



The University of the State of New York

The State Education Department State Review Officer

No. 07-115

Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a child with a disability

Appearances:

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

Mayerson & Associates, attorney for respondent, Gary S. Mayerson, Esq., of counsel

DECISION

Petitioner appeals from the decision of an impartial hearing officer which found that it failed to offer an appropriate educational program to respondent's daughter and ordered it to reimburse respondent for her daughter's tuition costs at the McCarton School for the 2005-06 school year. The appeal must be sustained in part.

When the impartial hearing commenced on June 1, 2006, respondent's daughter was six years old and attending the McCarton School (June 1, 2006 Tr. pp. 54-55; Dist. Ex. 2 at p. 1; Parent Ex. Q). The McCarton School is a private school for children with autistic spectrum disorders that has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (June 1, 2006 Tr. p. 23; see 8 NYCRR 200.1[d], 200.7). The student has an auditory processing disorder, expressive language deficits, pragmatic language deficits, decreased attention skills and fine/gross motor deficits (Parent Ex. K at p. 7). She exhibits indicators of an autistic spectrum disorder in the areas of communication, reciprocal social interactions, imagination and creativity, as well as stereotyped behavior and restricted interests (Parent Ex. F at p. 3). The student's eligibility for special education services and classification as a student with autism are not in dispute in this appeal (Parent Ex. B at p. 1; see 34 C.F.R. § 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

In September 2002, the student attended a private preschool program that referred her to the Early Intervention Program (EIP) due to concerns regarding delayed speech-language and

social skills development (Parent Ex. J at pp. 3-4). Also, in September 2002, the student was evaluated by the McCarton Center for Developmental Pediatrics (McCarton Center), and referred to the EIP due to the presence of a severe expressive language delay, auditory processing difficulties, oral motor weakness and difficulty with social interactions (Parent Ex. O at p. 2; see Parent Ex. F at p. 1). Through the EIP, the student received ten hours per week of special instruction services and three hours per week of speech-language therapy (Parent Ex. O at p. 3). In October 2002, a psychological evaluation of the student was conducted through petitioner's Committee on Preschool Special Education (CPSE) (Dist. Ex. 21). At that time, the student exhibited impulsivity, unintelligible speech, lack of social relatedness and significant language delays, which suggested the presence of a pervasive developmental disorder (PDD) (id. at p. 4). Among other recommendations, the school psychologist recommended that the student undergo a pediatric psychiatric evaluation to determine the presence of a PDD diagnosis (id.). When the student "aged out" of the EIP, respondent did not pursue special education services through the CPSE, rather she obtained private speech-language therapy services for the student (Parent Ex. J at p. 4).

For the 2003-04 school year, the student attended a different private preschool program five half days per week and received ten hours per week of private in-school educational support and private speech-language therapy twice weekly (Parent Ex. O at pp. 2-3, 6). Either the student's nanny or a privately paid teacher accompanied the student to school (id. at p. 6). The private preschool suggested that the student undergo a psychological evaluation due to concerns regarding the student's speech-language and social-behavioral development (Parent Exs. M at p. 1; O at p. 2). In February 2004, a psychological evaluation of the student was conducted (Parent Ex. M). The student did not participate in formal testing due to resistance to examiner directed tasks (id. at p. 5). The school psychologist described the student as an "intermittently related" child who exhibited a global language disorder and difficulty with play, pragmatic language and reciprocal social interaction skills (id.). She recommended that the student receive instruction in a small structured classroom with a high teacher to student ratio (id.).

The CPSE convened on March 24, 2004 for an initial review of the student and determined that the student was eligible to receive special education services as a preschool student with a disability (Dist. Ex. 17 at pp. 1-2). The CPSE recommended that the student receive 15 hours per week of special education itinerant teacher (SEIT) services and four sessions per week of individual speech-language therapy (Dist. Ex. 17 at p. 1; see Parent Ex. J at p. 4). The student received SEIT services from petitioner from May through August 2004, and private speech-language therapy services beginning in June 2004 because the student's mother was unable to obtain speech-language therapy services through petitioner (Parent Ex. J at p. 5).

