



# The University of the State of New York

## The State Education Department State Review Officer

No. 08-038

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

#### **Appearances:**

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

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

#### **DECISION**

Petitioner (the district), appeals from the decision of an impartial hearing officer which found that it failed to offer an appropriate educational program to respondents' (the parents') son and ordered it to reimburse the parents for the costs of their son's tuition at the Early Childhood Learning Center at Temple Israel (ECLC), special education itinerant teacher (SEIT) services and related services for the 2007-08 school year. The appeal must be sustained.

At the time of the impartial hearing, the student was attending a prekindergarten class at ECLC with approximately 17 other students (Tr. pp. 670-71). ECLC has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7). The student's eligibility for special education services as a student with a speech or language impairment is not in dispute in this appeal (Parent Ex. L at p. 1; see 34 C.F.R. § 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

The student began attending a "mainstream" preschool program at ECLC in September 2005, and in December 2005 and January 2006, he was referred to the district's Committee on Preschool Special Education (CPSE) for evaluation due to concerns about his difficulty with transitions and peer socialization skills (Parent Ex. MM at pp. 1, 4). The student thereafter received 12 hours of SEIT services at ECLC and at a day camp (Tr. p. 185; Parent Ex. MM at p. 2).

In July 2006, a developmental pediatrician completed a developmental evaluation of the student (Parent Ex. MM). She concluded that the student's receptive language and expressive vocabulary skills were at age appropriate to above age appropriate levels and that he exhibited sensory processing difficulties, which were most evident in the area of auditory processing (*id.* at pp. 4-5). The student's sensory processing difficulties led to problems with behavior, socialization, attention and fine-motor/perceptual abilities (*id.* at p. 5). The student was observed engaging in unprovoked aggression during busy play time, echolalia and "scripting" (*id.* at p. 3).<sup>1</sup> For the 2006-07 school year, the developmental pediatrician recommended that the student continue in his preschool classroom, and that he receive SEIT support five days per week at a total of 20 hours per week, two 60-minute sessions per week of sensory integration therapy with an occupational therapist and one to two sessions per week of counseling/behavioral therapy in the form of a social skills group (*id.* at p. 5).

During the 2006-07 school year, the student attended ECLC where he received 20 hours of in-school 1:1 SEIT services and two 60-minute sessions of group counseling/social skills therapy per week (Tr. pp. 112, 681; Parent Ex. B at p. 18).<sup>2</sup> The student's class was comprised of a regular education teacher, two assistants and 17 children (Tr. p. 111; Parent Exs. P at p. 1; W at p. 1). In November 2006, two weekly 45-minute 1:1 sessions of occupational therapy (OT) were initiated (Parent Ex. II).

On November 27, 2006, a speech-language pathologist conducted a speech-language evaluation of the student (Parent Ex. LL). Administration of the Clinical Evaluation of Language Fundamentals Preschool-2nd Edition yielded expressive language subtest scaled scores in the average range (*id.* at p. 2). The student's scores on receptive language subtests were at the 9th percentile (sentence structure) and 16th percentile (concepts and following directions) and he exhibited difficulty following directions and also interpreting sentences of increasing length and complexity (*id.* at pp. 2-3). The speech-language evaluation report stated that the student's mother was concerned about his pragmatic language skills and ability to maintain conversations with peers (*id.* at p. 1). The speech-language pathologist concluded that the student exhibited delays in receptive and pragmatic language skills, and recommended that the student receive two 45-minute sessions of speech-language therapy per week (*id.* at p. 3).<sup>3</sup>

On November 30, 2006, the student returned to the developmental pediatrician for a follow-up visit (Parent Ex. KK). Administration of the Kaufman Brief Intelligence Test (K-BIT) yielded an expressive vocabulary standard score of 160 (upper extreme), a matrices standard score of 128 (well above average) and a K-BIT IQ composite standard score of 150 (upper extreme) (*id.* at p.

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<sup>1</sup> The term "scripting" is described in the hearing record as repetition of entire sentences and phrases from movies, television shows or books (Parent Exs. GG at p. 1; MM at p. 2).

<sup>2</sup> The hearing record indicates that while the student was at school he was receiving either 1:1 SEIT support or related services (Parent Ex. YY; *see* Parent Ex. P at p. 1).

<sup>3</sup> On January 9, 2007 the CPSE convened for a requested review of the student's individualized education program (IEP) (Parent Ex. B at pp. 1-2). The January 2007 IEP continued the student's 1:1 SEIT, OT and counseling services, and added two weekly 45-minute 1:1 speech-language therapy sessions, which was provided in the student's preschool classroom (Parent Exs. B at p. 18; S at p. 1).

2). The developmental pediatrician reported that the student had made some progress with his sensory processing difficulties and his resistance to change and socialization skills, although concerns persisted in the areas of expression, frustration tolerance and peer interaction skills (id.). For the 2007-08 school year, the developmental pediatrician recommended that the student be placed in an inclusion kindergarten or "collaborative team-teaching" (CTT) classroom at his local public school (id.).<sup>4</sup>

On December 1, 2006, a progress report was prepared by the school psychologist who provided the student's home-based and in-school counseling services (counselor) (Parent Ex. JJ). The counselor stated that the student had made progress since the commencement of counseling services in September 2006 and that he benefitted from individualized adult attention (id. at p. 1). She reported that despite the student's strengths, he experienced difficulty with pragmatic language skills, socialization and sustaining interactions, and using language in a functional manner with peers without adult assistance (id.). Although able to initiate play with peers, he struggled to maintain a positive interaction without adult assistance, and when "left to his own devices" occasionally demonstrated the use of physical behaviors to seek out the attention of others (id.). The counselor opined that the student did not act in a physical manner with harmful intent; rather, it was due to his difficulty with expressive language and regulation of his emotions (id.). Due to the student's "high" intellectual ability, sensory needs and weaknesses in socialization skills, the counselor recommended placement of the student in a CTT classroom for kindergarten (id.).

On December 15, 2006, the student's SEIT prepared a progress report (Parent Ex. GG). She reported that the student participated in the classroom and attempted to interact with peers, although he exhibited difficulty sustaining those interactions (id. at p. 1). He had improved his ability to use language more appropriately and to express negative feelings rather than exhibit "disruptive" behaviors (id.). At times, the student had difficulty sustaining a topic of conversation and required redirection for his occasional scripting behavior (id.). The SEIT's report described the student as "very sensitive" and having a tendency to frustrate easily, becoming upset when asked to complete writing, coloring or cutting tasks (id.). He required assistance with clean-up and transition times due to his tendency to become disorganized, and during play in order to interact with peers appropriately (id.). The student achieved designations of "some progress" or "significant progress made, but goal not yet met" on all of his annual goals (id. at pp. 2-4). The SEIT reported that the student had demonstrated "great improvement" since February 2006 and recommended that he attend school in a CTT classroom where he would continue to receive individual attention from a special education teacher (id. at p. 5). According to her progress report, a CTT classroom would be the "best environment" for the student to continue to develop his socialization skills; it would be sensitive to his needs and it would continue to foster his growth and independence (id.).

