



The University of the State of New York

The State Education Department State Review Officer

No. 08-003

Application of a STUDENT WITH A DISABILITY, by his parents, for review of a determination of a hearing officer relating to the provision of educational services by the Board of Education of the Kiryas Joel Union Free School District

Appearances:

Mayerson & Associates, attorneys for petitioners, Gary S. Mayerson, Esq., of counsel

Shebitz, Berman, Cohen & Delforte, PC, attorneys for respondent, Matthew J. Delforte, Esq. and Frederick J. Berman, Esq., of counsel

DECISION

Petitioners appeal from the decision of an impartial hearing officer which denied their request to be reimbursed for the costs of extended-day related services and a classroom aide at B'nai Yoel for the 2005-06 school year. Respondent, the Board of Education, cross-appeals from the impartial hearing officer's determination that it failed to provide pendency services to the student for a portion of the 2005-06 school year. The appeal must be dismissed. The cross-appeal must be sustained in part.

At the outset, I will address several procedural matters arising on appeal. First, petitioners attached an exhibit to their petition and offer it as additional documentary evidence for consideration in this appeal. Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an impartial hearing officer's decision if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary to enable a State Review Officer to render a decision (Application of a Child with a Disability, Appeal No. 07-109; Application of a Child Suspected of Having a Disability, Appeal No. 07-042; Application of a Child with a Disability, Appeal No. 06-058; Application of a Child with a Disability, Appeal No. 05-020). A review of the challenged exhibit indicates that a classroom observation occurred in December 2007 after the conclusion of the impartial hearing (Pet. Ex. A). Petitioners assert that the observation report was not available to offer into evidence at the time of the impartial hearing. Respondent objects in its answer to the admission and consideration of this observation report because it was not available for consideration by the Committee on Special Education (CSE), and it is not relevant to the 2005-06 school year. I find

that respondent's objection is persuasive because the observation report was not available at the time of the impartial hearing and it is not necessary in order to render a decision. I, therefore, decline to accept it.

Second, respondent asserts in its answer that the petition should be dismissed for failure to state a claim for which relief can be granted and failure to comply with the pleading requirements of the State regulations. Although in their reply petitioners failed to specifically respond to the procedural defenses in the answer in accordance with State regulations (8 NYCRR 275.14[a], 279.6), petitioners asserted general allegations that their exclusion of citations to the hearing record should be excused because it is "the only approach that is practicable" because the hearing record "consists of many thousands of pages of testimony, and scores of exhibits" and a State Review Officer must review the entire hearing record.¹ While federal regulation emphasizes the review of an entire hearing record by a State Review Officer (34 C.F.R. § 300.514[b][2][i]), that provision in no way diminishes a party's obligation to comply with State procedures for presenting their appeal (8 NYCRR 200.5[k][1]) and supporting their assertions in their pleadings and memorandum of law with appropriate references to the hearing record (8 NYCRR 279.8[b]).

In addition, I note that petitioners raised several procedural and substantive issues in their memorandum of law that were not raised in their petition for review. The petition for review is required to "clearly indicate the reasons for challenging the impartial hearing officer's decision" (8 NYCRR 279.4[a]). A memorandum of law is not a substitute for a pleading (see 8 NYCRR 279.4, 279.6; Application of a Child with a Disability, Appeal No. 06-096; Application of the Bd. of Educ., Appeal No. 05-031). State regulations direct that "[n]o pleading other than the petition or answer will be accepted or considered by a State Review Officer except a reply by the petitioner to the answer" (8 NYCRR 279.6). Although petitioners submitted a memorandum of law together with their petition for review, the memorandum is not a substitute for a properly drafted petition for review and will not be considered to the extent that it raises issues that were not raised in the petition.

Here, petitioners are represented by counsel. The petition for review fails to adequately identify the impartial hearing officer's findings and conclusions to which exceptions are taken. Moreover, aside from a single citation to the transcript in petitioners' memorandum of law, there are no other citations to the hearing record to support their allegations in their pleadings and memorandum of law. In accordance with the foregoing, I find that the petition for review fails to meet the requirements of the State regulations; and in the exercise of my discretion, I will dismiss the petition (8 NYCRR 279.8; see Application of the Dep't of Educ., Appeal No. 07-120).

Third, respondent objected to those portions of petitioners' reply and answer to the cross-appeal, noting that the reply failed to adhere to State regulations and, as a result, it should not be considered. I agree with respondent's contention that petitioners' reply and answer to respondent's cross-appeal does not specifically respond to the procedural defenses in the answer and raises

¹ Petitioners further note in their reply that State regulations "starkly limit the length of the petition and the size of any brief." I note that, while their petition consists of five pages and their memorandum of law consists of ten pages, State regulations permit up to 20 pages each for the petition and memorandum of law (8 NYCRR 279.8[a][5]). I also note that petitioners' memorandum of law does not comply with the form requirements in State regulations insofar as the pages are unnumbered (8 NYCRR 279.8[a][4]).

arguments that exceed the scope of a reply permitted by State regulation (8 NYCRR 279.6). Accordingly, the allegations contained in pages one through six of petitioners' reply and answer to the cross-appeal, prior to the sentence on page six that states: "In the balance of this submission, we shall respond specifically to the allegations contained in respondent's cross-appeal..." will not be considered (8 NYCRR 275.14[a], 279.6; see Application of a Child with a Disability, Appeal No. 06-121).²

Despite dismissing the petition, I have reviewed the entire hearing record and, as set forth below, I concur with the impartial hearing officer's determinations that petitioners failed to meet their burden to establish that respondent's recommended program, as set forth in the August 2005 individualized education program (IEP), failed to offer their son a free appropriate public education (FAPE)³ for the 2005-06 school year in the least restrictive environment (LRE) (IHO Decision at pp. 116, 126).

At the time of the impartial hearing, the student attended B'nai Yoel, a private sectarian school where he had been privately placed by his parents (Dist. Ex. 1 at p. 1; Parent Exs. A at p. 1; F at p. 2). During the 2005-06 school year, the student attended a general education preschool class with a private 1:1 "shadow" (Tr. pp. 71, 76). For a portion of the 2005-06 school year, respondent provided the student with speech-language therapy, occupational therapy (OT), physical therapy (PT), and vision services (Tr. pp. 2899, 2917, 2921, 4359; Dist. Ex. 1 at p. 2; Parent Ex. DD-2 at p. 2). The hearing record indicates that petitioners provided additional private speech therapy, OT, behavioral consultation, and aqua therapy outside of school (Tr. pp. 2108-10, 2113, 2116, 2120, 2791, 3261, 3265, 4438, 4793, 5256-57). Petitioners also hired a private provider who reviewed concepts with the student at home and accompanied the student to his related services (Tr. pp. 2397-98). The student's eligibility for special education services as a student with multiple disabilities is not in dispute in this appeal (Dist. Ex. 1 at p. 2; see 34 C.F.R. § 300.8[c][7]; 8 NYCRR 200.1[zz][8]).

The student exhibited developmental delays in his speech and language, feeding, physical, gross and fine motor, vision, and social development skills (Dist. Ex. 1 at pp. 3-5; Parent Exs. H at p. 3; J at p. 2; K at p. 3). The hearing record indicates that the student was highly distractible and required verbal cuing, a high level of structure, repetition, and reinforcement to participate and remain engaged in an activity (Parent Ex. I at p. 5). He displayed difficulty maintaining head support and a balanced gait (Tr. pp. 916, 5187-88). The student had not yet acquired requisite social skills to play with other children, and he had few readiness skills for school (Tr. pp. 5187-

² I also note that petitioners' reply and answer to respondent's cross-appeal do not comply with the form requirements set forth in the State regulations insofar as the paragraphs are unnumbered (8 NYCRR 279.8[a][3]).