In spring 2004, respondent informed petitioner that she did not consent to the Committee on Special Education (CSE) evaluation process and did not want special education services for her daughter beyond the CPSE level (Aug. 2, 2006 Tr. pp. 343-46; Parent Ex. J at p. 5). By letter dated May 6, 2004, respondent stated that she no longer wanted or needed any "services" for her daughter and requested that her daughter be placed in a regular education class without services (Dist. Ex. 16). On August 16, 2004, petitioner closed the student's CSE case because respondent did not provide consent (Dist. Ex. 15).

Beginning in October 2004, the student attended one of petitioner's regular education kindergarten classes and was assigned a full-time paraprofessional due to concerns regarding her behavior (Dist. Ex. 10 at p. 1; Parent Ex. J at pp. 5-6). During the 2004-05 school year, the McCarton Center provided the student with in-school applied behavioral analysis (ABA) services and "SEIT" services one to two hours per day, three days per week, and speech-language therapy and occupational therapy (OT) (Dist. Ex. 10 at p. 1; Parent Ex. P).¹ On October 4, 2004, respondent requested that the CSE conduct an evaluation of the student and consented to the evaluation on October 18, 2004 (Dist. Exs. 32; 34). On November 4, 2004, a classroom observation was conducted by petitioner's social worker (Dist. Ex. 30). In November 2004, the Vineland Adaptive Behavior Scales (VABS) - Interview Edition was administered to respondent and the VABS - Classroom Edition was completed by the student's teacher (Dist. Ex. 10 at p. 2). According to respondent, the student's communication abilities were in the average range, daily living skills were at the low end of the low average range, socialization skills were at the low end of the borderline range, and the overall composite score fell within the middle of the low average range (June 22, 2006 Tr. pp. 178-79). Petitioner's school psychologist reported that a "significant discrepancy" across the two measures was evident, with respondent's results indicating higher overall functioning (Dist. Ex. 10 at p. 2; see June 22, 2006 Tr. pp. 178-80).

On November 1, 2004, petitioner's school psychologist requested from respondent an updated speech-language report including goals, the report from a neurological evaluation that had been conducted earlier in the year and a psychiatric evaluation of the student (June 22, 2006 Tr. p. 169; Dist. Ex. 31 at p. 1). On November 8, 2004, respondent requested that petitioner "close my daughter's CSE case" (Parent Ex. J at p. 6).² Petitioner complied with respondent's request (Dist. Ex. 13). Respondent informed the school psychologist that she was obtaining a private psychoeducational evaluation of the student at the McCarton Center (Parent Ex. J at p. 6).

During the fall and winter of the 2004-05 school year, the school psychologist documented the student's behaviors, including running out of the classroom, inability to function independently unless involved in an activity with which she was comfortable, inability to participate and/or remain on task despite individualized support, and tantrum behavior that was characterized by screaming and crying (June 22, 2006 Tr. p. 240; Dist. Ex. 10 at p. 2; see Dist. Ex. 7 at p. 3). In addition, the student reportedly exhibited poor eye contact, limited speech intelligibility and sentence length, idiosyncratic vocalizations, inappropriate emotional responses, and stereotypic and perseverative behaviors (Dist. Ex. 10 at p. 2). The school psychologist stated that the only intervention in the regular education setting that allowed the student to participate in lessons was the presence of the individual paraprofessional, and that in her current educational environment

¹ The hearing record refers to the student's school-age educational support services as "SEIT" support. However, the Education Law defines special education itinerant services (commonly referred to as "SEIT") as "an approved program provided by a certified special education teacher . . . , at a site . . . , including but not limited to an approved or licensed prekindergarten or head start program; the child's home; a hospital; a state facility; or a child care location as defined in [§ 4410(8)(a)]" (Educ. Law § 4410[1][k]). Although mischaracterized in the hearing record, I will continue to refer to the privately obtained school-age educational support service providers as SEITs to remain consistent with the hearing record and to avoid confusion in this decision.