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<sup>4</sup> "Collaborative team teaching," also referred to in State regulation as "integrated co-teaching services," means "the provision of specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students" (8 NYCRR 200.6[g]). The Office of Vocational and Educational Services for Individuals with Disabilities issued an April 2008 guidance document entitled "Continuum of Special Education Services for School-Age Students with Disabilities," which further describes integrated co-teaching services (see <http://www.vesid.nysed.gov/specialed/publications/policy/schoolagecontinuum.pdf>).

By letter to the district's school psychologist dated January 2, 2007, the student's mother sent recent progress reports from her son's SEIT, occupational therapist and "play therapist," and a copy of the November 2006 speech-language evaluation (Parent Ex. DD). According to the letter, the parents had visited the CTT classroom at their home-zoned school, and based on his need for ongoing assistance with socialization, pragmatic language, fine-motor development and sensory integration, felt strongly that their son should attend that class (Tr. p. 216; Parent Ex. DD; see Tr. p. 693). The student's mother indicated to the district that the CTT classroom was an environment in which her son would be able to succeed (Parent Ex. DD).

On January 24, 2007, the student's SEIT prepared a second progress report (Parent Ex. EE). She indicated that the student demonstrated improvement as the school year progressed, exhibited more interest in social interactions and was less physically aggressive (id. at p. 1). He attempted to participate in conversation with peers and was able to use more appropriate language to verbalize negative feelings (id.). He demonstrated the ability to transition "smoothly" with fewer negative outbursts (id.). According to the SEIT, the student's "frustration with pre-kindergarten skills . . . improved" (id.). Once again, the student achieved designations of "some progress" or "significant progress made, but goal not yet met" on all of his annual goals (id. at pp. 2-4). The SEIT stated that the student continued to make progress, but noted that he experienced "periods of regression" (id. at p. 5).

By letter dated January 31, 2007, the Committee on Special Education (CSE) notified the parents that it would be conducting a review of their son for purposes of a "Turning 5 Assessment" and requested consent to conduct additional assessments (Parent Exs. BB; CC). On February 7, 2007, the district received the parents' consent to evaluate and observe the student (Dist. Ex. 3; Parent Ex. Y).

On March 7, 2007, the parents and the special education teacher of the CTT classroom discussed the student's difficulties and the CTT classroom environment via telephone (Tr. pp. 716, 718; Parent Ex. SS). Notes taken by the parents indicate that the CTT classroom was composed of a regular education teacher, a special education teacher and a full-time assistant teacher (Parent Ex. SS). During the 2006-07 school year, the CTT class also had a full-time paraprofessional, and although the special education teacher told the parents that it was likely there would be a paraprofessional in the class in the future, she indicated that the paraprofessional was not guaranteed (Tr. pp. 716-17; Parent Ex. SS). The special education teacher explained that her class had approximately 22-25 children, nine or ten of whom had special education needs (Parent Ex. SS). She indicated that modifications were made for the children with special education needs and that instruction occurred in group settings, in parallel teaching situations and that students worked independently at tables (id.). The parents and the teacher also discussed the typical lunch and recess routines for the CTT class (Tr. p. 717; Parent Ex. SS).

On March 8, 2007, the district's school psychologist conducted a 30-minute observation of the student at ECLC and administered subtests of the Developmental Assessment of Young Children (DAYC) (Parent Ex. W; see Dist. Ex. 2). She reported that the student was friendly and cooperative, but that his style of relating was "somewhat unusual" (Parent Ex. W at p. 1). His attention and focus were variable and he exhibited weak fine-motor skills (id. at pp. 1-2). The school psychologist reported that the student's "fund of knowledge" appeared to be good, but that

he had difficulty counting items with 1:1 correspondence and with visual memory tasks (id. at p. 2). DAYC results indicated the student's cognitive skills were above average, communications skills were average, social-emotional skills were below average, and physical development and adaptive skills were described as "poor" (Dist. Ex. 2 at p. 1).

At the CSE's request, the student's private regular education preschool teacher prepared an undated progress report (Parent Ex. X). She indicated that the student participated and cooperated in class, but his ability to stay focused, work independently and follow directions was "poor" (id. at p. 1). She reported that the student did not understand questions, verbal directions, ask for help when needed, interact appropriately with peers or follow classroom rules (id.). The preschool teacher stated that the student required constant redirection to complete self-help activities and if he did not have this redirection he would be "lost in the classroom" (id. at p. 2). Regarding readiness skills, the student reportedly memorized letters and numbers, but had not "internalized" this knowledge and had difficulty with drawing shapes, 1:1 correspondence and representational drawing (id.).

In an April 2007 letter "To Whom It May Concern," the preschool teacher stated that the SEIT's 1:1 attention was "extremely necessary and beneficial" to the student (Parent Ex. V). She described the student's difficulties in the classroom with transitioning, gaining and maintaining attention, expressing thoughts and socially interacting with peers (id.). In the classroom, the student reportedly scripted from movies, books and shows about topics unrelated to the classroom discussion, was easily distracted by peers and required redirection when asked to complete a specific task (id.). She opined that without a SEIT, the student would "not be able to function effectively in a typical classroom setting" and that it would be difficult for a classroom teacher to focus attention on him because he often required redirection (id.). She further stated that the student's "team" concluded that he was not ready for kindergarten "at this time" (id.). The preschool teacher recommended that although the student demonstrated progress, another year in a preschool setting with SEIT support was "necessary and appropriate" for him (id.; see Parent Ex. X at p. 2).

On April 2, 2007, the director of the agency that provided preschool special education services and related services to the student conducted an observation of the student at his preschool to assist with educational recommendations for the upcoming school year (Tr. pp. 525, 527-28; Parent Ex. U; see Parent Exs. JJ; LL). Administration of the Functional Emotional Assessment Scale indicated that the student's functional emotional developmental age fell "at about 36 months" of age (Parent Ex. U at p. 5). He required assistance to engage in emotional, "grey area," and symbolic thinking and displayed an inability to maintain regulation which had significantly interfered with his social-emotional growth (id.). The student was not able to consistently engage in complex patterns of communication unless provided with support under optimal conditions (id. at pp. 5-6). He required assistance in learning to read emotional signals and cues and engaging in reciprocal communication with peers (id. at p. 6). The director's recommendations for the student's school program included a small classroom environment with a low student to teacher ratio, exposure to general education peers, full-time SEIT services and continuation of his related services (id. at pp. 6-9).

