



The University of the State of New York

The State Education Department State Review Officer

No. 08-138

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

Appearances:

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

DECISION

Petitioners (the parents) appeal from the decision of an impartial hearing officer which determined that respondent (the district) offered the student a free appropriate public education (FAPE) and declined to award the parents additional services for their daughter at the Bais Blima Girls School (Bais Blima) for the 2008-09 school year. The appeal must be dismissed.

At the time of the impartial hearing in September and October 2008, the student was described as "Yiddish dominant," and was attending the first grade at Bais Blima where her parents had unilaterally enrolled her at the beginning of the 2008-09 school year (Tr. pp. 65, 101; Dist. Ex. 4 at p. 1; Parent Ex. C). Bais Blima 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 programs and services as a student with a speech or language impairment is not in dispute in this appeal (see 34 C.F.R. § 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

The student has a long history of developmental difficulties (Dist. Ex. 3 at p. 3). Since the age of two, the student displayed "significant delays" in all areas of development (id.). She received early intervention services as well as preschool special education services that included speech-language therapy, physical therapy (PT), occupational therapy (OT), special education itinerant teaching (SEIT)¹ and tutoring (Dist Exs. 2 at p. 1; 3 at pp. 2-3).

¹ The Education Law defines special education itinerant services (commonly referred to as "SEIT") as "an approved program provided by a certified special education teacher . . . , at a site . . . , including but not limited to an approved or licensed prekindergarten or head start program; the child's home; a hospital; a state facility; or a child care location as defined in [§4410(8)(a)]" (Educ. Law § 4410[1][k]).

During the 2005-06 school year, the student attended a special education preschool and received related services through the Committee on Preschool Special Education (CPSE) (Tr. p. 61; Dist. Ex. 2 at p. 1; Parent Ex. A at p. 2). During the 2006-07 and 2007-08 school years, the student attended a private general education program (Tr. p. 46; Dist. Exs. 3 at p. 2; 5; Parent Ex. A at p. 3). Pursuant to an impartial hearing officer order dated December 22, 2006, the student received related services from the district of two 30-minute individual OT sessions per week, two 30-minute individual PT sessions per week, one 30-minute individual speech-language therapy session per week, one 30-minute group speech-language therapy session per week and ten hours of special education teacher support services (SETSS) (Parent Ex. A at p. 14).

On April 18, 2007, a certified bilingual school psychologist from the district conducted a bilingual Yiddish psychoeducational evaluation of the student (Dist. Ex. 1; see Tr. p. 137). The student was referred for an evaluation due to parental and teacher concerns regarding the student's social, cognitive and academic development (id. at pp. 1, 5). Testing was conducted mainly in Yiddish, as the student was Yiddish dominant and knew little English (id. at p. 2). Behaviorally, the evaluation report noted that the student displayed a significant lack of attention throughout the duration of the testing, which lengthened testing time significantly (id.). Administration the Wechsler Preschool and Primary Scale of Intelligence – Third Edition (WPPSI-III), yielded a full scale IQ score and verbal index score in the extremely low range ("deficient range") and performance index and processing speed index scores in the borderline range (id. at pp. 3, 5).² As to the student's social/emotional functioning, the evaluation report noted that the student responded "inconsistently to the good nature of adults," that her drawings illustrated a "significant" amount of immaturity, and that she displayed a need to assert control over adults and peers (id. at p. 5). To assess the student's adaptive behavior functioning, the evaluator conducted the Vineland Adaptive Behavior Scales-Parent Edition (VABS-Parent Ed.), which was completed by the student's mother (id.). Results indicated "significant" delays in the areas of communication, socialization and daily living (id.). Additional testing included a story retell task administered in Yiddish and English that resulted in the student responding only to the questions about the story presented in Yiddish (id.). The evaluator reported that the student's immature play skills, poor self-concept, and need to assert control were areas of concern that required added support (id. at p. 6).

On June 3, 2007, the student's mother referred the student for a bilingual Yiddish/English speech-language evaluation due to the student's language delay, to determine the student's current level of speech-language functioning at that time, and to determine the student's need for speech-language services (Dist. Ex. 2 at p. 1).³ The bilingual speech-language pathologist conducted the evaluation in Yiddish and English because the student spoke both languages at home (id. at pp. 1, 3). The student was observed to respond impulsively and appeared to have a limited attention span

² The evaluator noted that the student's overall full scale IQ score was not an accurate descriptor of the student's cognitive abilities due to the "significant 22 point discrepancy" between her extremely low verbal IQ and her borderline performance IQ (Dist. Ex. 1 at p. 3). Additionally, the evaluator noted that the results were considered "to be an estimate, due to the lack of bilingual appropriate norms and deviations from the standard procedures, which were inherent in the translation of test materials" (id. at p. 5). Further, the evaluator maintained that the student's performance IQ was not an accurate depiction of the student's "true non verbal, perceptual skills" (id. at p. 3).