² The hearing record contains conflicting testimony regarding which party prompted the closing of the student's CSE case in November 2004 (June 12, 2006 Tr. pp. 135-38; Aug. 2, 2006 Tr. pp. 272-75).

neither stimuli/triggers nor rewards/consequences that maintained her behaviors could be identified (*id.* at p. 3). In December 2004, the principal of the school requested that the student only attend classes in the morning and that respondent hire a trained SEIT to work with the student during the time that the student was in the classroom (Dist. Ex. 7 at p. 3). In January 2005, the student attended petitioner's school on a reduced schedule with a private SEIT (Aug. 2, 2006 Tr. pp. 283-85).

On December 10, 2004, a private pediatric neurologist examined the student (Dist. Ex. 36). He characterized the student's speech-language deficits as moderate and indicated that she had difficulty in the classroom with attention, focus, transitions, group learning, and pragmatic skills (*id.*). He stated that the student benefited from 1:1 attention and needed the services of an in-class paraprofessional and speech-language therapy services (*id.*). He was "hopeful" that the student could continue in a public school setting with a paraprofessional or in a collaborative class (*id.*).

In December 2004 and January 2005, the McCarton Center conducted a private psychological/neurodevelopmental evaluation of the student (Parent Ex. K). Administration of the Wechsler Primary and Preschool Scale of Intelligence-3rd Edition (WPPSI-III) yielded a verbal IQ score of 77 (moderately low), a performance IQ score of 108 (average) and a full scale IQ score of 88 (low average) (*id.* at p. 4). The student demonstrated math and spelling skills commensurate with same age peers, and above age and grade level skills in reading (*id.*). Visual processing speed, expressive language formulation and organization, attention and auditory processing were identified as areas of difficulty (*id.* at p. 6). The student was diagnosed with an auditory processing disorder, expressive and pragmatic language deficits, decreased attention skills and fine/gross motor deficits (*id.* at p. 7). Recommendations included a small, structured classroom with a low student to teacher ratio to monitor the student's attention skills, a 12-month program, ten hours per week of behavioral modification therapy, two hours per week of parent training, speech-language therapy, listening therapy and OT (*id.* at pp. 6-7).

On January 24, 2005, respondent requested and consented to reopen the student's CSE evaluation process and provided petitioner's principal with the January 2005 private psychological/neurodevelopmental evaluation report (June 12, 2006 Tr. p. 31; Dist. Exs. 12; 33; 35). Petitioner's CSE members subsequently received the evaluation report (June 12, 2006 Tr. pp. 31-32). On January 27, 2005, petitioner's social worker requested that respondent obtain a psychiatric evaluation of the student (Dist. Ex. 31 at p. 3; Parent Ex. J at p. 7). The following day, respondent informed petitioner that a private psychiatric evaluation of the student was scheduled for February 2, 2005 (Parent Ex. J at p. 7). In a psychiatric statement, the private psychiatrist reported that the student had "considerable problems" in the areas of language and relatedness (Dist. Ex. 37). He diagnosed the student with a Mixed Receptive-Expressive Language Disorder and recommended that the student be placed in a collaborative team teaching (CTT) class with a small teacher-student ratio, full time SEIT services, and daily speech-language therapy (*id.*).

By letter dated March 10, 2005, petitioner's social worker and school psychologist acknowledged receipt of the private psychiatric statement and private pediatric neurological report, but requested that respondent supply additional information in the form of a "complete psychiatric

evaluation with a DSM-IV-TR diagnosis"³ (Dist. Ex. 9). The letter also acknowledged receipt of the McCarton Center's January 2005 psychological/neurodevelopmental evaluation report and informed respondent that the CSE could not proceed without administration of a bilingual psychoeducational evaluation and behavioral ratings scale ("CARS and/or GARS")⁴ (*id.*). Petitioner notified respondent that the additional information must be received by March 14, 2005 in order to hold a timely CSE meeting, and if the requested evaluation reports were not obtained by the date indicated, it would request an impartial hearing (*id.*). On March 14, 2005, the CSE closed the student's CSE case because it did not receive the requested information from respondent (June 12, 2006 Tr. pp. 109-10; Dist. Ex. 8).