On April 3, 2007, the parents brought their son to the developmental pediatrician for another follow-up appointment (Parent Ex. T). The pediatrician observed that the student's play, drawing and interaction skills appeared to be similar to those of a younger child (id. at p. 2). She reported that although the student had made some progress with his sensory integration difficulties and resistance to change; his ability to express his needs, his frustration tolerance and peer interaction skills continued to be significant areas of concern (id.). The pediatrician reported that the student exhibited difficulty following directions at school and at home, needed extra structure/supervision to initiate and maintain conversations and continued to exhibit sensory integration and regulatory problems (id.). The pediatrician updated her program and placement recommendations, opining that, for the 2007-08 school year, the student should continue in his "current preschool with all of his current services intact," and further stating that he was not yet ready to face the challenges of a CTT class in a large school (id. at p. 3).

The student's speech-language pathologist prepared a progress report dated April 6, 2007 (Parent Ex. S). The report described the student's difficulty with receptive language and auditory processing skills that the speech-language pathologist opined was in part due to a "behavioral component" and his inconsistent response to various stimuli (id. at p. 1). Although the student's expressive language skills for form and content were age appropriate, pragmatic language and social skills were the areas of "most concern" (id.). The speech-language pathologist's report described the student's difficulty with initiating and maintaining appropriate interactions with peers, using language effectively in emotionally charged situations, and being aware of the listeners' reference point (id. at pp. 1-2). According to the speech-language pathologist, the student's limitations in these areas often resulted in communication breakdowns, which could not be repaired without adult intervention (id. at p. 1). The student also engaged in off-topic scripting behavior and verbal perseveration on a topic to the exclusion of all other topics (id. at pp. 1-2). For the 2007-08 school year, the speech-language pathologist recommended that the student continue in his "present educational environment" with "appropriate behavioral support" and receive speech-language therapy twice weekly for 45-minute sessions (id.).

The student's counselor prepared a report dated April 15, 2007, which contained updated program and placement recommendations (Parent Ex. R; see Tr. pp. 128-30). The report described the student's difficulty with sensory processing, progress in expanding play skills and decrease in the display of repetitive behaviors (Parent Ex. R at p. 2). The counselor amended her prior recommendation that for the 2007-08 school year the student be placed in a CTT class, stating that due to his "recent regression in the classroom environment" and social immaturity, he required "another year in a preschool environment with support" (id. at pp. 2-3). She stated that "significant gaps" have occurred in the student's learning due to his poor attention span, lack of focus during large group activities and difficulty reading and interpreting social cues, which she opined would become "insurmountable" if he were placed in a CTT classroom (id. at p. 3).

The student's occupational therapist prepared a progress report dated April 18, 2007, which indicated the student made "some progress" in meeting his sensory processing, visual-motor and fine-motor goals, but needed additional time to complete all of them (Parent Ex. Q at p. 1). The occupational therapist recommended that the student continue to receive OT services (id.).

The student's SEIT prepared a report dated April 26, 2007, which provided updated recommendations for his program and placement for the upcoming school year (Parent Ex. P; see Parent Ex. Z). She explained that her December 2006 recommendation that for the 2007-08 school year the student receive a CTT program was based upon her "hopeful assumption" that the student would have made significantly more progress than he displayed at that point in the school year (Parent Ex. P at p. 1; see Parent Ex. GG at pp. 4-5). Although she acknowledged that the student had made some progress, she reported that he demonstrated regression following breaks from school in December 2006 and March 2007 (Parent Ex. P at p. 1). After reviewing the student's progress and meeting with his parents and related service providers, she recommended that for the 2007-08 school year, the student remain at the private preschool, which offered a program for five-year-old children, and receive 20 hours per week of SEIT services (Parent Ex. P).

By letter dated April 30, 2007, the CSE chairperson sent an invitation to the parents to attend their son's CSE meeting (Parent Ex. O). The letter indicated that a district special education teacher, a district regular education teacher, a school psychologist, a social worker, an additional parent member and the student's private preschool teacher had been invited to participate in the CSE meeting scheduled for May 7, 2007 (id.).

On May 2, 2007, the parents sent copies of the student's evaluation reports, progress notes, observations, a parent survey and a medical history form to the district's school psychologist in preparation for the student's upcoming CSE meeting (Parent Ex. N; see Parent Exs. P-V; AA; WW).

On May 7, 2007, the CSE convened for a review of the student and to develop an individualized education program (IEP) for the 2007-08 school year (Parent Ex. L). Participants at the May 2007 CSE meeting included the parents, the additional parent member, the district's school psychologist who also acted as the district representative, the district's regular education teacher, and the CTT special education teacher (Tr. pp. 223-24; Parent Ex. L at p. 2; see Parent Ex. DD). The May 2007 CSE recommended that for the 2007-08 school year the student be placed in a CTT classroom and receive two individual and one group counseling sessions per week, two individual and one group speech-language therapy sessions per week, and three individual sessions of OT per week (Parent Exs. H; I; L at p. 15). The resultant May 2007 IEP reflected that the student's behavior did not seriously interfere with instruction and could be addressed by the regular and/or special education teacher, noting that he would receive additional adult support within the CTT program and counseling services (Parent Ex. L at p. 4).<sup>5</sup> The parents thereafter received the recommended May 2007 IEP on June 6, 2007 (Parent Ex. C at p. 1).

On June 8, 2007, the parents visited the recommended CTT classroom (Tr. pp. 724-26; Parent Ex. UU). In notes taken by the parents, they described observing "floor" and discussion time and academic instruction including letters, sounds and writing (Parent Ex. UU). They observed the special education teacher implementing the classroom students' sensory programs including the use of "brushing" and weighted vests (id.). The parents indicated that during the time the regular and special education teachers were in the front of the classroom teaching, the

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<sup>5</sup> The CSE did not develop a behavior intervention plan for the student (see Parent Ex. L at p. 4).

assistant teacher had a child on her lap and the paraprofessional attended to another child (Tr. pp. 724-25).