³ 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]).

88). The student communicated by using vocalizations and the Picture Exchange Communication System (PECS) (Parent Exs. H at p. 1; I at p. 2; K at p. 3). His primary language is Yiddish (Dist. Ex. 1 at p. 1).

The parties' familiarity with the student's prior educational history is presumed, therefore, it is unnecessary to repeat here in detail. However, some discussion of the student's history is instructive.

During the 2004-05 school year, the student was four years old and lived in a family care home located within another school district (Parent Ex. V at p. 1). He attended a private preschool program recommended by the other school district's Committee on Preschool Special Education (CPSE) that consisted of a full day 8:1+2 special class, speech-language, vision, OT and PT services (Dist. Ex. 2 at p. 1).

On February 15, 2005, the preschool's speech-language pathologist conducted a bilingual speech-language evaluation of the student (Parent Ex. K). Behavioral observations included that when the student was given a task he did not want to do, he tended to display his frustration by saying in Yiddish, "nein" (no), and if told to try, he reportedly cried for a minute prior to participating appropriately in the task (id. at p. 1). According to the evaluation report, the student enjoyed playing with cars, trucks, and the kitchen corner, where he imitated cooking, eating and washing dishes (id.).

Administration of the Preschool Language Scale, Fourth Edition (PLS-4) yielded an auditory comprehension standard score (SS) and (percentile rank, age equivalent) of 61 (1st percentile, 2 years 5 months), an expressive communication SS of 50 (1st percentile, 1 year 3 months), and a total language SS of 51 (1st percentile, 1 year 10 months) (Parent Ex. K at p. 2). Although the evaluator indicated that the results should be interpreted cautiously because the PLS-4 was not standardized for a bilingual population, the student's receptive language, expressive language and total language scores were described as significantly delayed (id.).

The bilingual speech-language evaluation report indicated that, due to the student's limited verbalizations, PECS was initiated in January 2005 to help him communicate his wants and needs (Parent Ex. K at p. 3). The student reportedly "picked this up quickly" and was appropriately "beginning to use it independently and with minimal prompts during meal time and toileting time" (id.). The student began requesting items with an "I want" plus the picture card of the item wanted from his book, then handing the two picture phrase card to an adult (id.). At the time of the evaluation, PECS was incorporated as his communication system within the classroom in order for him to request desired objects (id.). Speech-language therapy focused on increasing the student's recognition of different pictures needed in the classroom to make his needs known using PECS (id.).

In her report, the speech-language pathologist described the student's difficulty with oral-motor and feeding skills, such as his loss of control while eating thin liquids (i.e. soup) (Parent Ex. K at p. 1). He used an up and down munch chew pattern for crunchy foods, but continued to suck on softer consistencies (id.). Although the student's overall cup-drinking skills improved, he lost liquids when drinking (id.). The speech-language pathologist concluded that petitioner's son

demonstrated "significantly impaired speech and language skills, as well as impaired feeding skills, in the presence of significant developmental delays" (id. at p. 3).

On March 1, 2005, the preschool conducted an educational evaluation of the student (Parent Ex. I). Administration of the Learning Accomplishment Profile-Diagnostic (LAP-D) Assessment yielded cognitive domain age equivalent (percentile) scores at 35 months (2nd percentile) for matching and at 34 months (2nd percentile) for counting (Dist. Exs. 1 at p. 4; 2 at p. 2; Parent Ex. I at pp. 1-3). Although no basal score was obtained in the language domain for naming, the student demonstrated age equivalent skills at 33 months for comprehension (2nd percentile) (id.). In the fine motor domain, the student demonstrated age equivalent skills of less than 30 months (1st percentile) for both manipulation and writing (id.). Administration of selected subtests of an assessment identified in the hearing record as the "Brigance Diagnostic" yielded age equivalent scores at the 2 year 6 month level for social-emotional skills, and at the 2 year 4 month level for self-help skills (Parent Ex. I at pp. 3-4).

The educational evaluation report described petitioners' son as easily frustrated to the point of crying and throwing himself on the floor when things did not go his way (Parent Ex. I at p. 1). He was also described as highly distractible and requiring verbal cueing to engage appropriately in an activity (id. at p. 5). He transitioned easily between activities and benefited from the picture schedule used in the classroom (id.). He enjoyed social interactions with adults and peers within the classroom, but required adult guidance to aid his social interactions (id.). The student engaged in parallel play and imitated simple one-step pretend play schemes (id.). At the time of the evaluation, the student had recently begun a toilet training program (id.). The educational evaluator recommended a highly structured program with a small adult to student ratio that offered consistency, adult guidance and support for the student (id.). According to the evaluation report, the recommended focus of the program was on the acquisition of communication, social and cognitive skills (id.).

Also on March 1, 2005, the preschool completed a PT evaluation of the student (Parent Ex. J). Administration of selected portions of the Peabody Developmental Motor Scales, Second Edition (PDMS-2) yielded results of 10 months for the stationary subtest (44 month delay), 16 months for the locomotion subtest (38 month delay), and 15 months for the object manipulation subtest (39 month delay) (Dist. Ex. 1 at p. 4; Parent Ex. J at p. 2). The physical therapist reported that the student presented with moderately low muscle tone, poor to fair muscle strength throughout, decreased standing balance reactions, and significant delays in gross motor skills (Parent Ex. J at pp. 1-2). The student required contact guarding for safety with stairs and supervision while negotiating the school environment due to frequent falling (id. at p. 2). Functionally, the student's coordination and quality of movement when ambulating was described as poor (id.). He ran using a quick, walking pace with a wide base of support, and he frequently fell (id.). The physical therapist recommended that the student continue to receive PT services (id.).

On March 2, 2005, the preschool's occupational therapist completed the student's evaluation (Parent Ex. H). Administration of selected portions of the PDMS-2 yielded results of 15 months (38 month delay) for fine motor and 18 months (35 month delay) for visual motor (Dist. Ex. 1 at p. 4; Parent Ex. H at pp. 2-3). In addition, low muscle tone, muscle weakness, and some sensory processing delays were noted (Parent Ex. H at p. 3). The student's self-help skills were

described as below age level expectations (id. at pp. 2-3). The occupational therapist recommended that the student continue to receive OT services (id. at p. 3).

A vision services summary annual report dated April 1, 2005 indicated that the student's visual efficiency skills were splintered into the two to three-year age range (Parent Ex. U at p. 3). The vision services report noted that when the student visually searched for or located an object, he appeared to look past it rather than at it (id. at p. 2). The closer the student got to an object the more he lost sight of it, indicating that his vision was fragmented rather than whole (id.). The student used a social gaze to watch and imitate actions of other children, recognize familiar faces, and identify himself in a mirror (id.). Difficulties were noted during exercises that focused on visual memory, visual association, visual sequencing, higher levels of visual discrimination, and spatial relations/eye-hand related tasks such as drawing lines between two parallel lines (id. at pp. 2-3). The teacher of the visually impaired recommended that the student receive specific classroom environmental modifications and vision therapy services for the upcoming 2005-06 school year (id. at p. 3).