On March 15, 2005, a speech-language pathologist from the McCarton Center compiled a speech-language progress report (Parent Ex. I). At that time, the student received one individual and one group 45-minute speech-language therapy session per week; both sessions in a 1:1 student-therapist ratio (*id.* at p. 1). Administration of the Preschool Language Scale-4 (PLS-4) yielded an auditory comprehension standard score of 82 (12th percentile), an expressive communication standard score of 61 (1st percentile) and a total language scale standard score of 69 (2nd percentile) (*id.* at p. 2). The student reportedly demonstrated progress in receptive language skills, her ability to answer questions and to attend in a group (*id.* at p. 3). The speech-language pathologist reported that the student used a Picture Exchange Communication System (PECS) to help her initiate communication and expand her utterances (*id.*). It was recommended that the student receive individual speech-language therapy two to three times per week for 45-minute sessions and also group speech-language therapy (*id.* at p. 4).

In April 2005, petitioner requested an impartial hearing to conduct a complete psychiatric evaluation, including a DSM-IV-TR diagnosis, a bilingual psychoeducational evaluation, and a behavioral ratings scale in order to recommend an academic program for the student (Dist. Ex. 7). The parties entered into discussions to determine which evaluations were required and at an unspecified time⁵ stipulated that only the GARS would be administered to the student (Aug. 2, 2006 Tr. pp. 278-79).⁶

In May 2005, the student's SEIT reported on the student's progress over the prior six weeks (Parent Ex. H). The SEIT reported that she had provided service to the student three times per week in her kindergarten class (*id.*). The SEIT indicated that the student exhibited the ability to understand most of the information presented in the classroom, but that she had extreme difficulty with compliance, which impeded her ability to follow through with activities and tasks (*id.* at p. 1). The student needed constant redirection to return to and attempt completion of teacher directed tasks (*id.*). The SEIT opined that although the student made some gains, she may make more

³ DSM-IV-TR refers to the Diagnostic and Statistical Manual of Mental Disorders-Fourth Edition-Text Revision.

⁴ Reference here is made to the Childhood Autism Rating Scale (CARS) and the Gilliam Autism Rating Scale (GARS).

⁵ Petitioner asserts that at the end of the 2004-05 school year, the parties agreed that respondent would obtain the necessary diagnostic evaluation of the student and provide a report from that evaluation with a diagnosis to petitioner.

⁶ The stipulation was not made part of the hearing record.

progress "in a learning environment better suited to her needs and developmental level" (id. at p. 3).

On May 14, 2005, the McCarton Center conducted an OT reevaluation of the student (Parent Ex. G). Following administration of the Sensory Profile Caregiver Questionnaire, the Peabody Developmental Motor Scales (PDMS-2), and the Beery-Buktenica Developmental Test of Visual-Motor Integration (VMI) with supplemental visual perception/motor supplemental tests and a parent interview, the occupational therapist concluded that the student had significant deficits in fine and gross motor skills, activities of daily living skills and sensory processing/modulation (id. at pp. 1, 5). The occupational therapist recommended five individual 45-minute sessions of OT per week (id. at p. 5).

The student began attending the McCarton School in July 2005 (June 1, 2006 Tr. pp. 54-55). On July 25, 2005, the McCarton Center conducted an evaluation of the student using the GARS and the Autism Diagnostic Observational Schedule (ADOS) Module 2 (Parent Ex. F). Completion of the GARS by respondent yielded an autism quotient of 75 (5th percentile), which placed the student in the low range in terms of probability of an autistic spectrum disorder (id. at p. 2). Administration of the ADOS to the student yielded scores above the "cut-off" for a diagnosis of autism or an autistic spectrum disorder in each of the two categories assessed, communication and reciprocal social interaction (id. at p. 4). The student also exhibited "indicators" in the areas of imagination and creativity as well as stereotyped behavior and restricted interests (id. at p. 3). The evaluators reported that although parental ratings of the student's behavior on the GARS suggested a low likelihood of an autistic spectrum disorder, results of ADOS administration more definitively indicated the presence of an autistic spectrum disorder (id. at p. 3). In July 2005, respondent contacted petitioner's CSE office by telephone to request a CSE meeting and informed petitioner that she was seeking reimbursement for the student's tuition costs at the McCarton School (Aug. 2, 2006 Tr. pp. 281-82, 286).

