The University of the State of New York

The State Education Department
State Review Officer

No. 08-020

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

Appearances:
Skyer, Castro, Foley & Gersten, attorney for petitioner, Jesse Cole Foley, Esq., of counsel

Michael Best, Special Assistant Corporation Counsel, attorney for respondent, Karyn R. Thompson, Esq., of counsel

DECISION

Petitioner (the parent) appeals from a decision of an impartial hearing officer which determined that the educational program that the respondent's (district's) Committee on Special Education (CSE) recommended for the student for the 2007-08 school year was appropriate. The appeal must be sustained in part.

Preliminarily, I will address a procedural issue raised in this appeal. A petition for review to a State Review Officer must comply with the timelines specified in section 279.2 of State regulations (8 NYCRR 279.13). A State Review Officer may excuse a failure to timely seek review within the time specified for good cause shown (8 NYCRR 279.13).

The State regulations provide that a copy of the notice of intention to seek review shall be served upon the school district not less than 10 days before the service of a copy of the petition for review upon such school district, and within 25 days from the date of the decision sought to be reviewed (8 NYCRR 279.2[b]). The petition for review shall be served upon the school district within 35 days from the date of the decision sought to be reviewed (id.). It further provides that if the decision has been served by mail upon the petitioner, the date of mailing and the four days subsequent thereto shall be excluded in computing the 25 or 35day period (id.). The impartial hearing officer's decision is dated February 5, 2008. There is no indication in the hearing record of either the date or method of mailing. If the decision was sent by regular mail to the parent, the parent would have been required to serve her notice of intention to seek review by March 6, 2008, and her petition for review by March 17, 2008 (8 NYCRR 279.2[b], 279.11).

The district asserts that it was served with a copy of the impartial hearing officer's decision via e-mail on the same day as the date of the decision, and that the e-mail also contained the electronic mail address of the parent's counsel who represented the parent at the impartial hearing (Answer ¶ 135). The district concedes that the e-mail does not explicitly indicate that the parent's counsel was also served with the decision by e-mail on February 5, 2008. The parent's counsel for this appeal[1] contends that the parent was served with the decision by regular mail only (Reply ¶¶ 1, 8, 12). The district alleges that the parent served her notice of intention to seek review on March 5, 2008 (Answer ¶ 136). Both parties agree that the parent served her petition on March 17, 2008 (id. at ¶ 137; Reply ¶ 7).

As the hearing record lacks sufficient evidence demonstrating that the parent was served with the decision via e-mail, I find the district's timeliness argument unpersuasive. As I am satisfied that the parent complied with the timeliness requirement set forth in 8 NYCRR 279.2(b) for both service of the notice of intention to seek review and service of the petition, the document that initiates a review by a State Review Officer, I do not find a basis for dismissal for lateness. The parent's petition for review will therefore be reviewed on the merits.

During the impartial hearing that began on September 25, 2007, the student was enrolled in a 6:1+3 special education preschool program for children with autism, and receiving related services of speech-language therapy, occupational therapy (OT), physical therapy (PT) and ten hours per week of home-based special education itinerant teacher (SEIT) services after school (IHO Decision at p. 2). The student exhibited significant cognitive, learning, and language delays with fine and gross motor skills at or near age expectancy and has been found eligible for special education programs and services as a student with autism (Parent Ex. B at pp. 1, 3). His classification as a student with autism is not in dispute (see 34 C.F.R. § 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

At the age of three, the student received a diagnosis of autism, after which time he entered a State-approved private preschool program (Tr. p. 75), where he would remain for the 2005-06 and 2006-07 school years. On January 9, 2007, the student was seen by a developmental and behavioral pediatrician for a pediatric neurodevelopmental follow-up (Parent Ex. D). The evaluation report indicated that the student was talking more, had greater than 50 words, used some spontaneous phrases, could indicate his wants, used the pronouns "I" and "you," and used simple sentences (id. at pp. 1-2). The pediatrician reported that the student's interaction with the parent and aunt were described as improved, that he would turn and look at them if he saw something of interest on television, and that he used the computer to watch cartoon videos (id. at p. 1). The report further indicated that although the student sat calmly with the parent and aunt while the evaluator completed the history portion of the evaluation, the student was difficult to test due to his tendencies to be distracted and look away, which required a great deal of redirection (id. at p. 2). The pediatrician reported that, when rewarded with popcorn, the student responded much more compliantly, pointing to seven pictures, labeling two colors, imitating a horizontal and vertical stroke, and completing a form board, forward and reverse (id.). However, the student did not point to actions (id.). She noted that the student exhibited self-stimulatory finger movements while walking around the room and reciting dialogue from "Barney" (id.). The pediatrician