On June 11, 2007, the parents visited the proposed school a second time and observed lunch and recess time (Tr. p. 727; Parent Ex. VV). They indicated that the cafeteria was a "very loud, very chaotic environment" in which there were five kindergarten classes with two adults per class (*id.*). In the cafeteria, the CTT class was divided into three tables of eight or nine children supervised by the paraprofessional and assistant teacher (Tr. pp. 727-28). The parents described the transition from the cafeteria to recess as "unorganized" and "wild" (Tr. p. 728; Parent Ex. VV). They estimated that during the recess period there were approximately 100-125 children "running everywhere," and commented that the teachers did not provide supervision (Tr. p. 729; Parent Ex. VV). They did not observe adults providing interaction with the students with special education needs to aid in their socialization (*id.*). The parents concluded that the playground environment at the proposed school would be unsafe for their son and cause him to regress socially (*id.*).

By letter dated June 15, 2007 to the district's CSE chairperson, the parents, among other things, informed the chairperson that they had visited the proposed CTT classroom (Parent Ex. C at p. 1). The parents indicated that the CTT classroom was inappropriate for their son for several reasons, including that it was contraindicated by all of his "treating professionals" (*id.*).

In a due process complaint notice dated June 26, 2007, the parents requested an impartial hearing, alleging that the May 2007 IEP was deficient because it did not include the student's "sensory integration dysfunction" diagnosis; did not assess his present levels and was unduly generic; did not address the student's individual needs; had deficient goals and objectives; did not include a functional behavioral assessment (FBA), behavioral intervention plan (BIP) or parent training; contained recommendations "in contrast" to the latest provider reports; and was predetermined and developed without meaningful participation of the parents (Parent Ex. A at p. 2). The parents also claimed that the proposed CTT classroom was not "reasonably calculated," would not provide adequate educational support, and would be overwhelming and unsafe for the student (*id.*). Among other things, the parents additionally alleged that they were not given parental rights information and that the district failed to include the student's current teachers or providers at the May 2007 CSE meeting (*id.*).<sup>6</sup> As relief, the parents requested the costs of tuition at ECLC, 20 hours of weekly SEIT support, OT, speech therapy, and social skills counseling in accordance with the student's last agreed upon IEP, as well as 12-month educational programming and parent training and counseling (*id.* at p. 3).<sup>7</sup>

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<sup>6</sup> The hearing record reveals that a "Parent Rights booklet" was sent to the parents on January 31, 2007 (Tr. p. 422; Dist. Ex. 3).

<sup>7</sup> The impartial hearing officer issued two pendency orders dated August 7, 2007 and November 26, 2007 in which he directed the district to provide the student with 20 hours of weekly SEIT support, counseling services, OT and speech therapy (IHO interim decision dated August 7, 2007 at p. 2; IHO interim decision dated November 26, 2007 at p. 2). I note that with the recent expiration of the 2007-08 school year, the parents have obtained much of the relief they sought by virtue of pendency (see Application of a Child with a Disability, Appeal No. 07-085; Application of a Child with a Disability, Appeal No. 07-077); one notable exception being the tuition costs for ECLC for the 2007-08 school year.



An impartial hearing convened on August 2, 2007 and concluded on December 6, 2007 after four days of testimony. In a decision dated March 19, 2008, the impartial hearing officer concluded that either the student's SEIT or one of his preschool teachers should have attended the May 2007 CSE meeting to "evaluate the regression factor," and that this constituted a "material violation that supports a Prong I finding" that the district failed to provide a free appropriate public education (FAPE) (IHO Decision at p. 19). The impartial hearing officer also determined that the program and services secured by the parents were appropriate and that they cooperated with the CSE (id. at p. 20). The impartial hearing officer ordered the district to reimburse the parents for the costs of the student's preschool program at ECLC for the 2007-08 school year, and fund SEIT services, counseling, OT and speech-therapy services (id.). However, the impartial hearing officer denied the parents' request for a 12-month school year (id.).<sup>8</sup>

The district appeals, contending that the impartial hearing officer erred by concluding that the failure to include the then-current special education teacher of the student constituted a denial of a FAPE. The district further argues that an FBA and a BIP were not necessary to address the student's behaviors. The district also argues that its recommendation for a CTT class without a SEIT or a paraprofessional would be appropriate to meet the student's needs. With regard to the student's placement at ECLC, the district asserts that the parents did not present any testimony regarding the student's current class, student make-up, curriculum or teaching methodology, and that the student's previous SEIT merely opined that the student required a SEIT. Among other things, the district also argues that the parents did not cooperate with the district because the parents should have secured the attendance of the student's preschool teachers at the May 2007 CSE meeting. As relief, the district requests annulment of the impartial hearing officer's decision to award tuition reimbursement and a 1:1 SEIT to the parents.<sup>9</sup>

In their answer, the parents deny many of the allegations of the district and, among other things, assert that the district erroneously concluded that an FBA of the student was not required. With regard to the student's placement at ECLC, the parents contend that they need only establish that the placement with SEIT support was reasonably calculated to provide the student with educational benefit and that there was significant evidence to support their claim. The parents also argue that the district has "manufactured" its defense that equitable circumstances preclude their

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<sup>8</sup> I further note that the hearing record contains no explanation whatsoever for the delay in conducting the impartial hearing or issuing the impartial hearing officer's decision. While the parents' due process complaint notice is dated June 26, 2007, it appears that in the ensuing four months, the case did not proceed further than very briefly addressing pendency in August 2007 and the issuance of two one-page interim pendency determinations in August 2007 and November 2007. Although the impartial hearing was concluded on December 6, 2007, the impartial hearing officer's decision was not issued for more than three months thereafter (IHO Decision at p. 20). I caution the impartial hearing officer to comply with State regulations with regard to granting extensions and rendering a timely, final decision (8 NYCRR 200.5[j][3][xiii], [5]).

<sup>9</sup> The parents were not required to fund the 20 hours of 1:1 SEIT services during the pendency of the proceeding (IHO interim decision dated August 7, 2007 at p. 2).

claim for tuition reimbursement, and that these allegations underscore the district's lack of good faith arguments with respect to the first and second prongs.<sup>10</sup>

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).<sup>11</sup> A student's educational program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.6[a][1]; see Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 132 [2d Cir. 1998]).

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"

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<sup>10</sup> The parents have not appealed the impartial hearing officer's determination to deny their request for services for summer 2008 or the impartial hearing officer's failure to address the parents' request for parent training and counseling, consequently these issues are not properly before me and I do not address them (see IHO Decision at pp. 19-20).

<sup>11</sup> The term "free appropriate public education" means special education and related services that--

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

(20 U.S.C. § 1401[9]).

(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, 142 F.3d at 130; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see Perricelli, 2007 WL 465211, at \*15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192).

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

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a child by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359 [1985]; Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (Burlington, 471 U.S. at 370-71; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the 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).