On August 22, 2005, respondent enrolled the student at the McCarton School for the upcoming 2005-06 school year (Parent Ex. Q). The McCarton School developed an individual education plan for the student that included goals addressing expressive and receptive language, pre-academic, academic, social and leisure, activities of daily living, behavior, OT, pragmatic language and oral sensory/feeding needs (Parent Exs. C; D). On August 31, 2005, respondent's counsel electronically transmitted the McCarton Center evaluation report to petitioner (Dist. Ex. 40).

On September 20, 2005, petitioner's school psychologist attempted to schedule a CSE meeting and noted in her "contact sheets" that respondent would not attend a CSE meeting until a "pre-meeting" occurred (Dist. Ex. 31 at p. 5). One of petitioner's school psychologists conducted a classroom observation of the student at the McCarton School on October 21, 2005 and on October 26, 2005 the CSE convened a meeting to develop an individualized education program (IEP) for the student (Parent Exs. B; E). Participants included respondent and her attorney, petitioner's supervisor of psychologists who also acted as the district representative, a regular education teacher, a special education teacher, the classroom teacher who instructed the student during the 2004-05 school year, a school psychologist, a social worker, an additional parent member and the student's classroom teacher from the McCarton School (Parent Ex. B at p. 2).

The October 26, 2005 IEP described the student as functioning in the low average range of cognitive ability and indicated that her nonverbal abilities were much better developed than her verbal abilities (Parent Ex. B at p. 3). Communicatively, the student expressed herself using three word utterances and at times used more words, but did not spontaneously communicate to others (id.). Academically, the student was stronger in reading than in math and demonstrated the ability to recognize all letters and many words, read a full sentence, answer "what" questions, write her name as well as letters and simple words with modeling, count quantities up to 30, and use 1:1 correspondence (id.). The October 26, 2005 IEP indicated that although the student had many skills, her behaviors interfered with her ability to demonstrate those skills in the classroom (id.). It stated that her performance was variable and at times difficult to assess, and that she had difficulty transitioning from one activity to another (id.). The October 26, 2005 CSE determined that the student benefited from individualized instruction and support whenever possible and adult assistance during transitions (id.).

Socially, the October 26, 2005 IEP described the student as one who smiled at teachers and inconsistently established eye contact (Parent Ex. B at p. 4). The October 26, 2005 IEP indicated that the student did not interact with peers without prompting, but did watch and show an interest in them (id.). The October 26, 2005 IEP described the student's need to do things her way and resultant crying and screaming behaviors if that did not occur (id.). The October 26, 2005 IEP indicated that the student's behavior seriously interfered with instruction and required additional adult support, such as that of a paraprofessional, and that she would benefit from encouragement and a consistent system of positive reinforcement (id.). A behavioral intervention plan was developed for the student to address her screaming/crying behavior and her lack of initiation of interaction with peers (id. at p. 26). Physically, the student was reported to be in good health, but exhibited "low-normal" muscle tone which required OT intervention (id. at p. 5). The October 26, 2005 IEP contained approximately 39 annual goals and 174 short-term objectives for the student in the areas of academics, fine motor, sensory processing, social/emotional and speech-language (id. at pp. 6-22, 27-38).

The October 26, 2005 CSE found the student eligible for special education services as a student with autism and recommended that the student be placed in a self-contained 6:1+1 classroom in a specialized school, and receive three individual and two group speech-language therapy sessions per week, and individual OT sessions five times per week (Parent Ex. B at pp. 1, 23, 25).

By email dated October 27, 2005, respondent informed petitioner's district representative that she disagreed with the October 26, 2005 CSE's recommendation for classification and program/placement of the student (Dist. Ex. 1). She also requested that the student's file be closed and the October 26, 2005 IEP be discarded (id.).

In an email dated January 4, 2006, respondent informed petitioner's district representative that she accepted the CSE's recommended classification of autism for her daughter and had acquired new legal representation (Dist. Ex. 23). In January 2006, the McCarton School reported that the student had made progress in classroom performance, OT and speech-language therapy, and toward her individual education plan goals and objectives (Parent Exs. R; S; T; U).

