.

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, 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>3</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.

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<sup>3</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.

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]).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student 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, 427 F.3d at 192). "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 student 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).

Respondent contends in its cross-appeal that it offered the student a FAPE. Petitioners assert that the June 2006 CSE was improperly constituted. For the reasons set forth below, I agree with the impartial hearing officer's finding that the June 2006 CSE failed to include an appropriate special education teacher or special education provider of the student.

The IDEA requires a CSE to include, among others, not less than one special education teacher of the student, or where appropriate, not less than one special education provider of the student (20 U.S.C. § 1414 [d][1][B][iii]; see 34 C.F.R § 300.321[a][3]; 8 NYCRR 200.3[a][1][iii]). The special education teacher or provider who is a member of the student's CSE should be the person who is, or will be, responsible for implementing the IEP (id.).

Here, the June 20, 2006 CSE participants included: the student's parent,<sup>4</sup> a district representative, a school psychologist, a bilingual school social worker, the parent's attorney, an additional parent member, and a special education teacher (Parent Ex. C at p. 2). The special education teacher participant at the June 20, 2006 CSE meeting was not a special education teacher or a related service provider of the student (Tr. pp. 243-50), nor does the hearing record show that she was a person who would be responsible for implementing the IEP.

At the time of the CSE meeting, petitioners' son was receiving home-based ABA services delivered by two SEITs, as well as related services of OT and speech-language therapy (Tr. pp. 4-5; Dist. Ex. 8 at p. 1; Parent Ex. F at p. 1). Neither of the student's SEITs or related service providers attended the June 2006 CSE meeting (Parent Ex. C at p. 2). The special education teacher participant testified that there was not a teacher of the student at the CSE meeting (Tr. pp. 292, 316). When asked why a special education teacher familiar with the student's functioning was not present at the CSE meeting, the teacher stated that she could not recall the reason (Tr. p. 303). The district representative reported that she attempted to contact the student's preschool service providers during the CSE meeting, but was unable to reach them (Tr. pp. 348-50, 392-396).

Based on the hearing record, I find that no special education teacher or provider of the student attended the June 20, 2006 CSE meeting (see 20 U.S.C. § 1414 [d][1][B][iii]; 34 C.F.R § 300.321[a][3]; 8 NYCRR 200.3[a][1][iii]). The hearing record does not include testimonial or documentary evidence of a written agreement between the parties that the attendance of the special education teacher or provider at the June 20, 2006 CSE meeting was not necessary or was excused (20 U.S.C. § 1414 [d][1][C]; see 34 C.F.R § 300.321[e]; IEP Team Attendance, 71 Fed. Reg. 46674-75 [Aug. 14, 2006]).

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<sup>4</sup> I note that the student's father attended the June 2006 CSE meeting with his attorney and respondent alleges that neither the student's father nor his attorney "objected" to the CSE's recommendations at the time of the June 2006 CSE meeting. The student's father testified that that there were some things that he did not understand and that he needed time to review the IEP and consult with the student's mother (Tr. p. 578). The hearing record in this case is not clear as to the level of "meaningful participation" of petitioners and their attorney at the time of the June 2006 CSE meeting (see Cerra, 427 F.3d at 193; Tr. pp. 256-57, 545-46, 573).



I find that, under the circumstances, the absence of an appropriate special education teacher or provider of the student at the June 20, 2006 CSE meeting impeded the development of an appropriate IEP for petitioners' son for the 2006-07 school year. This is true particularly in light of the substantive inadequacy of the program offered, as discussed below.

Petitioners further contend that the goals and objectives on the June 20, 2006 IEP were not appropriate. The impartial hearing officer found that although it was not clear that the student was capable of achieving the designated math and reading goals, the lack of more modest goals did not result in a denial of a FAPE (IHO Decision at p. 15). Rather, the impartial hearing officer determined that the student was denied a FAPE due to inappropriate or omitted goals in the areas of attending, writing, daily living skills, and social-emotional functioning (*id.* at p. 17). For the reasons set forth below, I find that the goals were not appropriate and were deficient in addressing the student's delays and weaknesses in self-help skills, social emotional development, sensory processing and motor development.