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program that met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Frank G., 459 F.3d at 363-64; Walczak, 142 F.3d at 129; Matrejek, 471 F. Supp. 2d at 419). A parent's failure to select a program approved by the state in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. 7; Application of the Dep't of Educ., Appeal No. 08-025; Application of the Bd. of Educ., Appeal No. 08-016; Application of the Bd. of Educ., Appeal No. 07-097; Application of a Child with a Disability, Appeal No. 07-038; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-105). The test for a parental placement is that it is appropriate, not that it is perfect (Warren G.

v. Cumberland Co. Sch. Dist., 190 F.3d 80, 84 [3d Cir. 1999]; see also M.S. v. Bd. of Educ., 231 F.3d 96, 105 [2d Cir. 2000]). In addition, parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F. 3d at 364-65). When determining whether the parents' unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether that placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see also Gagliardo, 489 F.3d at 112). While evidence of progress at a private school is relevant, it does not itself establish that a private placement is appropriate to meet a student's unique special education needs (Gagliardo, 489 F.3d at 115).

The Second Circuit has set forth the standard for determining whether parents have carried their burden of demonstrating the appropriateness of their unilateral placement.

No one factor is necessarily dispositive in determining whether parents' unilateral placement is reasonably calculated to enable the child to receive educational benefits. Grades, test scores, and regular advancement may constitute evidence that a child is receiving educational benefit, but courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs. To qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special service necessary to maximize their child's potential. They need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction (Gagliardo, 489 F.3d at 112; see Frank G., 459 F.3d at 364-65; see also A.D. and H.D. v. New York City Dep't of Educ., 06 Civ. 8306 [S.D.N.Y. April 21, 2008]).

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]).<sup>12</sup>

Turning first to the district's argument that the May 2007 CSE was properly composed, as further described below, I find that the district appropriately assigned teachers from the student's local school to sit as members of the CSE. The IDEA requires a CSE to include, among others,

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<sup>12</sup> The New York State Legislature amended the Education Law to place the burden of persuasion upon the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of persuasion regarding the appropriateness of such placement (Educ. Law § 4404[1][c], as amended by Ch. 583 of the Laws of 2007). The amended statute took effect for impartial hearings commenced on or after October 14, 2007 (see Application of the Bd. of Educ., Appeal No. 08-016). In this case, the parents' due process complaint notice was dated June 26, 2007, well before the burden of proof shifted to the district (Parent Ex. A at p. 1). Under the circumstances presented herein, the impartial hearing commenced prior to the effective date of the amended law. Accordingly, in the instant case, the burden of persuasion that the district failed to offer the student a FAPE rested with the parents. (Application of a Student Suspected of Having a Disability, Appeal No. 08-023; Application of the Dep't of Educ., Appeal No. 08-018).

not less than one regular education teacher if the student is or may be attending a general education environment and one special education teacher of the student, or where appropriate, not less than one special education provider of the student (20 U.S.C. § 1414[d][1][B][ii]-[iii]; see 34 C.F.R. § 300.321[a][2]-[3]; 8 NYCRR 200.3[a][1][ii]-[iii]). The Official Analysis of Comments to the revised IDEA regulations noted that:

A few commenters recommended that the regulations define "special education teacher" and "special education provider," as used in § 300.321(a)(3).

Discussion: Section 300.321(a)(3), consistent with section 614(d)(1)(B)(iii) of the Act, requires that the IEP Team include not less than one special education teacher, or where appropriate, not less than one special education provider of the child. This is not a new requirement. The same requirement is in current § 300.344(a)(3). As noted in Attachment I of the March 12, 1999 final regulations, the special education teacher or provider who is a member of the child's IEP Team should be the person who is, or will be, responsible for implementing the IEP.

(IEP Team, 71 Fed. Reg. 46670 [August 14, 2006] [emphasis added]).

In this case, among other participants, the May 2007 CSE was composed of the special education teacher of the proposed CTT classroom, a regular education teacher from the district, and the school psychologist who conducted the observation of the student at his preschool (Tr. p. 351; Parent Exs. L at p. 2; W). Furthermore, the May 2007 CSE meeting notice sent to the parents indicates that, among others, the student's preschool teacher had been "invited to participate" at the May 2007 CSE meeting (Parent Ex. O). Although the student's preschool teacher testified that she did not recall if she was contacted by the district at any point prior to the May 2007 CSE meeting, she conceded that it was possible (Tr. pp. 110-11, 118). I find that the parents did not establish that the May 2007 CSE was improperly composed, and consequently, the impartial hearing officer's determination that the district failed to offer the student a FAPE on that basis must be annulled.

The hearing record also indicates that the district was in possession of placement recommendations and significant documentation from the student's evaluators and service providers regarding the student's strengths and weaknesses. At two points during the 2006-07 school year prior to the May 2007 CSE meeting, the parents provided the district with numerous evaluation reports, progress reports and observation reports regarding their son, which the district's school psychologist responsible for preparing for his review, testified she received (Tr. pp. 319, 322-26, 329-30; Parent Exs. N; DD; see Parent Exs. P-V; AA; GG; II; JJ; LL; WW). Both of the parents' submissions contained progress reports and information from the student's SEIT, and the May 2007 correspondence contained information from the student's preschool teacher (Parent Exs. N; DD). The special education teacher from the CTT class, who attended the May 2007 CSE, recalled that she understood that the student had sensory difficulties, life skills issues, and language issues and that lunch, noise and recess were areas of concern for the student (Tr. pp. 240-41). The hearing record shows that the district sought input from the student's preschool teacher, who

completed a report of the student's progress that was requested by the district (Parent Ex. X). In addition, the May 2007 CSE had before it the report of the observation of the student conducted by the district's school psychologist at his preschool (Tr. pp. 326-29; Parent Ex. W). Although the May 2007 CSE ultimately reached a different recommendation than the revised recommendations of some of his service providers, the school psychologist testified that information regarding the recommendations for a preschool program and SEIT services was taken into account by the May 2007 CSE (Tr. pp. 330-31).

With regard to the district's argument that an FBA was unnecessary, the individual evaluation of a student by a district must be at no cost to the parents, and the initial evaluation must include, among other things, other appropriate assessments or evaluations, "including a functional behavioral assessment for a student whose behavior impedes his or her learning or that of others, as necessary to ascertain the physical, mental, behavioral and emotional factors which contribute to the suspected disabilities" (8 NYCRR 200.4[b][1][v]). According to a letter issued by the Office of Special Education Programs (OSEP) of the United States Department of Education, school districts may employ FBAs for several purposes, some of which may apply to a school or program as a whole and some of which are necessarily focused on evaluating an individual student (see Letter to Christiansen, 48 IDELR 161 [OSEP 2007]). In developing an IEP and considering "special factors," when a student's behavior impedes learning, federal regulations (34 C.F.R. § 300.324[a][2][i]) and State regulations (8 NYCRR 200.4[d][3]) require consideration of strategies to address that behavior as part of the development of the IEP. Federal regulations (34 C.F.R. §§ 300.530[d][1][ii], 300.530[f][1][i]) and State regulations (8 NYCRR 201.3) also address the preparation of, or review of, an FBA and BIP in disciplinary situations. In addition, as presented in the instant case, State regulations (8 NYCRR 200.22[a],[b], 200.4[d][3][i]), but not federal regulations, require consideration of an FBA and BIP in certain non-disciplinary situations.