During the 2004-05 school year, the student also received services from a private behavioral occupational therapist who suggested to petitioners that their son might be able to "mainstream" for academics (Tr. pp. 2103-05, 3189; Parent Ex. V at p. 2). In summer 2005, in addition to his extended school year (ESY) CPSE services, the student attended B'nai Yoel on Sundays in a class with typical peers with his father who acted as his 1:1 aide (Tr. pp. 2200-03, 2234, 3502; Dist. Ex. 2). The purpose of the student's attendance at B'nai Yoel on Sundays was to determine if a mainstream program was appropriate for him (Tr. pp. 3076-77).

On August 12, 2005, the student's mother referred her son to respondent's CSE because the student was going to move back into his parents' home, which was located in respondent's school district (Tr. pp. 291, 296, 7275; Dist. Exs. 1 at p. 1; 3A at p. 4; 5 at p. 1). Six days later on August 18, 2005, in anticipation of the student's return to his parents' home, the CSE convened for a "requested review transfer student" meeting and to plan for the 2005-06 school year (Tr. p. 1312; Dist. Ex. 1 at p. 1-2). Attendees at the August 12, 2005 CSE meeting included the CSE Chairperson, who also fulfilled the role of school psychologist, respondent's speech-language pathologist, occupational therapist, teacher of the visually impaired, school administrator, and the student's parents (Dist. Ex. 1 at p. 2; Parent Ex. OO). Petitioners waived participation of an additional parent member (Parent Ex. E).

The comments section of the resultant August 18, 2005 IEP indicates that the CSE reviewed the student's summer 2005 preschool IEP, as well as the preschool's February 2005 bilingual speech-language evaluation report, the March 2005 educational, OT, and PT evaluation reports, the April 2005 vision services report and an August 16, 2005 social history compiled by respondent (Tr. p. 299; Dist. Ex. 1 at pp. 3-5; Parent Exs. H; I; J; K; V). The CSE also reviewed a July 2003 psychological evaluation report and an August 2004 medical health record (Dist. Ex. 1 at pp. 1-2).

Based on the information available to it at the time, the August 18, 2005 CSE determined that the student was eligible for special education services as a student with multiple disabilities because of his vision deficits and developmental delays (Dist. Ex. 1 at p. 2). For the 2005-06 school year, respondent's CSE recommended a program consisting of a daily, six-hour 8:1+1

special class and related services including individual OT one time per week for 30 minutes and group OT (5:1) one time per week for 30 minutes; individual PT two times per week for 30 minutes, and group PT (5:1) one time per week for 30 minutes; individual speech-language therapy two times per week for 30 minutes and group (5:1) speech-language therapy one time per week for 30 minutes; and individual vision services one time per week for 30 minutes (id.). The CSE recommended that the student receive all of his related services in a separate location (id.). The CSE also recommended special transportation for the student (id.). Although the August 18, 2005 IEP indicated that the student was ineligible for ESY services,⁴ the CSE Chairperson stated that the CSE made no determination regarding future ESY services because it did not have sufficient information about the student's needs at that time relating to ESY services (id.).

Petitioners informed the August 18, 2005 CSE that their son attended B'nai Yoel on Sundays with typical peers (Tr. pp. 7296-97) and requested that the CSE recommend placement of the student at B'nai Yoel with the support of a 1:1 aide and related services (Tr. pp. 932-33, 3077-78, 3502). The CSE determined that none of the reports considered led to the conclusion that placement at B'nai Yoel for the upcoming school year would be appropriate for the student's special education needs (Dist. Ex. 1 at p. 1). Instead, the CSE discussed placing the student for the first weeks of school in September 2005, in a small group special class that was similar to his preschool class (id. at pp. 1-2). The CSE concluded that in order to discuss additional placement options for the student, the CSE would observe the student during the initial weeks of school in the recommended in-district class, and it would also observe the classroom setting at B'nai Yoel in which the student would be expected to function (id. at p. 2). After becoming more familiar with the student through observation, the CSE would be willing to further discuss additional programmatic options with petitioners (id.).

The student did not attend respondent's recommended program (Parent Ex. F). In mid-September 2005 his mother observed the placement recommended by respondent (Tr. p. 432). Following the observation, petitioners rejected the CSE's 2005-06 recommended program and placement (Parent Ex. F). In an undated letter to respondent's CSE chairperson, the student's mother stated that the recommended placement did not meet the student's individual social, communication and behavioral needs (id. at p. 1). Petitioners notified respondent of their intention to seek tuition funding for B'nai Yoel, related services, transportation, and "home intervention" services (id. at pp. 2-3).

On September 19, 2005 petitioners arranged for the student to attend B'nai Yoel on a full-time basis (Tr. pp. 2953-55; Parent Ex. MM). Petitioners were aware that B'nai Yoel offered no special education instruction and would not provide an aide for the student (Tr. pp. 3210-11). On September 27, 2005, the CSE Chairperson responded to petitioners' September 19, 2005 correspondence with a letter that summarized the August 18, 2005 CSE meeting (Parent Ex. M). The CSE Chairperson indicated that "the public school district will not pay your child's private school tuition," and "will not provide services for [the student] at B'nai Yoel . . . since the school is not an appropriate setting" (id.). The CSE Chairperson further indicated that the CSE recommendations would remain as written and noted that a copy of the IEP was attached to the

⁴ Programming for summer 2005 had ended on August 12, 2005, prior to the August 18, 2005 CSE meeting (Dist. Ex. 2 at p. 1). Recommendations for summer 2006 were to be determined by a CSE that was to review the student's program by June 30, 2006 in preparation for the 2006-07 school year (Tr. 5548-49; Dist. Ex. 1 at p. 2).

letter (id.).⁵ The letter stated that respondent offered the student a FAPE and offered petitioners the opportunity to set up a resolution meeting with the superintendent (id.).

By due process complaint notice dated October 6, 2005, petitioners requested an impartial hearing seeking reimbursement for tuition at B'nai Yoel and privately obtained related services, declaratory and compensatory relief, and pendency (IHO Ex. 3). Petitioners amended their due process complaint notice by letter dated April 27, 2006, wherein they withdrew their claim for the cost of tuition at B'nai Yoel (Tr. pp. 325-26, 537; IHO Ex. 3A at p. 1). Petitioners also clarified that they were seeking an assistive technology evaluation, reimbursement for the cost of the student's 1:1 classroom aides, "home programming/intervention," related services and transportation, as well as compensatory relief for respondent's failure to offer extended day services and adequate levels of related services (IHO Ex. 3A at pp. 1-2).

In a November 1, 2005 letter, respondent offered to provide related services to the student during the school day and transportation, consistent with the recommendations in the student's 2005-06 IEP (Dist. Ex. 7). Respondent's attorney indicated that petitioners' acceptance of this offer would not be conditioned on a waiver of any rights not already preserved by their impartial hearing filing (id.). Respondent was "merely seeking to immediately provide the child with what it believes are appropriate services" (id.).

The student continued to reside in the family care home outside respondent's district until November 2005 (Tr. p. 1146). The hearing record reveals that, until the student moved back to petitioners' home in respondent's school district on November 10, 2005, the student's father transported the student between the family care home and B'nai Yoel and also functioned as the student's aide in the classroom (Tr. pp. 2956, 3546). Upon returning to respondent's district, the student traveled to B'nai Yoel by bus and petitioners hired a private 1:1 aide (Tr. pp. 3211, 3546-47).