[1] The parent was represented by different counsel at the impartial hearing and on this appeal.

recommended continued placement in a small, self-contained special education classroom for children with autism spectrum disorders, applied behavioral analysis (ABA) therapy, speech-language therapy, OT, PT, and home-based ABA services (id. at pp. 2-3). She also initiated a trial of stimulant medication to address the student's inattention (id. at p. 3).

The district's school psychologist completed a psychoeducational evaluation of the student on February 16, 2007 (Parent Ex. C). The psychologist observed the student in his classroom during morning activities and reported that the student appeared "marginally engaged" while working one-to-one with an adult (id. at p. 1). Informal administration of the Vineland Adaptive Behavior Scales-Second Edition (Vineland-II) reportedly indicated that the student's adaptive behavior skills were delayed across all major test domains, including communication, daily living skills, and socialization (id. at pp. 1-2). The student's fine and gross motor skills were found to be "well within" normal limits (id. at p. 2). The program director at the student's preschool program reported to the psychologist that the student had made improvement in matching pictures, letters, and following directions, but that he could not identify letters or match colors or shapes (id.). In the area of social-emotional functioning, the student reportedly exhibited behaviors consistent with students identified with autism spectrum disorders, including self-stimulation, vocalizations, repetitive movements, and occasional self-harm (id.). The student sometimes interacted with others when prompted, and food or toy reinforcers had been used with a "certain degree" of success (id.). The psychologist opined that the student "may require placement in a highly structured learning environment as he becomes of school age" (id.).

The district's CSE convened on March 16, 2007 (Parent Ex. B at p. 1). The meeting was attended by the district's school psychologist, a general education teacher, the director of the student's special education program, the student's special education teacher, the student's related service provider, the student's maternal aunt, and the parent (id. at p. 2). The CSE found the student eligible for special programs and services as a student with autism and recommended a 12-month school year program of a 6:1+1 special class in a specialized school with related services of OT for two individual 30-minute sessions per week, PT for two individual 30-minute sessions per week, and speech-language therapy for two individual 30-minute sessions per week and one 30-minute session per week in a group of three (id. at pp. 1, 18). The academic performance and learning characteristics portion of the proposed individualized education program (IEP) stated that the student demonstrated significant cognitive, learning, and language delays (id. at p. 3). The student's fine and gross motor skills were reported to be at or near age expectancy (id.). Based on an "informal/teacher report," the student's math and reading skills were described as significantly below age expectancy (id.). The student's academic management needs included a small class placement within a highly structured learning environment that provided additional adult support (id.). In the area of "social/emotional" development, the IEP indicated that the student's behavior seriously interfered with instruction and required additional adult support, and that he demonstrated significant delays in adaptive behavior and socialization skills (id. at p. 4). The CSE did not develop a behavior plan (id.). The CSE developed goals and short-term objectives related to pre-academic skills that included basic number facts, math reasoning, reading comprehension, basic reading skills and basic writing skills, as well as goals and objectives related to recognition and interpretation of familiar signs and symbols from the environment, labeling of items, actions, adjectives, identification of prepositions, and deficits in the student's gross motor, fine motor, visual motor, visual perceptual, and sensory processing skills (id. at pp. 6-15). The district prepared a referral form for the student dated March 16, 2007 (Dist. Ex. 1). The form contained a

description of the student's behaviors, including his autism and "commensurate behaviors in all areas: adaptive behavior, cognitive-learning, language, socialization," and cognitive functioning levels, which were described as "delayed cognitive functioning with commensurate readiness skills," and noted a 6:1+1 class ratio (id.).