In a due process complaint notice dated March 8, 2006, the student's parents requested a due process hearing to "adjudicate claims for declaratory, compensatory and reimbursement relief relating to the 2005-06 school year and summer 2006" (Parent Ex. A at p. 1). The due process complaint notice alleged that petitioner both procedurally and substantively failed to offer the student a free appropriate public education (FAPE), and that the October 26, 2005 IEP was untimely, inappropriate, and otherwise defective (*id.* at p. 2). As relief, the student's parents requested reimbursement for tuition costs at the McCarton School and reimbursement for "supplemental supports and interventions" including SCORE,⁷ gym classes and SEIT/behavior therapy (*id.* at pp. 2-3).

The impartial hearing convened on June 1, 2006 and ended on April 18, 2007, after eight days of testimony. By decision dated August 29, 2007, the impartial hearing officer found that petitioner failed to: 1) timely convene and properly conduct an annual review in order to develop an IEP prior to the commencement of the 2005-06 school year; 2) make timely program recommendations; and 3) provide a final notice of recommendation to respondent subsequent to the October 26, 2005 CSE meeting (IHO Decision at pp. 57-59). In addition to finding that testimony elicited from respondent and her prior attorney regarding respondent's request for tuition reimbursement at the October 26, 2005 CSE meeting was credible, the impartial hearing officer also found that respondent had met her burden to prove that the McCarton School offered an educational program which met her daughter's needs, and that respondent was cooperative (*id.* at pp. 57, 59). After noting that respondent paid what the impartial hearing officer determined to be reasonable costs for tuition at the McCarton School, the impartial hearing officer awarded respondent tuition reimbursement for the McCarton School for the 2005-06 school year (*id.* at p. 60).

On appeal, petitioner asserts that the impartial hearing officer incorrectly determined that it denied respondent's daughter a FAPE, that respondent's program was appropriate, and that equitable considerations favored respondent. Respondent alleges that petitioner failed to offer a timely and "defensible" IEP for the 2005-06 school year, that respondent provided an appropriate placement for the student at the McCarton School, and that respondent cooperated with petitioner.

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,

⁷ Respondent testified that SCORE is a supplemental academic program in math, reading, and spelling (Aug. 2, 2006 Tr. p. 335).

provided in conformity with a written IEP (20 U.S.C. § 1401[9][D]; 34 C.F.R. § 300.17[d];⁸ see 20 U.S.C. § 1414[d]; 34 C.F.R. § 300.320).⁹

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,

⁸ The Code of Federal Regulations (34 C.F.R. Parts 300 and 301) has been amended to implement changes made to the IDEA, as amended by the Individuals with Disabilities Education Improvement Act of 2004. The amended regulations became effective October 13, 2006. For convenience, citations in this decision refer to the regulations as amended because the regulations have been reorganized and renumbered.

⁹ The term "free appropriate public education" means special education and related services that--

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

(20 U.S.C. § 1401[9]).

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

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

The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.6[a][1]; see Walczak, 142 F.3d. at 132). The IDEA "expresses a strong preference for children with disabilities to be educated 'to the maximum extent appropriate,' together with their nondisabled peers" (Walczak, 142 F.3d at 122). In addition, federal and state regulations require that districts ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services (34 C.F.R. § 300.115[a]; see 8 NYCRR 200.6[a][1]).

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 child by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359 [1985]; Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (Burlington, 471 U.S. at 370-71; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra, 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 child a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 C.F.R. § 300.148).

Based on the following, I agree with the impartial hearing officer and find that petitioner failed to offer the student a FAPE for the 2005-06 school year.