In December 2005 and January 2006, respondent attempted to establish, for purposes of pendency, a related services schedule that accommodated petitioners' request for respondent to deliver related services between 9:00-10:00 a.m. and after 2:00 or 2:30 p.m. (Tr. pp. 3990-94; Dist. Exs. 8; 13; Parent Exs. CC-2; CC-3 at pp. 1-3; CC-4 at pp. 1-2; CC-5 at pp. 1-3). Petitioners accepted all of the related services offered by respondent except for one session of PT and one session of speech therapy because the student was unavailable at the time of the therapy sessions, due to his attendance at B'nai Yoel (Tr. pp. 4013-14). The hearing record reflects that the student subsequently received services from respondent's speech-language pathologist, occupational therapist, physical therapist and teacher of the visually impaired (Dist. Ex. 11; Parent Exs. N at pp. 1-4; FF; GG at pp. 1-5; HH; RR at pp. 1-17).

The impartial hearing officer convened a prehearing conference on December 15, 2005 (IHO Ex. 5). The parties attended a resolution session on December 22, 2005, but they did not reach an agreement (IHO Ex. 9). After a second prehearing conference was held on January 24,

⁵ The attached IEP is not part of this exhibit in the hearing record (Parent Ex. M).

2006, the impartial hearing convened on April 24, 2006 and concluded on March 23, 2007 after 31 days of testimony.⁶

In a thorough, 128-page decision dated December 14, 2007, the impartial hearing officer found that: 1) a regular education teacher was not required to attend the August 2005 CSE meeting because respondent had no prior knowledge that petitioners sought a regular education environment, and none of the reports or observations submitted to the CSE recommended a mainstream setting for any portion of the student's day; 2) petitioners fully participated in the CSE meeting; 3) the failure to include a special education teacher of the student at the CSE meeting did not compromise the development of an appropriate IEP, there was no loss of educational benefits or opportunity, and the parents fully participated in the IEP process; 4) the presence of an additional parent member at the CSE meeting was waived by petitioners; 5) there were no procedural violations that affected the student's right to a FAPE; 6) no assistive technology was considered for the student at the CSE meeting; 7) a working augmentative communication system must be put in place for the student; 8) the August 2005 IEP accurately reflected the student's present levels of performance, and the student's goals and objectives were objectively measurable and reflected the student's needs and abilities; 9) the August 2005 IEP was reasonably calculated to enable the student to receive educational benefits in the LRE and was formulated to meet the student's individual needs; 10) the student exhibited severe and significant global delays and the nature and severity of the student's disability were such that education in a regular class with supplementary aids and services could not be achieved satisfactorily; 11) the evaluations and reports considered by the CSE were comprehensive in scope and precisely pinpointed the student's individual needs; 12) petitioners agreed at the CSE meeting that the reports were accurate; 13) the CSE adopted many, if not most, of the summaries and recommendations in the reports; 14) respondent demonstrated and petitioners agreed that the students with whom the student would have been placed at the program recommended by respondent had sufficiently similar needs; 15) by virtue of pendency, petitioners were entitled to receive limited reimbursement for related services obtained by them in the durations and frequencies on the summer 2005 preschool IEP from the date that the student entered the district on November 10, 2005 until the date that the district spoke to the parent about a proposed schedule for services on January 5, 2006 (IHO Decision at pp. 111-25).

The impartial hearing officer denied petitioners' request for compensatory education, finding that such relief was unwarranted due to the student's age (IHO Decision at pp. 125, 127). The impartial hearing officer also denied petitioners' request for additional services on equitable grounds because petitioners had rejected two out of three sessions of PT offered by respondent in January 2006 and discontinued vision therapy services in April 2006 (*id.* at pp. 125-27). The impartial hearing officer did not address the appropriateness of the unilateral placement because of her determination that respondent had offered the student a FAPE (*id.* at p. 126). The impartial hearing officer ordered respondent to provide the student with an independent assistive technology evaluation at public expense, and to reimburse petitioners \$465 for speech-language therapy and \$1,280 for OT pursuant to the pendency provisions of the IDEA (*id.* at p. 127). The impartial hearing officer denied petitioners' request for related services on an extended day basis, in excess

⁶ The hearing record includes well over 8,000 pages of transcript and 176 exhibits.

of what was recommended by the CSE, and petitioners' request for reimbursement for the services of private 1:1 classroom aides (*id.* at pp. 127-28).

Petitioners appeal and assert that the student was denied a FAPE due to the absence of a regular education teacher at the August 18, 2005 CSE meeting, and that the CSE predetermined that the student would not be considered for an inclusion setting. Additionally, petitioners contend that respondent does not offer any inclusion settings within its district, that it failed to consider the full continuum of placements, and that its offer of a self-contained classroom was not the student's LRE and failed to provide the student a FAPE. Petitioners further argue that the private 1:1 classroom aide was appropriate for the student and that the equities support a full reimbursement award for the aide.

Respondent cross-appeals from the impartial hearing officer's: 1) denial of its motion to dismiss on jurisdictional grounds because the student was not a resident of the district when the CSE convened in August 2005 and did not become a resident until November 2005; 2) determination that the district did not satisfy its pendency obligations and the award of reimbursement for speech-language therapy and OT; 3) determination that the summer 2005 preschool IEP was the "last agreed upon" IEP; 4) determination that it is obligated to provide the student with an independent assistive technology evaluation at public expense because the CSE determined that the student would not benefit from assistive technology devices beyond those that were already available in the district's classrooms; and 5) finding that it was a procedural error to conduct the August 2005 CSE meeting without a special education teacher of the student.

A 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]; see 20 U.S.C. § 1414[d]; 34 C.F.R. § 300.320).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (*Rowley*, 458 U.S. at 206-07; *Cerra v. Pawling Cent. Sch. Dist.*, 427 F.3d 186, 192 [2d Cir. 2005]). While school districts are required to comply with all IDEA procedures, not all procedural errors render an IEP legally inadequate under the IDEA (*Grim v. Rhinebeck Cent. Sch. Dist.*, 346 F.3d 377, 381 [2d Cir. 2003]; *Perricelli v. Carmel Cent. Sch. Dist.*, 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if a procedural violation is alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, 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]; 8 NYCRR 200.5[j][4][ii]; *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 student received a FAPE (20 U.S.C. § 1415[f][3][E][i]; see 8 NYCRR 2005[j][4][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the student 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).

In addition, 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, quoting 20 U.S.C. § 1412[a][5]). A FAPE must be provided to a student with disabilities in the "least restrictive setting consistent with the child's needs" (see Perricelli, 2007 WL 465211 at *1, citing Walczak, 142 F.3d at 122, 132). 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]). In determining an appropriate placement in the LRE, the IDEA requires that children with disabilities be educated to the maximum extent appropriate with children who are not disabled and that special classes, separate schooling or other removal of children with disabilities from the regular educational environment may occur only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily (20 U.S.C. § 1412[a][5][A]; see 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.6[a][1]; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 144 [N.D.N.Y. 2004]; Walczak, 142 F.3d at 122). The Court in Walczak further noted that "[e]ven when mainstreaming is not a feasible alternative,' the statutory preference for a least restrictive placement applies" (Walczak, 142 F.3d at 132, quoting Sherri A.D. v. Kirby, 975 F.2d 193, 206 [5th Cir. 1992]). The placement of an individual student in the LRE shall "(1) provide the special education needed by the student; (2) provide for education of the student to the maximum extent appropriate to the needs of the student with other students who do not have disabilities; and (3) be as close as possible to the student's home" (8 NYCRR 200.1[cc]; see 34 C.F.R. § 300.116). Further, both State and federal regulations require that when considering a placement in the LRE, school districts place the student as close to his or her home as possible, unless the IEP requires some other arrangement (34 C.F.R. § 300.116[b][3],[c]; 8 NYCRR 200.4[d][4][ii][b]). Consideration is also given to any potential harmful effect on the student or on the quality of services that he or she needs (34 C.F.R. § 300.116[d]; 8 NYCRR 200.4[d][4][ii][c]). Federal and State regulations also require that school districts ensure that a continuum of alternative placements be available to meet the needs of children with disabilities for

special education and related services (34 C.F.R. § 300.115; 8 NYCRR 200.6). The continuum of alternative placements includes instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions; and the continuum makes provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement (34 C.F.R. § 300.115[b]).