The district mailed a C-10 Final Notice of Recommendation (FNR) dated June 1, 2007 to the parent on June 4, 2007 recommending a specific special class placement at a specialized school and instructing the parent to contact a named individual if she wished to discuss the recommendation further (Parent Exs. H; L). The FNR stated that if the district did not hear from the parent by June 17, 2007, the district would effectuate the recommended placement (Parent Ex. H).

By letter dated June 21, 2007, the parent notified the individual named in the FNR that she had unsuccessfully tried to contact her by telephone on June 12, 15, and 20, 2007 (Tr. pp. 74-75; Parent Ex. I). The parent further wrote that she had met with the educational coordinator from the recommended placement on June 14, 2007, that the student's father had met with the coordinator on June 19, 2007, and that both parents concluded that the recommended placement was inappropriate to meet the student's special needs, prompting them to request pendency and a CSE review meeting (Parent Ex. I).

The parent met with the principal of a State-approved private elementary school on July 6, 2007 regarding the student's potential placement for the 2007-08 school year (Parent Ex. K). In a letter dated July 16, 2007, the principal notified the parent that the student would be appropriate for the school if a seat was to become available, but cautioned that the letter was not an offer of acceptance at that time (id.).

In a July 27, 2007 letter addressed "to whom it may concern," the student's treating developmental and behavioral pediatrician opined that although the student was showing some progress through therapy, the student continued to exhibit significant impairments in cognitive, adaptive, language, and interpersonal skills that necessitated his placement in a "very small class setting," no greater than 6:1+3, with as much individual attention as possible (Parent Ex. E). The pediatrician further recommended that the student continue to receive "ABA therapy with discrete trial tracking to monitor his performance," and that the ABA therapy should be continued at home as well (id.). The pediatrician opined that because of the student's significant impairments and unique developmental needs, he would likely require placement in a specialized nonpublic school setting for children with autism spectrum disorders (id.).

By due process complaint notice dated July 31, 2007, the parent, through her attorney, requested an impartial hearing (Parent Ex. A at p. 1). The parent sought funding for the student's tuition at a State-approved private school for students with autism for the 2007-08 school year (id. at p. 2). The parent also alleged that she was entitled to a "Nickerson [l]etter"[2] on the grounds that the district: failed to offer the student an appropriate placement for the 2007-08 school year within

[2] A "Nickerson letter" is a letter from the Department of Education (DOE) to a parent authorizing the parent to immediately the place student in an appropriate special education program in any State approved private school, at no cost to the parent (see Jose P. v. Ambach, No. 79 Civ. 270 [E.D.N.Y. Jan. 5, 1982]). The remedy of a "Nickerson letter" is intended to address the situation in which a child has not been evaluated or placed in a timely manner.

60 days of the March 16, 2007 CSE meeting, and failed to schedule a new CSE review or offer the student an alternative placement for more than 30 days after the parent's June 21, 2007 letter requesting that the CSE reconvene (id.). The parent further sought home-based SEIT services, five days per week for two hours per day, for the 2007-08 school year (id.). In addition to the due process complaint notice, by notarized letter dated July 31, 2007 to the district's CSE Chairperson, the parent requested a Nickerson letter due to the CSE's alleged failure to offer the student an appropriate placement within 30 days of the March 16, 2007 CSE meeting (Parent Ex. J).

On August 14, 2007, the student's speech-language pathologist reported that the student significantly increased his ability to label actions and had started to combine words into two- word utterances (Parent Ex. F at p. 2). Her report noted that the student could use the carrier phrase "I want" to request with 75 percent accuracy when provided with a model from the clinician, used one-word requests spontaneously throughout the school day, could label four actions with 80 percent accuracy, demonstrated understanding of the adjectives big/little with 60 percent accuracy, could identify the prepositions "in" and "out" with 80 percent accuracy, and could answer "[w]hat's he doing" and "[w]hat is this" with 80 percent accuracy (id.). The student also used two-word utterances consisting of "action + object " or "agent + action" (for example, "[b]aby eat" or "[e]at cookie") (id.).