The hearing record reveals that respondent gave consent for an initial CSE evaluation on January 24, 2005 (Dist. Ex. 35). The hearing record also reveals that the CSE's review of the evaluative data and determination of eligibility for special education services did not take place until October 26, 2005. Petitioner, therefore, did not evaluate the student and render an eligibility

determination in a timely manner.¹⁰ Petitioner did not offer an appropriate program in a timely manner and, therefore, did not offer a FAPE to respondent. I note also that respondent had sufficient evaluative data in March 2005 to render an eligibility determination and to determine appropriate services. The hearing record reflects that petitioner had at a minimum, the results of the November 2004 parent and teacher VABS, the 2004-05 draft functional behavioral assessment, the January 2005 pediatric neurologist's clinical summary, the McCarton Center's January 2005 psychological/neurodevelopmental evaluation report, the January 2005 classroom observation, and the January 2005 social history (June 12, 2006 Tr. pp. 64-66; Sept. 27, 2006 Tr. pp. 473-75; Dist. Exs. 10; 36; Parent Exs. F; J; K). Accordingly, respondent has prevailed with respect to the first criterion of the Burlington analysis for tuition reimbursement.

With respect to the second criterion for an award of reimbursement, respondent must show that the services she obtained for her daughter were appropriate to meet her special education needs for the 2005-06 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 addressed the student's special education needs (see Gagliardo, 489 F.3d at 112; Frank G., 459 F.3d at 363; Walczak, 142 F.3d at 129; Cerra, 427 F.3d at 192). Parents are not held as strictly to the standard of placement in the LRE 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).

At the time of the impartial hearing, the McCarton School served 23 children, from three to eleven years old (June 1, 2006 Tr. p. 24). The McCarton School uses ABA principles throughout the day (June 1, 2006 Tr. pp. 26-27). Students receive 1:1 support at all times (June 1, 2006 Tr. p. 36). The McCarton School program also includes two hours per week of parent training and counseling services in the form of "home to school coordination," which involves completing school work at home and generalizing skills to community-based situations (June 1, 2006 Tr. p. 36).

The McCarton School developed an individual education plan for the student based on her performance on a developmental assessment tool identified in the hearing record as the ABLLS (June 1, 2006 Tr. p. 85). The student's classroom was composed of four other children and five adults: a head teacher, three assistant teachers and a speech therapist (June 1, 2006 Tr. p. 36). Respondent's daughter received one hour of speech-language therapy per day and OT five times per week for 45-minute sessions (June 1, 2006 Tr. pp. 37, 127). The student used assistive technology support in the form of picture schedules, written prompts and a written system for responses (June 1, 2006 Tr. pp. 49-50). She also used a token reinforcement system (June 1, 2006 Tr. p. 51).

¹⁰ State regulations require that for a student not previously identified as having a disability, that a CSE shall provide a recommendation to a board of education, which shall arrange for appropriate special education programs and services to be provided to a student with a disability within 60 school days of a receipt of consent to evaluate (8 NYCRR 200.4[d]).

The McCarton School's clinical psychologist and classroom teacher testified that behaviors the student initially exhibited when she entered school including screaming, face tapping and echolalia, were either reduced in frequency or extinguished (June 1, 2006 Tr. pp. 44-46, 48, 62-63, 83, 87-88, 101). At the beginning of the school year, the student exhibited rigidity in her routines, and demonstrated tantrum behaviors in flexible situations (June 1, 2006 Tr. pp. 56-58). The clinical psychologist stated that the student is now able to take turns without exhibiting tantrum behavior (June 1, 2006 Tr. p. 59). Her attention improved to the extent that she required less frequent token reinforcement and was able to work for a period of time without reinforcement (June 1, 2006 Tr. p. 51).

Academically, the student demonstrated progress in reading, spelling and math (June 1, 2006 Tr. pp. 90-91). Her classroom teacher stated that the student's reading, math and cognitive skills were commensurate with other children in her class (June 1, 2006 Tr. pp. 94, 99-100). The classroom teacher testified that student's social skills were a "little lower" than her classroom peers due to rigid behaviors, but opined that the peers provided good social role models (June 1, 2006 Tr. p. 100). In January 2006, the McCarton School staff documented the student's mastery of and progress toward her individual education plan goals and objectives (Parent Ex. R). At that time, the student's ABA therapist concluded that the student demonstrated progress in the areas of communication, cognitive skills, social skills, and adaptive behaviors and also exhibited a very positive response to the highly structured and individualized behavioral teaching methods used by the McCarton School (Parent Ex. S at p. 3).