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).

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).

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]).⁷

Turning first to respondent's argument that the impartial hearing officer erred by denying its motion to dismiss for lack of jurisdiction, I disagree. The dispute between the parties in an appeal must at all stages be "real and live," and not "academic," or it risks becoming moot (see Lillbask v. State of Conn. Dep't of Educ., 397 F.3d 77, 84 [2d Cir. 2005]). As the impartial hearing officer noted, respondent convened the August 2005 CSE meeting in response to petitioners' referral prior to the time that the student was expected to move back into its district (Tr. pp. 1150-52; IHO Ex. 27 at p. 3). Also, it is undisputed that the student moved into respondent's school district on November 10, 2005 (Tr. p. 1146), at which time respondent became legally responsible for the student's program. Therefore, I concur with the impartial hearing officer's decision that

⁷ On August 15, 2007, New York State amended its Education Law to place the burden of proof upon the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement would continue to have the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404 [1][c], as amended by Ch. 583 of the Laws of 2007). The amended law took effect for impartial hearings commenced on or after October 14, 2007. In this case, the amended law does not apply because the impartial hearing was commenced before the effective date of the amendment.

respondent's jurisdictional challenge became moot when the student moved into respondent's district in November 2005 (IHO Ex. 27 at pp. 3-5).

Turning next to respondent's assertion that the impartial hearing officer erred by awarding reimbursement for pendency services, I agree. The pendency provisions of the IDEA and the New York State Education Law require that a student remain in his or her then current educational placement, unless the student's parents and the board of education otherwise agree, during the pendency of any proceedings relating to the identification, evaluation or placement of the student (20 U.S.C. § 1415[j]; Educ. Law §§ 4404[4], 4410[7][c]). Pendency has the effect of an automatic injunction, and the party requesting it need not meet the requirements for injunctive relief such as irreparable harm, likelihood of success on the merits, and a balancing of the hardships (Zvi D. v. Ambach, 694 F.2d 904, 906 [2d Cir. 1982]; see Wagner v. Bd. of Educ., 335 F.3d 297, 301 [4th Cir. 2003]; Drinker v. Colonial Sch. Dist., 78 F.3d 859, 864 [3d Cir. 1996]). The purpose of the pendency provision is to provide stability and consistency in the education of a student with a disability and "strip schools of the unilateral authority they had traditionally employed to exclude disabled students . . . from school" (Honig v. Doe, 484 U.S. 305, 323 [1987]; Evans v. Bd. of Educ., 921 F. Supp. 1184, 1187 [S.D.N.Y. 1996], citing Bd. of Educ. v. Ambach, 612 F. Supp. 230, 233 [E.D.N.Y. 1985]). The pendency provision does not mean that a student must remain in a particular site or location (Concerned Parents and Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751 [2d Cir. 1980]; Application of the Bd. of Educ., Appeal No. 99-90), or at a particular grade level (Application of a Child with a Disability, Appeal No. 95-16). Furthermore, the pendency provisions of State Regulations do not require a student who has been identified as a preschool student with a disability to remain in a preschool program for which he or she is no longer eligible pursuant to Education Law § 4410 (8 NYCRR 200.16[h][3][i]; see 8 NYCRR 200.5[m]).

Under the IDEA, the pendency inquiry focuses on identifying the student's then current educational placement (Mackey v. Bd. of Educ., 386 F.3d 158, 163 [2d Cir. 2004], citing Zvi D., 694 F.2d at 906). Although not defined by statute, the phrase "then current placement" has been found to mean the last agreed upon placement at the moment when the due process proceeding is commenced (Murphy v. Bd. of Educ., 86 F. Supp. 2d 354, 359 [S.D.N.Y. 2000] aff'd, 297 F.3d 195 [2002]; Application of a Child with a Disability, Appeal No. 01-013; Application of the Bd. of Educ., Appeal No. 00-073). The U.S. Department of Education has opined that a student's then current placement would "generally be taken to mean current special education and related services provided in accordance with a child's most recent [IEP]" (Letter to Baugh, 211 IDELR 481 [OSEP 1987]; see Susquenita Sch. Dist. v. Raelee, 96 F.3d 78, 83 [3d Cir. 1996]). However, if there is an agreement between the parties on placement during the proceedings, it need not be reduced to a new IEP, and it can supersede the prior unchallenged IEP as the then current placement (Evans, 921 F. Supp. at 1189 n.3; see Bd. of Educ. v. Schutz, 137 F. Supp. 2d 83 [N.D.N.Y. 2001] aff'd, 290 F.3d 476, 484 [2d Cir. 2002]; see also Letter to Hampden, ___ IDELR ___, 108 LRP 2225 [OSEP 2007]).

In this case, respondent offered the same quantity and duration of related services in its August 2005 IEP that the student had been receiving pursuant to the IEP developed by the other school district (compare Dist Ex. 1 at p. 2, with Dist. Ex. 2 at p. 1). Through their due process complaint notice, petitioners notified respondent that they had unilaterally placed the student and that he was receiving privately obtained services and requested pendency services (IHO Ex. 3).

By letter dated November 1, 2005, respondent notified petitioners of its "intention and desire" to provide transportation and related services to the student during the school day, consistent with the recommendations in the student's 2005-06 IEP (Dist. Ex. 7). Respondent further indicated that petitioners' acceptance of its offer would not be conditioned on a waiver of any rights not already preserved by their impartial hearing filing and that it was "merely seeking to immediately provide the child with what it believes are appropriate services" (*id.*).

The student moved into respondent's school district on November 10, 2005 (Tr. p. 1146), and in response to the November 1, 2005 offer to provide services, petitioners, in a letter dated November 29, 2005, requested that respondent's superintendent send them the proposed plan regarding related services for their review (Parent Ex. CC-2). Respondent replied to petitioners by a second letter dated November 29, 2005, requesting that they contact its superintendent by telephone in order to schedule the provision of services (Dist. Ex. 8). On December 22, 2005, petitioners again requested by letter that respondent provide the student with pendency services (Dist. Ex. 27). In a third letter dated December 23, 2005, respondent reiterated its intent to provide the student with related services and requested that petitioners contact its superintendent to arrange for the services (Dist. Ex. 28). On January 5, 2005, respondent contacted petitioners by telephone to discuss scheduling for the provision of related services (Tr. pp. 6016-17). In January 2006, respondent and petitioners worked together to establish a related services schedule agreeable to petitioners' request for respondent to deliver related services between 9:00-10:00 a.m. and after 2:00 or 2:30 p.m. (Tr. pp. 3990-94; Dist. Exs. 8; 13; Parent Exs. CC-2; CC-3 at pp. 1-3; CC-4 at pp. 1-2; CC-5 at pp. 1-3). Petitioners accepted all related services except for one session of PT and one session of speech-language therapy because the student was at B'nai Yoel during the school day when the therapy sessions were available (Tr. pp. 4013-14). The hearing record reflects that the student subsequently received services from respondent's speech-language pathologist, occupational therapist, physical therapist and teacher of the visually impaired (Dist. Ex. 11; Parent Exs. N at pp. 1-4; FF; GG at pp. 1-5; HH; RR at pp. 1-17).