On August 20, 2007, the student's physical therapist reported that the student demonstrated increased muscle strength, endurance, and coordination and that he responded well during therapy, singing songs while completing therapy activities (Parent Ex. F at p. 1). The physical therapist observed that the student was able to maintain his balance independently with "mild challenges" on a "bolster swing," negotiated up one flight of stairs with a mature reciprocal pattern with one hand held, and climbed down two to three steps with two-hand support using a mature reciprocal pattern (id.). The therapist noted that occasionally during the summer, the student exhibited aggressive behaviors of hitting and scratching the therapist and other children, and she opined that the student was either seeking attention or attempting to end his current activity (id.). The physical therapist recommended that the student continue to receive 30-minute PT sessions twice per week (id.).

On September 17, 2007, the student's home-based educator issued a report stating that the student could receptively identify primary colors, match shapes and colors with four distractors present, identify approximately 40 common objects, and complete 12-piece puzzles (Parent Ex. G). The student was unable to identify letters or numbers and exhibited difficulty with temporal and prepositional activities (id.). The report also indicated that the student demonstrated improvement in his fine motor development and was able to cut on a line with prompting, string various sized beads independently, and draw the letters "t," "l," "I," and "o" with assistance (id.). The student demonstrated limited improvement in dressing skills, requiring hand-over-hand assistance with most fasteners (id.). The student was not capable of feeding himself with utensils and, if not supervised, would use his hands (id.). The student was on an adult-supervised toileting schedule and requested to urinate in the toilet (id.). The student continued to exhibit significant expressive language delays and minimal spontaneous language, and during sessions, he repeated phrases from television or sang songs he learned during the school day (id.). The student was highly distractible and required constant redirection to focus on the task at hand (id.). The teacher also described the student as "highly excitable," reporting that when excited, the student exhibited aggressive behavior toward himself and others, pulling hair and repeatedly scratching the teacher (id.). The teacher recommended that the student continue to receive one-to-one instruction (id.).

An impartial hearing was convened on September 25, 2007[3] and concluded on December 18, 2007, after two days of testimony. By decision dated February 5, 2008, the impartial hearing officer determined that the district's placement of the student in a 6:1+1 special class was appropriate (IHO Decision at pp. 9, 11). The impartial hearing officer found that the district's mailing of the FNR identifying the proposed placement to the parent on June 4, 2007, 79 days after the CSE review, did not impede the student's right to a free appropriate public education (FAPE), did not significantly impede the parent's opportunity to participate in the decision making process regarding the provision of a FAPE to the student, and did not cause a deprivation of educational benefits (id. at p. 9). The impartial hearing officer also determined that the March 16, 2007 IEP provided an educational program that was "designed to meet the student's unique needs in the least restrictive environment [LRE]" (id.). Therefore, the impartial hearing officer denied the parent's request for a Nickerson letter (id. at p. 11). With regard to the issue of continuation of home-based educational services, the impartial hearing officer remanded the case back to the CSE for reconsideration of the necessity of such services as part of an appropriate program for the student (id.). The impartial hearing officer further ordered that the district continue funding SEIT services at 15 hours per week as set forth in her September 28, 2007 pendency order until the CSE meeting she ordered had taken place (id.).

The parent appeals from the impartial hearing officer's decision and seeks to overturn the determinations that the district's educational program and placement were appropriate, and further seeks an order authorizing funding for both the parent's unilateral placement of the student in his current State-approved private school for the 2007-08 school year, and for continued home-based SEIT services through the conclusion of the 2007-08 school year.[4]

Initially, I will address the district's assertion that the parent raised for the first time on appeal that the March 16, 2007 IEP contained procedural and substantive deficiencies. The district asserts that the parent is precluded from raising these issues on appeal because they were not raised in her due process complaint notice or during the impartial hearing. In her petition for review, the parent alleges that the March 16, 2007 IEP was procedurally and substantively deficient. The parent argues that the development of the IEP was defective because during the March 16, 2007 CSE review, she was allegedly "asked to waive the presence of a mandated 'Parent Member,' or "risk not having a timely review." The parent contends that this request denied her "meaningful participation in the development of the IEP." The parent also asserts that she was denied due process because of "[t]he CSE's failure to provide the parent with prior written notice as to why it chose to take, or not take, a requested action in the IEP," and because "[t]he CSE failed to respond, in writing, to the concerns of the parent raised in the [i]mpartial [h]earing." The parent maintains that the IEP "fails to identify the student's current levels of functioning in all areas – academic, social, emotional, and behavior," and that the IEP fails to properly identify the student's "current levels of ability, current levels of need" and does not "provide appropriate goals and objectives designed to allow progress." The parent neither amended her due process complaint notice to include these claims nor raised them at the impartial hearing. The district did not consent to include