The student's June 20, 2006 IEP contained academic goals for reading, mathematics and handwriting. Each of the academic goals indicated that the student would attain skills at the pre-kindergarten or beginning kindergarten level by June 2007 (Parent Ex. C at pp. 7-9). The student's SEITs reported that the student exhibited cognitive skills in the 2.0 to 2.8 year range (Dist. Ex. 8 at p. 2). As discussed above, administration of the K-SEALS yielded a standard score of 59 (0.3 percentile) on the early academic and language skills composite (Parent Ex. F at p. 2), indicative of significant delays in all areas (*id.* at p. 3). Administration of the SB5 yielded a full scale IQ score of 51, a verbal IQ score of 53 and a non-verbal IQ score of 53; scores which fell in the very low range of cognitive functioning (Dist. Ex. 11 at pp. 4, 10). Given the student's significant delays in cognitive functioning and the level of intervention he required to learn new skills, mastery of academic goals at a beginning kindergarten level by June 2007 was unrealistic. While some of the academic short-term objectives contained in the student's June 20, 2006 IEP were appropriate, they were not by themselves sufficient to address the student's needs, specifically as they related to functional performance. In addition to academic readiness skills, the hearing record suggests that the student was in need of a program that focused on the acquisition of more basic skills, such as those identified by his SEITs (Dist. Ex. 8).

Furthermore, a review of the student's June 20, 2006 IEP reveals that it does not contain goals related to the development of social-emotional skills or self-help skills. In the March 2006 aging out report, the student's SEITs reported that the student's self-help skills were delayed by approximately 1.5 to 2 years (Dist. Ex. 8 at p. 6). In addition, the student's occupational therapist indicated that the student was dependent regarding some aspects of daily living (Dist. Ex. 6). However, the student's June 20, 2006 IEP does not include goals targeting the development of self-help skills. With regard to social-emotional development, the student's SEITs reported that the student's skills were delayed by more than two years (Dist. Ex. 8 at p. 4). The psychologist from the McCarton Center identified deficits in the student's ability to maintain eye contact, his social interaction and his play skills (Dist. Ex. 11 at pp. 3, 4, 6-7). Impairments in social relatedness and social interaction were also noted by respondent's school psychologist (Parent Ex. F at pp. 2, 3). The social-emotional performance section of the student's IEP indicated that the student had difficulty initiating interactions and had a hard time transitioning from certain activities (Parent Ex. C at p. 5). The district representative testified that the student needed to improve his eye-gaze and language, and that these skills were included in the student's speech goals (Tr. p. 405). While the student's speech goals do contain objectives related to greeting people independently and

identifying familiar people (Parent Ex. C at p. 14), the objectives fall short of addressing the student's primary deficits in social interaction and play, which are hallmarks of his disability.

Finally, I note that the student's OT and PT goals were written for other students and "recycled" for this student's IEP (Tr. p. 347; Parent Ex. C at pp. 13, 15). The short-term objectives which required the student to form all capital letters of the alphabet correctly and copy a three word sentence appear to have been unrealistic goals for the student at the time they were added to his IEP, and the hearing record indicates that the student may have already mastered many of the PT objectives (Dist. Exs. 8 at p. 5; 11 at p. 7).

Based on the foregoing, the June 20, 2006 IEP goals did not sufficiently target the student's primary needs. As discussed above, the June 20, 2006 CSE also lacked a special education teacher or provider of the student. Together, the improper CSE composition and the inadequacy of the annual goals resulted in an IEP that did not offer a FAPE to the student for the 2006-07 school year (see Rowley, 458 U.S. at 203). Accordingly, petitioners have prevailed with respect to the first criterion of the Burlington/Carter analysis for tuition reimbursement.

With respect to the second criterion for an award of reimbursement, petitioners must show that the services they obtained for their son were appropriate to meet his special education needs for the 2006-07 school year (Burlington, 471 U.S. 359; Frank G., 459 F.3d at 363). In order to meet that burden, the parents must show that the services provided were "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., that "the private education services obtained by the parents were appropriate to the child's needs" (Walczak, 142 F.3d at 129; see also Frank G., 459 F.3d at 363; Cerra, 427 F.3d at 192). Parents are not held as strictly to the standard of placement in the least restrictive environment as school districts are; however, the restrictiveness of the parental placement may be considered in determining whether the parents are entitled to an award of tuition reimbursement (Rafferty v. Cranston Pub. Sch. Comm., 315 F.3d 21 [1st Cir. 2002]; M.S. v. Bd. of Educ., 231 F.3d at 105).