Based upon the foregoing, I find that the delay in providing related services for the student was due to petitioners' failure to adequately respond to respondent's offers of services. Petitioners made repeated demands for pendency services (Dist. Ex. 27; Parent Ex. CC-2; IHO Ex. 3); however, they did not respond to specific requests to contact respondent's superintendent in order to schedule such services (Dist. Exs. 8; 28). Although the parties were, as a practical matter, in agreement that the student should receive related services, petitioners did not sufficiently cooperate with respondent's efforts to provide the student with related services pursuant to his August 2005 IEP. Under these circumstances, I disagree with the impartial hearing officer's award of reimbursement for petitioners' privately obtained services from November 10, 2005 until January 5, 2006 (IHO Decision at pp. 124-25; *see* 34 C.F.R. § 300.300[b]; *Schaffer*, 546 U.S. at 53; *Cerra*, 427 F.3d at 192-93; *Arlington Cent. Sch. Dist. v. L.P.*, 421 F. Supp. 2d 692, 701-02 [S.D.N.Y. 2006]).

I now turn to petitioners' request for reimbursement for privately obtained related services, 1:1 classroom aides, home programming and extended day services. The hearing record reflects that the August 2005 CSE engaged in a thorough and thoughtful process to develop an appropriate program for the student upon his return to respondent's district. The impartial hearing officer conducted a thorough and well-reasoned analysis of the hearing record with respect to the CSE's recommendations for the student. I find no reason to disturb this aspect of the impartial hearing

officer's decision, and I agree with the impartial hearing officer's determination that respondent offered the student a FAPE in the LRE (IHO Decision at pp. 116-18, 121-22, 125-26).

With regard to petitioners' assertion that respondent denied the student a FAPE because there was no regular education teacher at the August 18, 2005 CSE meeting, the hearing record reflects that there was no regular education teacher of the student in attendance at the August 18, 2005 CSE meeting (Tr. pp. 5554-55, 5587-89; Parent Ex. OO). However, for the reasons described below, I concur with the impartial hearing officer's findings that the information before the August 18, 2005 CSE indicated that the student had not participated in a general education program in the past, placement in a general education setting was not recommended by the preschool evaluators, and that a general education program would not meet his special education needs (IHO Decision at pp. 111-12).

According to the evidence in the hearing record, at the time of the August 18, 2005 CSE meeting, the student exhibited cognitive, academic, motor, fine-motor, and speech-language delays (Parent Exs. H-K). Information before the CSE indicated that the student attended a self-contained preschool program and received extensive related services including PT, OT, speech-language therapy, and vision services (Dist. Ex. 2 at p. 1). The student's related service needs identified in the preschool reports and on the resultant August 2005 IEP were addressed by the recommendations of respondent's speech-language pathologist, occupational therapist and teacher of the visually impaired (Dist. Ex. 1). I agree with the impartial hearing officer's conclusion that the absence of a regular education teacher at the August 2005 CSE meeting did not affect the student's right to a FAPE (IHO Decision p. 112).

In addition, I note that respondent's school principal is certified as a regular education teacher for grades N-6, as well as certified as a special education teacher and as a teacher of the deaf (Tr. pp. 1358-59; IHO Decision at pp. 30-31, 113). The record reflects that the school principal and the CSE Chairperson had a thorough knowledge of the district, the programs in the community, and an awareness of the evaluative information regarding the student (Tr. pp. 250-52, 295-99, 312-14, 320-25, 340, 5088-92, 5095-120, 5112-19, 5128-32, 5182-88, 5278-82, 7278-79). Moreover, the record reflects respondent's willingness to attempt to meet petitioners' requests regarding the scheduling of related services and mainstreaming opportunities for the student, as well as communicating with petitioners about the appropriateness of mainstream opportunities for the student (Tr. pp. 136, 155-56, 158-61, 5074-76, 5081-87, 5190-97, 5315-16, 5321-33, 5633-34, 6098-99, 6102-07, 6109-110, 7250-71, 7287-90, 7294-97, 7503-05, 7508-10, 7515-16, 7568-69). I concur with the impartial hearing officer's determination that the hearing record reflects no deprivation of educational benefits for the student, no impediment to the student's right to a FAPE, and no significant infringement on petitioners' opportunity to participate in the development of the student's 2005-06 IEP (IHO Decision at pp. 112-13; see 20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]).

With respect to respondent's cross-appeal regarding the impartial hearing officer's determination that the absence of a special education teacher of the student at the August 2005 CSE meeting was a procedural violation, "[t]he administrative appeal process is available only to a party which is 'aggrieved' by an IHO's determination" (Cosgrove v. Bd. of Educ., 175 F. Supp. 2d 375, 385 [N.D.N.Y. 2001]). A party aggrieved by an impartial hearing officer's decision may appeal to a State Review Officer (see 34 C.F.R. § 300.514[b][1]; 8 NYCRR 200.5[j][1]; Mackey

v. Bd. of Educ., 386 F. 3d 158, 160 [2d Cir. 2004]; Application of a Child Suspected of Having a Disability, Appeal No. 05-047; Application of the Bd. of Educ., Appeal No. 04-016; Application of a Child with a Disability, Appeal No. 02-007; Application of a Child with a Disability, Appeal No. 99-029). "Generally, the party who has successfully obtained a judgment or order in his favor is not aggrieved by it, and, consequently, has no need and, in fact, no right to appeal" (Parochial Bus Sys., Inc. v. Bd. of Educ., 60 N.Y.2d 539, 544 [1983]). In the instant case, because the impartial hearing officer's decision ultimately found that respondent had offered the student a FAPE for the 2005-06 school year, respondent is not aggrieved by this aspect of the decision (see Parochial Bus Sys., Inc. at p. 544-45; Application of a Child Suspected of Having a Disability, Appeal No. 05-047; Application of the Bd. of Educ., Appeal No. 05-023; Application of the Bd. of Educ., Appeal No. 04-016).⁸

In any event, the participation of the members of the August 2005 CSE, including the school principal who was familiar with the student's needs and the recommended program, resulted in an IEP that was reasonably calculated to confer educational benefit to the student (Tr. pp. 5057, 5178, 5182-85). The recommended program was similar to the student's preschool program (compare Dist. Ex. 1, with Dist. Ex. 2), which had reportedly been successful during the 2004-05 school year (Parent Exs. H at p. 1; I at p. 1; K at p. 1). Moreover, the record reflects that petitioners meaningfully participated in the development of their son's IEP and they did not articulate any facts that describe how the lack of a special education teacher at the CSE meeting compromised their ability to participate in the process (Tr. pp. 932-33; 2128-29, 2235-36; Parent Ex. OO). I agree with the impartial hearing officer that the August 2005 CSE members were highly experienced in the areas of the student's disabilities (IHO Decision at p. 115; Tr. pp. 248-49, 6394-97, 6893-900, 7231-36; Parent Ex. OO). In summary, I concur with the impartial hearing officer that, under the circumstances of this case, the absence of a special education teacher of the student, although a procedural violation, did not deprive the student of educational benefits, impede the student's right to a FAPE, or significantly infringe upon petitioners' opportunity to participate in the development of the student's 2005-06 IEP (20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]).