[3] On September 28, 2007, the impartial hearing officer issued a decision and order on pendency retroactive to July 31, 2007 which ordered the district to continue to fund the student's placement at his current State-approved private preschool program and the student's home-based SEIT services for 15 hours per week at a ratio of 1:1.

[4] The parent did not specify in her petition for review the exact number of hours of SEIT services she seeks for the student.

these claims as a part of the impartial hearing. I therefore agree with the district and find that these claims are outside the scope of my review because they were not raised below and I will not consider them (Application of a Student Suspected of Having a Disability, Appeal No. 08-002; Application of a Child with a Disability, Appeal No. 07-051; Application of a Child with a Disability, Appeal No. 06-139).

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).[5]

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]; 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]). 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,

[5] 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]).

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).

The parent does not specifically request a "Nickerson letter" as relief on appeal. On appeal, for the first time in the instant case, the parent alleges that a determination on whether a FAPE was offered should not be made. In response, the district alleges that the parent's arguments regarding the issuance of a "Nickerson letter" are inconsistent with the terms of the Jose P. stipulation. Neither argument was developed below nor adequately developed on appeal.

I now turn to the argument of whether the recommended program and placement are designed to meet the student's unique special education needs in the LRE. The student exhibits significant cognitive, learning, and language delays and reportedly exhibits behaviors consistent with students identified with autism spectrum disorders that include self-stimulation, vocalizations, repetitive movements, and occasional self-harm (Parent Exs. B at p. 3; C at p. 2). The parent describes him as having "a lot of energy" and as "highly excitable" with "very short attention spans" (Tr. p. 70). At the impartial hearing, the parent testified that the student is not toilet trained, does not answer yes/no questions, and needs a lot of attention and redirection (Tr. pp. 30, 70-71). The CSE recommended a 12-month school year program for the student in a 6:1+1 special class in a specialized school (District 75) with related services of OT for two individual 30-minute sessions per week, PT for two individual 30-minute sessions per week, and speech-language therapy for two individual 30-minute sessions per week and one 30-minute session per week in a group of three (Parent Ex. B at pp. 1, 18).

At the impartial hearing, the parent testified that she visited the proposed program at the district's school and observed three classrooms spending "a few minutes" in each (Tr. pp. 25, 29-30). The parent testified that she found the placement inappropriate because she did not think that there were enough teachers in the classes, the students did not appear to have similar needs and abilities as her son, and she did not see "ABA being given" (Tr. pp. 25, 29). She further testified that the students she observed were speaking better than her son was, appeared to have behavioral problems, and appeared to be "more developed" than her son (Tr. pp. 25, 28-29). The parent also expressed concern that the classrooms were on the fourth floor of the school and that the student would have to go up four flights of stairs which, she testified would be dangerous for him (Tr. p. 29).

The hearing record reflects that at the time of the impartial hearing, the student's proposed class was comprised of three students, all of whom were five years old with a classification of autism (Tr. p. 174). The teacher of the proposed class, who holds a master's degree in special education, had prior experience teaching autistic students (Tr. pp. 169-70). He testified that one student in the class was verbal; two were nonverbal; and that all three of the students had challenging behaviors, were highly distractible, had low frustration tolerance, and were being toilet trained (Tr. pp. 176, 185). The students all received speech-language therapy, PT, and OT (Tr. p. 67). Related services were provided both in the classroom and on a pull-out basis, depending upon the need of the student, and all of the students participated in adaptive physical education, music,

dance therapy, computer class, and art (Tr. pp. 46-47, 173). The students also had an instructional breakfast and instructional lunch, which were used as opportunities to teach the students how to open packets of utensils, how to use a napkin, how to sit properly, and how to eat properly (Tr. p. 57).