In this case, based on her review of the student's documentation, the district's special education teacher stated that behaviorally the student's expressive language skills impeded him during play with peers (Tr. pp. 241-42). The special education teacher's understanding of the student's play skill difficulties was that he had a hard time verbally negotiating and playing with peers and sensory difficulties affected his behavior (Tr. pp. 240-41, 245). The school psychologist testified that the information regarding the student's behaviors did not indicate that an FBA was necessary (Tr. p. 369). The school psychologist further indicated that the student's behaviors occurred because of his speech-language and pragmatic language difficulties which interfered with his social development and emotional functioning (Tr. p. 372), a point which the parents do not dispute. Her theory as to why the student exhibited certain behaviors is consistent with the reasons for the student's behaviors contained in the documentation that was before the CSE (Tr. pp. 449-51; Parent Exs. P; R-V; X), and in that children with behaviors similar to that of the student had done well in the CTT class (Tr. p. 358). The May 2007 CSE noted that the student was highly intelligent and that his difficulties with socialization, maintaining interactions with peers, social immaturity and regulation of his emotions did not seriously interfere with his instruction and could be addressed by the special education teacher and the adult support in the CTT program (Parent Ex. L at pp. 3-4). Under the circumstances of this case, it was not necessary to conduct an FBA to determine why the student engaged in particular behaviors or how his behavior related to the environment, and a BIP was not necessary in order to address the student's identified needs (see

Perricelli, 2007 WL 465211, at \*13 [holding that an FBA was not required where the student's behaviors were not out of control and did not stand out in the recommended program]).

I have also thoroughly reviewed the hearing record and, for the reasons described below, find that the May 2007 IEP was reasonably calculated to enable the student to receive educational benefits. The present levels of performance contained in the May 2007 IEP indicate that the student is a "highly intelligent" child who displays delayed auditory processing skills and significantly delayed pragmatic skills (Parent Ex. L at p. 3). His pragmatic skill limitations result in social difficulties with peers, and he engages in verbal perseverations that often negate his ability to relate appropriately to peers and adults (*id.*). Information taken from the April 2007 counseling report and utilized in the formulation of the May 2007 IEP stated that socially the student displayed a desire to interact with peers but experienced significant difficulty with socialization and engagement (*id.* at p. 4). Although the student was capable of initiating play interactions with peers, he struggled to maintain a positive "back and forth" flow without adult intervention (*id.*). The IEP also noted the student's difficulty with social immaturity and difficulty regulating his emotions (*id.*). The IEP indicated that the student exhibited low normal muscle tone and strength that "should not interfere with normal school day activities" (*id.* at p. 5). The IEP described the student's sensory difficulties as decreased body image and motor planning skills, and also modulation of emotions (*id.*). I find that the present levels of performance described in the May 2007 IEP are adequately supported by the district's evaluation and observation of the student as well as the service provider reports that were available to the CSE (Tr. pp. 322-26, 329-30; Dist. Ex. 2; Parent Exs. N; DD; see Parent Exs. P-V; AA; GG; II; JJ; LL; WW).

The May 2007 IEP contained approximately 11 annual goals and 47 short-term objectives in the areas of OT, gross-motor, counseling, speech-language, auditory processing, and pragmatic language (Parent Ex. L at pp. 6-12). The school psychologist, who collected information about the student from his preschool providers, testified that all of the annual goals and short-term objectives contained in the May 2007 IEP were developed by the student's preschool providers (Tr. pp. 321-23, 397; see Parent Ex. J). The annual goals and short-term objectives address the areas of need documented in both the preschool reports and in the present levels of performance contained in the May 2007 IEP (see Parent Exs. L at pp. 3-12; P; R-V; X). The special education teacher testified that based upon what she learned about the student during the May 2007 CSE meeting and a review of the resultant IEP, his deficits were similar to other students entering a CTT kindergarten classroom (Tr. p. 253).

I am also not persuaded that the district was required to include SEIT services on a 1:1 basis for the student on his IEP. SEIT services are "services provided by a certified special education teacher of an approved program on an itinerant basis at a site determined by a board of education including but not limited to an approved or licensed prekindergarten," and such services are for the purpose of providing specialized individual or group instruction and/or indirect services to preschool students with disabilities (Educ. Law § 4410[1][k]; 8 NYCRR 200.16[i][3][ii]).

In this case, the parties do not dispute that the CTT classroom placement proposed by the district included a certified special education teacher who would provide group instruction to the student on a full time basis along side his regular education peers (Tr. pp. 215-17). However, the crux of the parents' contentions is that the student requires a second special education teacher on a

1:1 basis in order to receive educational benefits. Although the student's father testified that the parents believed after December 2006 that the student would require 1:1 support for the 2007-08 school year, they did not raise this point at the May 2007 CSE meeting after the district explained that SEIT services provided to preschool student's with a disability rather than kindergarten, and instead the parents took the position that they were willing to listen to the options presented by the district (Tr. pp 687-88, 734, 765, 767; Parent Ex. TT at pp 1-2). Notes from the May 2007 CSE indicate that a variety of placements on the continuum of special education services were discussed (Parent Ex. TT). When asked if she believed that the student required a SEIT or additional person in the CTT classroom, the special education teacher stated that she may be viewed as the "SEIT" for the special education students in the class (Tr. p. 254). Based on what she knew about the student and considering the presence of a paraprofessional in the CTT class, she did not anticipate that he would require a 1:1 or very small class setting (*id.*). The special education teacher based her opinion on the similarity of the student's IEP to other children currently in the CTT class, and she estimated that at least half of the special education students in the CTT class previously had SEIT services in their preschool settings, and that they had successfully transitioned to the CTT environment without a 1:1 SEIT (Tr. pp. 254-55). The special education teacher further stated that the fact the student had a SEIT was not an indication that he would need another additional 1:1 person in the CTT classroom (Tr. pp. 255, 271-72). According to the special education teacher, CTT classroom personnel are able to provide individualized interventions to students based on their needs without an additional SEIT (Tr. pp. 313-14).<sup>13</sup>

The student's SEIT at ECLC testified that she provided the student with cues to verbalize his feelings when he is frustrated and verbal reminders to attend to activities, two strategies also used by the CTT special education teacher and social worker (Tr. pp. 87-88, 242-44, 589-91). When the district's social worker was asked who in the CTT classroom would provide the student with cuing, repetition and assistance with transition, he testified that the role would be filled by a combination of the two teachers, the assistant teacher and the paraprofessional functioning as a team (Tr. pp. 624-25). Although he stated the student may not receive constant intervention, he opined that the interventions of the four adults in the CTT classroom were "effective over time" (Tr. pp. 625, 638).