Petitioners assert that the impartial hearing officer erred in finding that they failed to demonstrate that the Rebecca School offered an appropriate program for the student. Petitioners first contend that the impartial hearing officer held them to impermissibly high standards because they did not follow specific recommendations generated from the student's evaluations. Petitioners further assert that they have the right to choose the methodology used for their son.

The Rebecca School is described as "a school for children with neurodevelopmental delays in relating and communicating, which include PDD and autism" (Tr. pp. 16-17). Instruction is centered around the developmental, individual difference, relationship-based model (DIR) which is described as a comprehensive, interdisciplinary approach that assesses and provides interventions for challenges in a student's functional emotional development, sensory processing systems, and capacity to form warm and intimate learning relationships (Tr. p. 17; Parent Ex. L at p. 1). The primary strategy for helping students progress across developmental domains is called floor time (id.). Floor time refers to focused time with one student in which an adult follows the lead of the student's play, and in doing so strives to build a sense of pleasure and flow of interactions (id.) During floor time, the adult attempts to move the student up through the developmental levels and assist the student in becoming a purposeful communicator, adept problem solver and thinker, and creative individual (Tr. pp. 29, 130; Parent Ex. L at p. 1). The Rebecca School employs speech therapists, occupational therapists, physical therapists,

psychologists, and social workers and has adopted a team approach to working with students (Tr. p. 17). The Rebecca School also offers parent training and parent support groups (Tr. p. 31). Every family is assigned a social worker who works with the family to assist with things such as referrals, training, or counseling for parents or families (Tr. pp. 32, 79).

Prior to admission to the Rebecca School, students are evaluated using the FEAS (Tr. p. 18). The FEAS is conducted by a clinical psychologist (Tr. p. 56). According to the program director, there are six basic developmental levels through which all children progress and the FEAS identifies the student's developmental level (Tr. p. 18). The levels are as follows: shared attention and regulation; engagement and relating; shared social problem solving; creating symbols and ideas; building logical bridges between ideas; and the use of logical thinking (Tr. pp. 95-96). Information from the FEAS is used for placement in the classroom and for setting up individual student programs (Tr. pp. 19-20).

Petitioners' son was evaluated using the FEAS on August 28, 2006 (Tr. p. 36) and found to have constrictions at the first two levels of development: shared attention and regulation, and engagement and relating (Tr. pp. 19, 96; Dist. Exs. 1; 5). However, the student also demonstrated some higher level skills (Tr. pp. 19, 96; Dist. Exs. 1; 5; 17). The student was placed in a classroom with three other students staffed by a teacher and two teacher assistants (Tr. p. 20). The program director testified that the student's classroom teacher held a New York State teaching "license" in special education and that one of the classroom assistants held a bachelor's degree in special education (Tr. pp. 62-63). The children in the student's class were grouped based on functional emotional developmental levels (Tr. p. 128). Some of the students possessed higher level skills, but also demonstrated constriction at the lower levels (id.).

The student's daily schedule included participation in a morning meeting designed to orient students to the school day, sensory activities, OT and speech-language therapy, one-on-one floor time, computer time, art, lunch, and group time that included work on pre-academic skills (Tr. p. 22; Parent Ex. J). At the completion of the day, the student participated in a meeting where the students talked about what they did that day and what they would be doing the next day (Tr. pp. 22-23). The student received floor time sessions twice a day, but floor time could also be incorporated into other activities throughout the day (Tr. pp. 22, 130-31). The program director explained in detail how a motivational object, such as the student's blanket, would be used to elicit expressive language, encourage reciprocal communication, develop problem solving skills and help the student develop initiation skills (Tr. pp. 132-35). The Rebecca School program included formal and informal teaching of social skills (Tr. p. 140). An adaptive physical education teacher worked with the student's class during gym (Tr. p. 142).