Classroom staffing included the master's level special education teacher (Tr. p. 169) and two paraprofessionals who, the assistant principal of the proposed school testified, had worked for the district for approximately 15 years (Tr. pp. 54-55). The assistant principal also testified that although the class proposed for the student was designated as 6:1+1, there were always two or three paraprofessionals assigned to the room in addition to the one paraprofessional required for the classroom, because generally all students in the 6:1+1 classes exhibited behavior that significantly interfered with instruction (Tr. pp. 49-50). The assistant principal further testified that with therapists coming in to do push-in therapy, there could potentially be four or five adults in the room with six children (Tr. p. 61). The special education teacher met with the students' related service providers twice per week and with the music, art, and other special area teachers once per week (Tr. p. 182).

The special education teacher testified that the school used an ABA-based curriculum including teaching gross and fine motor skills, imitation, and pre-academic self-help skills (Tr. pp. 175-76). He also used Treatment and Education of Autistic and Communication Handicapped Children (TEACCH), and the Picture Exchange Communication System (PECS) methodologies in his classroom (Tr. p. 177). When asked during cross-examination if he conducted "ABA trials" or "tracking," the special education teacher responded affirmatively and testified that he used data sheets to record the data and then graphed it to gauge the progress of a student (Tr. p. 191). He testified that ABA concepts were used throughout the day for generalization or transfer of learned skills to different situations or environments (Tr. pp. 177-78). A behavior analyst with a master's degree in ABA from Columbia University supervised the students' ABA programs, and provided training to the special education teachers (Tr. pp. 170-71, 187-88). The special education teacher testified that he grouped the students in the classroom for some instruction based on their functioning level, and conducted lessons with the whole class as well, so that all of the students could improve their communication skills and learn to initiate verbal communication (Tr. p. 175). He stated that he motivated students through reinforcement, such as passive reinforcement (edibles, for example) (Tr. pp. 178-79). He testified that he provided "differentiated instruction," defining it as "vary[ing] your instruction depending upon the needs of the [student] [s]o you tend to come up with different teaching methodologies to address the present level of the [student] (Tr. p. 180).

The special education teacher identified the student's weaknesses as difficulty with behavior, high distractibility, and tantrums (Tr. pp. 180-81). He indicated that he would address these weaknesses by first performing a Functional Behavioral Analysis (FBA) to determine the purpose or motivating factor behind the behavior, and subsequently develop a behavioral intervention program (BIP) (Tr. p. 181). The special education teacher testified that based upon his review of the IEP, he believed that the student would fit into his class, and that the student's needs could be addressed therein (Tr. p. 180).

Based upon my review of the hearing record, I find that the district's proposed placement for the student comports with the recommendation of the student's own developmental and behavioral pediatrician that the student be placed in a small self-contained special education

classroom for children with autism spectrum disorders, ABA therapy, speech-language therapy, OT, and PT (Parent Ex. D at pp. 2-3). As the parent has not met her burden of proving that the district's proposed placement is inappropriate, I concur with the impartial hearing officer's determinations that the proposed program and placement meet the student's unique needs in the LRE, and are therefore appropriate.

Addressing the parent's request for an order funding the student's unilateral placement in his current state-approved private school for children with autism for the 2007-08 school year, the hearing record demonstrates that student can be appropriately educated in a public school setting; therefore, the parent is not entitled to such funding.

Regarding the parent's request for funding for continued home-based "SEIT" services through the conclusion of the 2007-08 school year, the pendency provisions of the IDEA and New York State Education Law require that a student remain in his or her then current placement, unless the student's parents and the school district 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]; see 34 C.F.R. § 300.518[a]; 8 NYCRR 200.5[m][1]). Because the parent filed this appeal, the impartial hearing officer's decision was not the conclusion of the administrative proceedings regarding the instant due process complaint notice (see 34 C.F.R. § 300.518; 8 NYCRR 200.5[m]), and the parent was entitled to continuation of the student's 15 hours per week of home-based SEIT services during the pendency of this appeal.[6] Pendency continues until there is a final determination of the claims set forth in the due process complaint notice. A determination is not final if it is appealed to the next level of administrative or judicial review (see 20 U.S.C. § 1415[j]; Educ. Law § 4404[4]; 34 C.F.R. § 300.518[a]; 8 NYCRR 200.5[m][1]; Zvi D v. Ambach, 694 F.2d 904, 906 [2d Cir. 1982]).