The hearing record reflects that until approximately February 2007, the student's parents, service providers and private evaluators recommended placement in a CTT class for the 2007-08 school year (Parent Exs. DD; JJ; KK at p. 2). From February through the remainder of the 2006-07 school year, the parents, the student's SEIT, developmental pediatrician, school psychologist, speech-language pathologist, and regular education preschool teacher recommended that the student remain in his current preschool setting with SEIT services (Parent Exs. P at p. 2; R at pp. 2-3; S at p. 2; T at p. 3; V; Z at p. 2). Information that was before the May 2007 CSE indicated that the reasons for the change in recommendation were observations of the student's regression which occurred after school vacations, and that although the student had made progress, his service providers believed that it was not as much progress as they had anticipated that he would make

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<sup>13</sup> The hearing record reflects that the parents were concerned about lunch and recess periods (Parent Ex. VV). For students who have a "hard time" the school provides lunch and recess periods in a smaller group in a classroom within the school (Tr. pp. 303-04, 447-48).



(Parent Exs. P at p. 1; R at pp. 2-3). The SEIT testified that the student's regression lasted "a week or two," in which he exhibited more difficulty and she needed to take a "more active role" with him, and that the student would continue to progress thereafter (Tr. p. 80).<sup>14</sup> Although the student's SEIT observed what she described as regression in January 2007, she did not recommend a change in the student's level of service (Tr. pp. 76-78), and the hearing record does not reflect that the SEIT modified the student's annual goals to address this problem (see Parent Exs. EE; GG). Other than this example, which was provided during the impartial hearing, the reports before the May 2007 CSE did not provide specific information about the areas where the student demonstrated regression (compare Parent Ex. EE at p. 2, with Parent Ex. GG at p. 2). Comparison of the SEIT's December 15, 2006 and January 24, 2006 progress reports indicate that the student progressed from designations of "some progress" to "significant progress made, but goal not yet met" on goals that measured his improvement of interpersonal skills and ability to transition from one activity to another (compare Parent Ex. EE at pp. 3-4, with Parent Ex. GG at pp. 3-4). A goal that measured the student's ability to participate in large group activities changed from "significant progress made" to "some progress," and all other goals as compared in the two reports reflected the same level of progress (compare Parent Ex. EE with Parent Ex. GG). The April 2007 reports from the student's providers recommended that the student continue with 1:1 support in preschool; however, they also acknowledge that "[a]lthough [the student] still has a difficult time managing himself in the classroom, he has progressed during the year" (Parent Ex. P at p. 2, see Parent Exs. R at p. 3; Z at p. 1). Comparison of the student's providers' reports from November and December 2006 (Parent Exs. GG at pp. 4-5; JJ; KK), with those from April 2007 (Parent Exs. P; R; T), do not reveal significant changes to their descriptions of the student's abilities, yet their recommendations for the 2007-08 school year changed significantly. Although the hearing record is clear that the student's parents and preschool providers were hoping that the student would experience faster progress during the second half of the 2006-07 school year, in light of the forgoing discussion, I am not persuaded that the student required a SEIT on a 1:1 basis in addition to the CTT special education teacher in order to make educational progress. I also find that the district's proposed program was designed with sufficient supports in place to provide the student with the individualized attention when necessary to address his needs.

Turning next to the placement offered by the district, I also find that the district's proposed kindergarten CTT classroom was an appropriate placement for the student. The special education teacher of CTT classroom testified that during the 2007-08 school year, her class was comprised of herself, a regular education teacher, an assistant teacher and a paraprofessional, all on a full-time basis and 23 students, nine of whom were receiving special education services in accordance with IEPs (Tr. pp. 215-18, 220). The other students in the class who were eligible for special education services were classified as either other health impaired or speech or language impaired, and all received related services (Tr. p. 220). The CTT classroom was physically described as the largest in the school building and had distinct areas such as a meeting area, classroom library, dramatic play/block area, art easel and sand-water table (Tr. p. 221). Four large tables were used

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<sup>14</sup> Although the impartial hearing officer identified the parents' claim that the student had regressed as one of the critical issues in the case (IHO Decision at p. 19), in the absence of an adequate description of the area(s) in which the student had failed to make progress or an explanation of the "more active role" on the part of the SEIT that was necessary in order for the student to make some progress toward his IEP goals (Tr. p. 80), I cannot conclude that the hearing record adequately supports the parents' claim.

for teaching and two smaller tables were used for 1:1 teacher-student work (id.). The special education teacher described a typical day in the classroom, which included morning meeting, writing, reading individually or with a buddy, letter study, lunch, recess, rest-time, math, snack, free-play, and "specials" such as art or science (Tr. pp. 221-22).

According to the special education teacher, she and the regular education teacher planned together and sometimes taught at the same time to small groups of students (Tr. p. 219). The special education teacher testified that she worked closely with the special education students, although everyone in the class followed the same curriculum and generally worked on the same activities (id.). The paraprofessional in the classroom for the 2007-08 school year worked closely with the special education students and occasionally shadowed a student who needed additional support or worked with a small group of students (Tr. p. 219). The assistant teacher provided support to the regular and special education teachers and worked with the whole class (id.).