The student's related services were provided by personnel employed by the Rebecca School (Tr. pp. 21, 77-78). The student received OT five times per week for thirty minutes and speech-language therapy five times per week for thirty minutes (Tr. p. 21). An oral motor program, developed by the speech therapist, was implemented hourly by classroom staff (id.). The student went to the sensory gym five times per week with his occupational therapist and also went with classroom staff every hour for five to ten minutes depending on what he needed to become regulated (Tr. pp. 24-25). The student participated in the following activities in the sensory gym: jumping on the trampoline, swinging on the swings, balancing on balls, and receiving deep pressure in a body sock or in a "Foof" chair (Tr. p. 25). The student's program included a goal for

him to improve his ability to regulate his body and affect in the classroom (Tr. p. 124; Parent Ex. K at p. 1).

The program director opined that academics could only be addressed when the student was able to engage in reciprocal communication (Tr. p. 97). She reported that the school was working on preacademic skills with the student and that staff was identifying the skills necessary for the student to participate in academics, as well as to relate and communicate (*id.*). The program director indicated that academic progress was measured three times per year using the assessment tools that came with the Everyday Math and Balanced Literacy curricula that was used by the school (Tr. p. 82). She reported that the Rebecca School also conducted follow-up assessments for academic progress (*id.*). In addition, students were also evaluated every four months using the FEAS (Tr. pp. 82, 138).

In a progress report dated November 13, 2006, the student's teacher reported that the student was more observant in the classroom and attempting new activities (Parent Ex. L at p. 1). The teacher stated that the student had several moments of dysregulation throughout the day, but was improving his tolerance for soothing sensory input (*id.* at p. 2). According to the teacher, the student demonstrated levels of shared attention during 1:1 interactions in the classroom, the sensory gym, art, music and gym class (*id.*). In addition, the student showed basic levels of engagement in the classroom setting and increased his circles of communication using gestures and expressive language (*id.*). In a separate November 2006 progress note, the student's occupational therapist indicated that the student had difficulty processing sensory information and that he would seek vestibular sensory input (Parent Ex. K at p. 1). The occupational therapist reported that the student seemed most calm, regulated, alert, and aroused when he was on the swing (*id.*). She noted that the student established and maintained good eye contact on while on the swing, spontaneously began singing and was able to engage in shared attention/two-way communication for six to ten circles of interaction (*id.*) In her January 2007 progress report, the student's speech therapist indicated that the student had made significant progress during speech sessions and in the classroom, and at that time seemed to adjust to class routines and transitions (Parent Ex. M at p. 1). The speech therapist noted that the student used 10 to 20 reciprocal verbal exchanges when given verbal cues (*id.*). Although most of the student's utterances were echolalic, he was beginning to use some one word utterances (*id.*). The therapist reported improvement in the student's ability to sit and feed himself during lunch (*id.* at pp. 1-2). She also indicated that the student had a difficult time allowing the therapist to be a participant in his play (*id.* at p. 2).

According to the program director, the student had made "incredible" gains at the Rebecca School (Tr. p. 23). She reported that the student was now able to sit and be involved in the classroom setting and to transition from one activity to another (Tr. pp. 23-24). She also indicated that the student had shown great improvement in his language and reciprocal communication (Tr. p. 24). The program director reported that when the student was regulated, he was able to attend and demonstrated interest in his environment (Tr. p. 139). The student was beginning to show interest in the people around him, including peers, and had begun to have favorite people (Tr. pp. 139-40). The program director opined that DIR was not the only methodology from which the student could derive benefit, but that it was the best methodology for the student at the time (Tr. p. 103). She stated that while the student could benefit from ABA services in home, at school he required a more generalized approach that addressed his communication skills and ability to relate (Tr. pp. 104-05).

Petitioners testified that since their son began attending the Rebecca School, he had shown improvement in his ability to communicate and socialize (Tr. pp. 492-94, 500, 552). The student's mother testified that the Rebecca School had helped the student with the application of learned skills (Tr. p. 496).