Turning to petitioners' contention that they were denied meaningful participation in the development of the student's August 2005 IEP, the hearing record does not support this assertion. The student's mother testified that she discussed her desire to place the student with typical peers and advised the August 2005 CSE that the student had been attending B'nai Yoel on Sundays (Tr. pp. 2127-31). The August 2005 CSE considered her request and determined that, based upon the reports and observations available for review, a regular education setting would not be appropriate for the student (Dist. Ex. 1 at pp. 1-2). The August 2005 CSE discussed observing the classroom setting in which the student might be expected to function at B'nai Yoel (*id.*). It recommended that for the first weeks of school in September 2005, the student attend a small group in-district special class that was similar to the preschool class the student had attended during the 2004-05 school year (*id.*). The CSE indicated that in order to more adequately discuss additional placement options for the student, it would observe the student in the recommended in-district class at the beginning of the school year, and observe the B'nai Yoel classroom (Tr. p. 7294). Afterwards, the

⁸ I note that petitioners did not appeal from the impartial hearing officer's determination that respondent offered the student a FAPE on this ground (Pet. ¶¶ 1-15).

CSE would reconvene and discuss additional placement options for the student (Dist. Ex. 1 at p. 2). The IDEA sets forth procedural safeguards that include providing parents an opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child" (20 U.S.C. § 1415[b][1]). Federal and State regulations governing parental participation require that school districts take steps to ensure that parents are present at their child's IEP meetings or are afforded the opportunity to participate (34 C.F.R. § 300.322; 8 NYCRR 200.5[d]). Although school districts must provide an opportunity for parents to participate in the development of their child's IEP, mere parental disagreement with a school district's proposed IEP and placement recommendation does not amount to a denial of meaningful participation (see Sch. for Language and Communication Dev. v. New York State Dep't of Educ., 2006 WL 2792754, at *7 [E.D.N.Y. Sept. 26, 2006] [stating that "[m]eaningful participation does not require deferral to parent choice"]; Paolella v. District of Columbia, 210 Fed. Appx. 1, 2006 WL 3697318 [C.A.D.C. Dec. 6, 2006]).

Similarly, the hearing record does not support petitioners' assertion that respondent predetermined the student's program.⁹ The consideration of possible recommendations for a student, prior to a CSE meeting, is not prohibited as long as the CSE understands that changes may occur at the CSE meeting (see Nack v. Orange City Sch. Dist., 454 F.3d 604, 610 [6th Cir. 2006]; Deal v. Hamilton County Bd. of Educ., 392 F.3d 840, 857-60 [6th Cir. 2004]; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 147-48 [S.D.N.Y. 2006]; Application of a Child with a Disability, Appeal No. 06-121). The hearing record clearly reflects that respondent's CSE considered persuasive evaluative data recommending a non-general education placement, provided petitioners an opportunity to express their concerns at the CSE meeting, and discussed petitioners' concerns. Respondent's CSE did not outright reject petitioners' concerns, rather it indicated a willingness for further discussion and consideration within a relatively short period of time subsequent to obtaining additional evaluative data based on observation of the student. Given the circumstances of this case, the hearing record supports the conclusion that "predetermination" did not invalidate the CSE process.

I now turn to respondent's assertion that the impartial hearing officer erred by ordering an independent assistive technology evaluation for the student. Respondent argues that, based on the reports it had received, the August 2005 CSE did not believe that the student would benefit from assistive technology devices beyond what it had available to all students, and even by the end of the 2005-06 school year, the student was not ready for and would not benefit from the more sophisticated devices that an outside assistive technology evaluation would consider. The due process complaint notice alleges that the August 2005 CSE did not consider assistive technology for the student (IHO Exs. 3 at p. 2; 3A at p. 3). The impartial hearing officer concluded that no assistive technology was considered for petitioners' son (IHO Decision at p. 118). She further found that the hearing record contains contradictory information regarding the proficiency of the student's use of PECS, a specific type of augmentative communication system (Tr. pp. 6421, 6432-33). The impartial hearing officer ordered an independent assistive technology evaluation of the student in order for respondent to determine and put into place an augmentative communication system that works for the student (IHO Decision at pp. 120-21).

⁹ I note that petitioners did not raise the issue of predetermination in their petition for review (Pet. ¶¶ 1-15).

Reports received from the student's preschool program and reviewed by the August 2005 CSE, indicated that he used PECS at school to communicate his needs (Dist. Ex. 1 at p. 2; Parent Exs. H at p. 1; I at p. 2; K at p. 3; U at p. 1). The preschool speech-language and educational annual review reports indicate that the student learned to use PECS quickly and required minimal prompts (Parent Exs. I at p. 2; K at p. 3). The preschool speech-language pathologist reported that the student started formulating phrases using a picture card for "I want" in combination with a picture of a desired item to communicate his requests to adults at school (Parent Ex. K at p. 3). The student's preschool IEP did not provide specific assistive technology devices or services, but it stated that he used PECS and the IEP contains one short-term objective relating to his ability to use a communication board or book (Dist. Ex. 2 at pp. 2, 3, 5). The speech-language pathologist who participated at the August 2005 CSE meeting testified that the CSE had a description of what the student did with assistive technology and that he was at a "very, very basic" level, such that an assistive technology evaluation to consider technology beyond what was offered at the school was not indicated (Tr. pp. 6394-95, 6406, 6437, 6614-15). She considered the student's use of PECS to be at a "preliminary stage" (Tr. pp. 6437-38).

The speech-language pathologist also explained that the August 2005 CSE's recommended program uses assistive technology devices and services that are provided without a specific designation on the student's IEP (Tr. p. 6432). Although the hearing record reflects that respondent could offer a "myriad" of assistive technology devices to students, the speech-language pathologist concluded that petitioner's son was at a developmental level where pointing to pictures was part of an appropriate communication system (Tr. p. 6600). I find that the information before the August 18, 2005 CSE did not indicate that the student needed an assistive technology evaluation, and that none of the reports from the student's preschool program recommended that one be conducted (Dist. Ex. 2 at p. 2; Parent Exs. H-K; U; V). Accordingly, I find that the impartial hearing officer erred by ordering an independent assistive technology evaluation (IHO Decision at pp. 120-21).

Although I have determined that an assistive technology evaluation was not necessary at the time of the August 2005 CSE meeting, I note that in January 2006, respondent began to provide speech-language therapy services to the student (Tr. p. 6455). The speech-language pathologist testified that she integrated pointing to and sequencing pictures in therapy with petitioners' son (*id.*). At the end of the 2005-06 school year, respondent's speech-language pathologist recommended continuing to develop an augmentative communication system (Parent Ex. GG at p. 5). The hearing record suggests that during the 2005-06 school year, respondent was aware that petitioners did not believe that the use of a picture communication system was beneficial to the student (Tr. pp. 945, 6453-55; Parent Ex. L at p. 2).

Given the passage of time since the August 2005 CSE meeting and the disconnect between petitioners and respondent regarding which type of augmentative communication system is appropriate for the student, an assistive technology assessment of the student may benefit the student. Thus, I will modify the impartial hearing officer's decision and order respondent to conduct an assistive technology assessment, if one has not already been conducted.