In addition to the progress reported by the student's ABA therapist, while at the McCarton School the student demonstrated progress in the related services of OT and speech-language therapy (June 1, 2006 Tr. pp. 124, 126-30, 184, 192-97). Her occupational therapist testified that the student is better able to tolerate changes to her environment, and had improved her handwriting skills, gross motor skills and ability to tolerate transitions (June 1, 2006 Tr. pp. 128-29; Parent Ex. T). The speech-language pathologist indicated that the student's receptive and expressive language skills improved and that she now makes communicative requests, exhibits improved eye contact, and uses words in the classroom (June 1, 2006 Tr. pp. 192-93; Parent Ex. U). The speech-language pathologist reported that the student's pragmatic skills progressed, such that her response to peer initiated interactions increased and she greeted staff and peers with intermittent verbal prompts (Parent Ex. U at p. 2). It was reported that the student's oral sensory and feeding skills also improved (id.).

Based on the above, I agree with the impartial hearing officer that respondent demonstrated the appropriateness of the program for the student at the McCarton School (IHO Decision at p. 58). Accordingly, respondent has prevailed with respect to the second criterion of the Burlington analysis for tuition reimbursement.

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).

The IDEA allows that tuition reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; see Mrs. C., 226 F.3d at n. 9). Regarding the former, tuition reimbursement may be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent CSE meeting prior to removing the child from public school, or by written notice ten business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 C.F.R. § 300.148[d]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). Although a reduction in reimbursement is discretionary, courts have upheld the denial of tuition reimbursement in cases where it was shown that parents failed to comply with this statutory provision (Greenland, 358 F.3d at 160; Ms. M. v. Portland Sch. Comm., 360 F.3d 267 [1st Cir. 2004]; Berger v. Medina City Sch. Dist., 348 F.3d 513, 523-24 [6th Cir. 2003]; Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 27 [1st Cir. 2002]).

Petitioner asserts that respondent failed to provide adequate notice to respondent prior to removing the student from the public school placement. Respondent argues that, inasmuch as petitioner never timely convened a CSE meeting or developed a timely IEP, respondent was not required to provide petitioner with notice of unilateral placement. In the alternative, respondent seeks tuition reimbursement for the periods commencing September 20, 2005 or October 26, 2005, based on assertions that proper notice was provided on each date. Respondent enrolled her daughter at the McCarton School in July 2005 (June 1, 2006 Tr. pp. 54-55) and then again on August 22, 2005 for the upcoming 2005-06 school year (Parent Ex. Q). Respondent's claim for tuition reimbursement commences in September 2005.

Here, the impartial hearing officer found both respondent and her former attorney's testimony regarding respondent's request for tuition reimbursement at the October 26, 2005 CSE to be credible (IHO Decision at pp. 21, 57; Aug. 2, 2006 Tr. pp. 360, 367; April 18, 2007 Tr. pp. 781-82, 788). In forming his opinion, the impartial hearing officer gave consideration to testimony of witnesses from both parties (see Application of a Child with a Disability, Appeal No. 07-051). I decline to disturb his credibility finding.

Respondent's notice to petitioner's October 26, 2005 CSE did not occur prior to removal of the student from public school; therefore petitioner was not given proper notice of the removal. Accordingly, I find that equitable considerations do not weigh in favor of full reimbursement for respondent. Given the circumstances of this case, I will reduce tuition reimbursement. I will

modify the impartial hearing officer's order to the extent that petitioner will only be responsible to provide tuition reimbursement for the 2005-06 school year from October 26, 2005 until the end of the school year.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the impartial hearing officer's decision is annulled to the extent it ordered petitioner to reimburse respondent in the amount of \$84,000 for tuition costs for her daughter at the McCarton School for the 2005-06 school year; and

IT IS FURTHER ORDERED that petitioner shall reimburse respondent for the cost of her child's tuition at the McCarton School from October 26, 2005 until the end of the 2005-06 school year upon respondent's submission of proof of payment for such expenses.

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

**PAUL F. KELLY
STATE REVIEW OFFICER**