The hearing record indicates that the student was functioning at a pre-academic level (Dist. Ex. 8 at pp. 2, 3; Parent Ex. F at pp. 2-3) and that he had significant deficits in expressive and receptive language, as well as verbal apraxia and oral motor weaknesses (Dist Exs. 7 at p. 2; 8 at pp. 3-4; 11 at pp. 4, 9). In addition, the student demonstrated deficits in sensory processing and the development of fine motor skills (Dist. Exs. 6; 8 at p. 5), attending (Dist. Exs. 8 at p. 2; 11 at p. 3; Parent Ex. F at pp. 2-3), and social-emotional development and play skills (Dist. Exs. 8 at pp. 4-5; 11 at pp. 3-4, 6-7; Parent Ex. F at pp. 2-3). The program director at the Rebecca School indicated that the student's program would include work on pre-academic skills including exposure to letters and numbers (Tr. pp. 22, 97) and that the student's progress would be measured using assessment tools that were part of the school's academic curricula (Tr. p. 82). With regard to the student's language and oral motor deficits, the Rebecca School provided the student with speech-language therapy at the same frequency and duration as recommended by the CSE (Tr. p. 21; Parent Ex. C at p. 18) and his speech-language therapy included an oral motor program, as recommended by the student's preschool providers and evaluators (Dist. Exs. 7 at p. 1; 11 at pp. 8-9). In addition, floor time sessions were used to develop the student's language and communication skills (Tr. pp. 132-35). The student also received OT five times per week as opposed to the three times recommended by the CSE (Parent Ex. C at p. 18), and his OT program included a comprehensive sensory diet that was implemented by classroom staff (Tr. pp. 21, 24-25). The Rebecca School program included formal and informal social skills training designed to address the students' deficits in socialization (Tr. p. 140). The student did not receive PT, but did receive adaptive physical education (Tr. p. 142).

Based on the above, the Rebecca School offered the student appropriate services designed to address his primary educational needs, as identified in the hearing record (Frank G., 459 F.3d at 364). Accordingly, I find that the Rebecca School was reasonably calculated to enable the student to receive educational benefits (see Frank G., 459 F.3d at 364; see also Gagliardo, 489 F.3d at 112).

The final criterion for an award of tuition reimbursement is that the parents' claim is supported by equitable considerations (see 20 U.S.C. § 1412[a][10][C]; Frank G., 459 F.3d at 363-64; Carmel Cent. Sch. Dist. v. V.P., 373 F. Supp. 2d 402, 416 [S.D.N.Y. 2005], *aff'd*, 2006 WL 2335140 [2d Cir. 2006]). Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; Mrs. C. v. Voluntown, 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 [noting that "[c]ourts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required"]). Such considerations "include the parties' compliance or noncompliance with state and federal regulations pending review, the reasonableness of the parties' positions, and like matters" (Wolfe v. Taconic Hills Cent. Sch. Dist., 167 F. Supp. 2d 530, 533 [N.D.N.Y. 2001], citing Town of Burlington v. Dep't of Educ., 736 F.2d 773, 801-02 [1st Cir. 1984], *aff'd*, 471 U.S. 359 [1985]). Parents are required to demonstrate that the equities favor awarding them tuition reimbursement (Carmel, 373 F. Supp. 2d. at 417).

Here, the impartial hearing officer stated that, if it were necessary, he would find no basis in the record to deny or limit reimbursement for the special education services petitioners privately obtained for their son for the 2006-07 school year (IHO Decision at p. 29). I must agree. Respondent shall provide reimbursement to petitioners for the cost of the student's tuition at the Rebecca School for the 2006-07 school year upon petitioners' presentation of proof of payment of such tuition (20 U.S.C. § 1412[a][10][C][ii]; 34 C.F.R. § 300.148[c]; see generally Burlington, 471 U.S. 359; Carter, 510 U.S. 7; A.A. v. Bd. of Educ., 196 F. Supp. 2d 259, 264 [E.D.N.Y. 2002]).

I have considered the parties' remaining contentions and find that I need not reach them in light of my determinations or that they are without merit.

**THE APPEAL IS SUSTAINED.**

**THE CROSS-APPEAL IS DISMISSED.**

**IT IS ORDERED** that the impartial hearing officer's decision is annulled to the extent that it found that petitioners had not provided an appropriate educational program to their son at the Rebecca School during the 2006-07 school year and it denied petitioners' request for an award of tuition reimbursement for such year; and

**IT IS FURTHER ORDERED** that respondent shall reimburse petitioners for the cost of the student's tuition at the Rebecca School for the 2006-07 school year upon petitioners' submission of proof of payment for such expenses.

**Dated:**            **Albany, New York**  
                         **December 7, 2007**

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