I note that the IEP does not include home-based SEIT services (Parent Ex. B).[7] The impartial hearing officer remanded the case to the CSE to determine the appropriateness of home-based services for the student because she found there was "confusion at both the IEP conference and at the hearing regarding the necessity for and availability of home-based services for the student" (IHO Decision at p. 11). The impartial hearing officer also ordered continued funding from the district for the current provision of SEIT services pursuant to her September 28, 2007 pendency order "until the CSE has convened and reached a conclusion on the issue of home-based services" (id.).

The hearing record reflects that the student had been receiving home-based educational services since March 8, 2006, and that he had shown progress with one-to-one instruction (Tr. pp. 83-84; Parent Ex. G). The home-based SEIT educator addressed the student's cognitive needs, fine motor needs, self-help skills, and his expressive language development (Parent Ex. G). The

[6] I note for the record that in her July 31, 2007 due process complaint notice, the parent requested ten hours of home-based SEIT services, two hours per day, five days per week. The impartial hearing officer, for reason unspecified, ordered funding for 15 hours of SEIT services in her order on pendency dated September 28, 2007. There hearing record does not indicate the reason for this discrepancy, and the interim order on pendency was not appealed; therefore, it is final and binding upon the parties.

[7] Section 4410(1)(k) of the Education Law states that SEIT services shall provide direct individual and/or group instruction to preschool children with disabilities by a certified special education teacher of an approved program 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 Educ. Law § 4410 [1999].

student's maternal aunt testified that the services provided at home were "a big part" of why the student was making gains (Tr. p. 123). She further testified that the student needs one- to-one instruction because of the student's difficulty in focusing, and because the student requires more individual instruction than he is able to get at school (Tr. p. 125). However, when asked by the impartial hearing officer what she would expect to happen in terms of the student's progress and regression if the student did not receive services at home, the student's special education teacher from his then current placement testified that "[h]e'll be fine. His five hours here, I mean it's great to have more, but his five hours here is enough to maintain what he learned and continue to learn more . . . I do recommend more hours if he can get it" (Tr. p. 144). The special education teacher at the proposed placement also addressed the issue of home-based educational services. He testified that in the student's case, "I think the school can probably address his needs" (Tr. p. 183).

In evaluating the substantive program developed by the CSE, the Second Circuit has observed that "'for an IEP to be reasonably calculated to enable the child to receive educational benefits, it must be likely to produce progress, not regression'" (Weixel v. Bd. of Educ., 287 F.3d 138, 151 [2d Cir. 2002], quoting M.S. v. Bd. of Educ., 231 F.3d 96, 103 [2d Cir. 1998][citation and internal quotation omitted]). This progress, however, must be meaningful; i.e., more than mere trivial advancement (Walczak, 142 F.3d at 130). The IDEA, however, does not require school districts to develop IEPs that maximize the potential of a student with a disability (Rowley, 458 U.S. at 197, n.21, 199; see Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132; Antonaccio v. Bd. of Educ., 281 F. Supp. 2d 710, 726 [S.D.N.Y. 2003]).

Based on the foregoing, I conclude that the parent has failed to demonstrate that continuation of home-based educational services is necessary to sustain the student's progress and to prevent his regression, and that a reconvening of the CSE to consider this issue is unnecessary.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED, that the part of the impartial hearing officer's decision remanding this case for a further CSE review on the issue of the continuation of home-based SEIT services is annulled; and

IT IS FURTHER ORDERED, that the impartial hearing officer's decision is modified to the extent that respondent is ordered to continue to provide and fund home-based SEIT services 10 hours weekly 1:1 until a final determination of the claims set forth in the due process complaint notice.

Dated: **Albany, New York**
May 2, 2008

PAUL F. KELLY
STATE REVIEW OFFICER