Next, I will address respondent's argument that the August 2005 IEP offered the student a placement in the LRE. As previously noted, the present levels of performance contained in the August 2005 IEP reflect the results of the February 2005 bilingual speech-language evaluation, the March 2005 educational, OT, and PT evaluations and the April 2005 vision services report

(Parent Exs. H; I; J; K, U; Dist. Ex. 1 at pp. 3-5). The school principal testified that petitioners indicated on multiple occasions at the August 18, 2005 CSE meeting that the evaluation reports from the preschool program were accurate (Tr. pp. 5188-89). Respondent's school principal concluded that, based on these reports:

"This is a highly distractible child, a child who did not learn from incidental learning but needed direct teaching. He was a nonverbal child, he did not have verbal skills to be able to be in a mainstream environment and communicate easily with children. He did not yet have social skills to be able to play with other children. That was first emerging. His motor skills were weak. He needed -- he couldn't walk without balancing himself, he didn't really have any well-balanced gait. He did not have -- he needed readiness skills to be able to enter school and he had very, very few skills at that point" (Tr. pp. 5187-88).

With the exception of the student's parents, the CSE members agreed that, based on the information in the preschool evaluation reports, the student required a full-day self-contained class that was highly structured and had a small student to teacher ratio to meet the student's needs (Tr. pp. 5184-89; Parent Ex. I at p. 5). The August 18, 2005 IEP indicates that, overall, the student exhibited global delays in cognitive, academic, social skill, speech-language and motor development, as well as impaired feeding skills (Dist. Ex. 1 at pp. 3-5). Consistent with this description, annual goals and short-term objectives addressed the student's speech-language (oral-motor, language, and communication skills), social, emotional, behavioral, fine and gross motor, cognitive, daily living and visual needs (Dist. Ex. 1 at pp. 5-7).

Respondent's school principal testified that the teacher in the recommended class was a licensed special education teacher (Tr. p. 5343). She indicated that the student's cognitive, motor and language skills were similar to the other children in the class respondent recommended (Tr. pp. 5184-86, 5279, 5288-89; Dist. Ex. 12 at pp. 2-7). She further stated that all students in the recommended class were at beginning readiness skill levels and similar to the student in that there was one other child who was preverbal (Tr. p. 5289). Paraprofessionals working in the recommended self-contained class were supervised by the special education teacher and they received training (Tr. pp. 5343-44, 5839, 5841, 6001-02). The teacher and paraprofessionals worked with students individually and in small groups (Tr. p. 5979). The curriculum was based on New York State standards (Tr. pp. 5343-44). The student would have access to assistive technology used in the classroom, such as adaptive keyboards and touch screens to access the computer (Tr. p. 5344). PECS was used throughout the day and manipulatives were presented to help the student learn (*id.*). In addition to related service providers working in the classroom, formal and informal meetings between the classroom teacher and the student's related service providers would facilitate the integration of related services into the classroom curriculum (*id.*). Assessment was ongoing and modifications to goals or methodologies were made for students as needed (*id.*). Opportunities for appropriate language modeling were available through adults in the classroom and older students in the school (Tr. p. 5360). In addition, bilingual instruction (Yiddish and English) was a theme in every lesson (Tr. pp. 5119-20). In light of the foregoing, I agree with the impartial hearing officer that the evidence did not show that the student could satisfactorily achieve the goals of his IEP within a general education program, even with the use of supplementary aids and services and that respondent's recommended program was provided in the LRE (IHO Decision at p. 122; *see* 20 U.S.C. § 1412[a][5][A]).

Regarding petitioners' allegation that respondent did not offer a continuum of services and opportunities for mainstreaming, the school principal testified that all regular education students living within the boundaries of respondent's district attended private schools and that respondent had no public general education school because "there is no public program that our parents would have their children attend" (Tr. p. 5249). She stated that mainstreaming in the district was unusual because no parent had ever requested to enroll a student in a general education program in respondent's school, as the district's residents prefer to privately place their children at a yeshiva (non-public sectarian school) (Tr. p. 5075). No full-time general education classes were offered in the district because there had not been a request for this service (Tr. p. 6109). Respondent's superintendent of schools testified that respondent provided opportunities for mainstreaming through the non-public schools (Tr. pp. 160-61), and provided general education programs for 800 students in remedial English, remedial reading, remedial math and remedial Yiddish (Tr. p. 6104). Respondent also offered academic intervention services for children who have not been identified as eligible for special education services (*id.*). Additionally, respondent has contracted with a neighboring public school district to provide general education and special education services for its students in appropriate circumstances (Tr. pp. 6116-19).

Respondent's CSE Chairperson testified that, if a student in one of respondent's self-contained classes became a candidate for mainstreaming, the CSE's recommended mainstream location would be decided upon by the parents because families residing in the district generally wanted their children placed in a yeshiva (Tr. p. 7252). Respondent employed community liaisons as a link between respondent and the nonpublic schools, to work out acceptable mainstreaming arrangements and to work out a plan between the public and nonpublic classroom teachers (Tr. pp. 7256-58). According to the CSE Chairperson, mainstreaming generally occurred before the CSE included it on the student's IEP on a trial basis whereupon respondent's teacher visited the student in the nonpublic school after an adjustment period, and reported back to the CSE on how successful the mainstreaming experience was for the student (Tr. p. 7254). Consistent with respondent's aforementioned practice, in the instant case, although respondent's August 2005 CSE determined that none of the reports it reviewed suggested that placement at B'nai Yoel would be appropriate, the CSE discussed observing the classroom setting in which the student might be expected to function at B'nai Yoel (Dist. Ex. 1 at pp. 1-2). It recommended that for the first weeks of school in September 2005, the student attend a small group in-district special class that was similar to the preschool class the student had attended during the 2004-05 school year (*id.*). The CSE indicated that in order to properly discuss additional placement options for the student, the CSE would observe the student in the recommended in-district class at the beginning of the school year, and observe the B'nai Yoel classroom (Tr. p. 7294). Afterwards, the CSE would reconvene and discuss placement options for the student (Dist. Ex. 1 at p. 2). Thus, the hearing record reveals that through contracting with a neighboring school district or permitting parents to dually enroll their children in nonpublic schools, respondent was able to offer a continuum of programs to the student. Even if the continuum was found to be lacking, the student did not suffer substantive educational harm because the hearing record supports the finding that the placement offered was substantively appropriate and in the LRE to meet the student's individual needs (*J.D. v. Pawlet Sch. Dist.*, 224 F.3d 60, 69 [2d Cir. 2000] [finding that if a procedural violation has occurred, relief is warranted only if the violation affected the student's right to a FAPE]).

In consideration of the foregoing, I find that petitioners did not prove that the program respondent offered to the student was inappropriate. I find that the special education and related

services recommended by the August 2005 CSE addressed the student's global developmental speech and language, cognitive, social, emotional, behavioral, motor and vision needs. Therefore, I agree with the impartial hearing officer that, based on the information it had at the time of the August 2005 CSE meeting, respondent offered the student a FAPE in the LRE for the 2005-06 school year (IHO Decision at pp. 117-18, 126). Having determined that respondent offered the student a FAPE for the 2005-06 school year, I need not address the appropriateness of petitioners' unilateral placement or the equitable considerations in this case (see Mrs. C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; Application of a Child with a Disability, Appeal No. 07-049; Application of a Child with a Disability, Appeal No. 07-030).

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

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the portion of the decision of the impartial hearing officer dated December 14, 2007, which ordered respondent to reimburse petitioners for the cost of speech-language therapy and OT, is hereby annulled.

IT IS FURTHER ORDERED that the decision of the impartial hearing officer dated December 14, 2007 is hereby modified to order respondent to conduct an assistive technology evaluation of the student, if it has not already done so.

Dated: **Albany, New York**
 April 18, 2007

PAUL F. KELLY
STATE REVIEW OFFICER