The special education teacher testified that she could address the student's expressive language difficulties because she collaborates with the speech-language therapist, provides additional adult support in situations that are known to be difficult for students, provides visual cues, personal schedules and picture cues to help students express their wants and needs, provides extra "wait-time" to allow a student to formulate his or her thoughts and provides verbal prompting (Tr. pp. 242-44). The district's speech-language pathologist who reviewed the student's IEP goals and speech-language progress report testified as to her understanding of the student's speech-language needs (Tr. pp. 642, 645-47). She indicated that the goals contained in the student's IEP were similar to other goals she had worked on with other students (Tr. p. 646). To address the student's receptive language difficulty, the speech-language pathologist would use visuals to explain what each "WH" question is asking, and then use pictures to ask those types of questions (Tr. p. 647). To help the student follow multi-step directions, the speech-language pathologist would write down the steps in a hands-on activity, carry out each step and then review the steps with the student (Tr. pp. 647-48). To work on sequencing and prepositions, the speech-language pathologist uses toys and requests that the student complete a sequence of directions, while providing visual cues (Tr. p. 649). The speech-language pathologist testified that to address the student's pragmatic language deficits, she would focus on explaining the "rules" for having an appropriate conversation such as eye contact and staying on topic (Tr. pp. 650-51). She has students draw pictures and explain their drawings using the rules (Tr. p. 651). She has conducted therapy in the lunch room to work on pragmatic and conversational goals (Tr. p. 661). The school psychologist testified that the student's behavioral difficulties arose from his difficulty with language and his need for assistance guiding his attention was "exactly the things that we do in a CTT program" (Tr. pp. 319, 332).

With regard to the student's difficulty with verbally negotiating and playing with peers, the special education teacher testified that there would be a teacher, paraprofessional or assistant teacher nearby the student to help him socially negotiate, take turns and share (Tr. p. 245). The adult would help the student understand rules, make him feel successful and help initiate play (Tr. pp. 245-46). The district's social worker who provided counseling services to students in the CTT class stated that he reviewed documentation about the student and testified as to his understanding of the student's counseling needs (Tr. pp. 583-87). To help the student learn to identify the feelings of peers, the social worker would use pictures of facial features and body language (Tr. pp. 587-

88). To improve the student's play skills he would use fantasy/role play and provide models of how to express a broader range of emotions (Tr. pp. 589-91). To address the student's perseverative behavior, the social worker would help interpret and expand on what the student was trying to say, move away from the topic and provide cuing (Tr. pp. 591-92). He explained that physically aggressive behaviors were not tolerated, and he used "mini-timeouts" and helping students express their frustration to manage those behaviors (Tr. p. 596). The social worker stated that the student falls within the range of students that he has worked with, that his IEP goals were very similar to what he worked on with other students, and that he believed he would have been able to meet the student's goals (Tr. pp. 586-87, 593-94, 600-03, 607). Having worked in the proposed CTT classroom, he opined that there was no reason to believe that the student would not be successful and that he was an "ideal candidate" for the CTT class (Tr. pp. 594, 608).

Turning next to the student's sensory difficulties, the district's special education teacher for the recommended CTT class testified how sensory difficulties manifest in the classroom and the interventions she uses to address the classroom students' sensory needs (Tr. pp. 228-31, 240-41). For example, she described a brushing and joint compression schedule, sit and move cushions and fidget balls, used to provide sensory feedback or stimulation in order for students to sit still and attend to lessons (Tr. p. 229). For students who are sensitive to noise, she discusses upcoming noisy situations ahead of time, encourages the class to use "inside voices" and uses environmental modifications such as ear muffs, hooded sweatshirts, and padded pencil cups (Tr. pp. 230-31). The district's occupational therapist who reviewed the student's documentation indicated that the student's needs were within the range of deficits that he worked with in school (Tr. pp. 462, 464-67, 479-80). The occupational therapist testified regarding the specific types of interventions that could be used to address the student's needs, including playing games and positioning techniques to improve strength; conducting OT in either a noisy or quiet environment to improve the student's sensitivity to noise; and building towers, using scissors, cutting and copying shapes to improve visual perception and fine-motor skills (Tr. pp. 468-72). The occupational therapist testified that the proposed school had all the equipment that the student would need as part of sensory integration therapy (Tr. pp. 500-501, 503).

The special education teacher indicated that she and the paraprofessional would assist the student during transition times, both within the classroom or when leaving the classroom for other activities such as lunch (Tr. p. 273). To address the student's needs, the special education teacher stated that the paraprofessional would be with him during transition times and would prepare him for the upcoming transition by discussing it with him (Tr. pp. 273-74). The student also may have had a personal schedule that he carried with him in the classroom to look at and "keep track of what is going on" (Tr. p. 274). The special education teacher and the related service providers work together to help students transition back and forth from therapy, by talking them through it, meeting them at the door and following consistent routines that the students can depend on (Tr. pp. 311-12; see Tr. pp. 475-78, 594-95, 653-54). The school psychologist acknowledged that the student was not yet independent and had difficulty with transitions, but stated that there were four adults in the CTT class because of the students who needed extra support (Tr. p. 437).

The special education teacher stated that the student benefitted from routine, structure and "individualized attention" (Tr. p. 242). She indicated that her classroom routine was very similar day-to-day, everything was structured and planned in detail (Tr. pp. 244-45). She testified that

related services were usually provided outside of the classroom, but occasionally therapists would push services into the classroom (Tr. pp. 246-47). She was able to informally collaborate with related service providers daily and formally collaborate every six weeks at an hour-long interdisciplinary meeting (Tr. pp. 247-48). In addition, the special education teacher e-mailed parents and their child's related service providers every two weeks to discuss what happened in class, and she testified that she was able to implement suggestions for working with students from the district's related service providers (Tr. pp. 248-50).

In view of the forgoing, I find that the May 2007 IEP, at the time it was formulated, was reasonably calculated to provide the student with educational benefits, and the district appropriately offered the student placement in the CTT classroom. Accordingly, the evidence in the hearing record does not persuade me that the district failed to offer the student a FAPE (M.D. and T.D. v. New York City Dep't of Educ., 07 Civ. 7967 [S.D.N.Y. June 27, 2008]). Generally, having determined that the challenged IEP offered the student a FAPE for the 2007-08 school year, I need not reach the issue of whether the parents' unilateral placement of their son at ECLC was appropriate, and the necessary inquiry is at an end (Mrs. C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134; Application of the Bd. of Educ., Appeal No. 08-029; Application of a Child with a Disability, Appeal No.07-017; Application of a Child with a Disability, Appeal No. 03-058).<sup>15</sup>

I have considered the parties' remaining contentions and find that it is unnecessary to address them in light of my determinations herein.

**THE APPEAL IS SUSTAINED.**

**IT IS ORDERED** that the impartial hearing officer's decision dated March 19, 2008 is hereby annulled.

**Dated: Albany, New York  
July 3, 2008**

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**PAUL F. KELLY  
STATE REVIEW OFFICER**

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<sup>15</sup> The impartial hearing officer did not make any factual findings with regard to prong II before concluding that the parents' unilateral placement of the student was appropriate (IHO Decision at p. 20). With respect to prong II, I only note that it is difficult to understand, in the absence of such an analysis, how he reached his determination that ECLC was an appropriate placement for the student, particularly given his concerns that the student may have regressed while attending the ECLC program during the 2006-07 school year (id. at p. 19).