³ I note that the speech-language pathologist who conducted the speech-language evaluation was not a district employee, but an outside provider (Tr. pp. 139-40).

during the assessment (id. at p. 1). Assessment of the student's oral mechanism, articulation, voice and fluency skills revealed adequate abilities (id. at p. 2). The student was informally administered the Preschool Language Scale-4 (PLS-4) in Yiddish (id.). The test revealed that the student had severe receptive and expressive language delays in Yiddish (id.),⁴ characterized by "a limited vocabulary, limited knowledge of basic concepts, difficulty comprehending and responding to 'wh' interrogatives, a decreased sentence length and difficulty retelling a simple story or personal event" (id. at p. 3). According to the evaluation report, the student also exhibited poor critical thinking skills, poor phonemic awareness and poor attending skills (id.). The speech-language evaluation report noted that on the translated PLS-4 the student appeared to function overall in the 3-7 to 4-1 year age range (id.). Recommendations for the student included an increase of the student's bilingual Yiddish/English speech-language therapy to four times per week to increase her receptive and expressive language skills (id.).

On April 7, 2008, a private psychological evaluation was conducted to determine the student's present level of functioning (Tr. p. 53; Dist. Ex. 3 at p. 1).⁵ The psychological evaluation report noted that at the time of the evaluation, the student was "a year below expectation" and not doing well in school, even with the additional assistance (Dist. Ex. 3 at p. 2). Administration of the Stanford Binet Intelligence Scales – Fifth Edition (SB5), yielded scores in the mildly retarded range for both the verbal and nonverbal IQ portions of the test, and a full scale IQ in the mildly retarded range (id.). Although the student's strengths included nonverbal memory and quantitative reasoning, the student displayed weaknesses in puzzle completion and in tasks that required conceptualization or language expression (id.). To assess the student's adaptive functioning, the psychologist conducted the Vineland Adaptive Behavior Scales - Second Edition (VABS-II) (id. at pp. 1, 3).⁶ Regarding communication skills, the psychological evaluation report indicated that the student spoke in four to six word phrases and short sentences, and although she understood the pronouns "I/you," she used them inconsistently (id. at p. 3). The student was also unable to use the present or past tenses consistently, tell a story, and had difficulty with conceptual order, following spatial directions receptively and expressing her feelings (id.). As to the student's self-care skills, the evaluation report noted that the student was "habit trained," but was unable to fully care for herself when toileting (id.). The student was dependent in areas, including bathing, shampooing and grooming (id.). She needed assistance with buttons and zippers, drinking thin liquids, undressing herself, the concept of time and following basic safety rules (id.). Regarding the student's social/emotional functioning, she was well oriented toward adults and imitated their actions (id.). The student gravitated toward younger peers with whom she could play as an equal and take the initiative, but she became nonresponsive or passive with older peers (id.). When the student was challenged by a task or situation, she gave the impression of being shy (id.). The student exhibited limited knowledge of basic personal information and did not know how to cope when she needed assistance (id.). Regarding sensory motor functioning, the student was able to

⁴ The report noted that "[n]orms for the PLS-4 are based on a mono-lingual English sample and no norms are available for the bilingual population, therefore the test scores are not reported in this evaluation. Consistent with the chancellor's regulations regarding non-discriminatory standards and in the absence of local norms, results of this evaluation should be interpreted with caution and used for comparative purposes and estimates" (Dist. Ex. 2 at p. 2).

⁵ I note that the psychological evaluation does not indicate whether the evaluation was conducted in Yiddish, English or both languages.

⁶ The hearing record indicates that the student's mother acted as the informant for the psychological evaluation, but it is unclear whether the student's mother was also the informant for the VABS-II (Dist. Ex. 3 at p. 1).

walk, run, jump, stand on one foot, hop and use the stairs with alternating feet up, but she was unable to go down the stairs consistently (id.). Regarding fine motor skills, although the student was able to move her hands across midline and use a cylindrical grasp, she was unable to move all her fingers independently or draw a square or triangle and displayed difficulty with directionality (id.). The psychological report reflected that the adaptive, academic and other evaluative instruments indicated that the student functioned more than two years below expectation (id. at p. 4). The psychologist diagnosed the student with mild mental retardation (id.). The parents did not agree with the diagnosis (Tr. p. 126).

On May 28, 2008, the student's SETSS teacher prepared a progress report for the student's annual review (Dist. Ex. 4). The SETSS progress report indicated that the student's language of instruction was Yiddish (id. at p. 1). Although the student was described as loving, obedient, cooperative and willing to please, she manifested receptive and expressive language delays, relied on visual cues to follow classroom schedules, learned routines and behaviors from peers, "barely utter[ed] genuine words," was unable to follow during verbal group activities, exhibited frequent "meltdowns" due to her anxiety and poor problem solving/coping skills and craved socialization (id.). The progress report noted that when she received the appropriate support to manage a task the student's attending skills were adequate, and that her anxiety was reduced (id.). The progress report also indicated that the student was learning to interact and reciprocate appropriately which enabled her to make and retain friends (id.). Recommendations included in the progress report were for general education with paraprofessional support during the entire school day in addition to SETSS, and related services (id. at p. 2). The progress report also stated that the student required direct instruction in a 1:1 setting, "such as, two to four hours daily of specialized instruction" and that she functioned best with strong peer role models (id.).

On June 13, 2008, a district school psychologist observed the student in a classroom setting (Dist. Ex. 5). The observation report indicated that the student moved around the classroom while the other students were socializing in small groups, spoke in short phrases, and expressed her needs and concerns (id.). The student's teacher reported to the psychologist that the student demonstrated progress throughout the year; she was delayed, but "picked up" many of the academic concepts taught in the classroom through 1:1 teaching; and she displayed immature socialization skills (id.). The student's SETSS teacher reported to the psychologist that the student demonstrated progress, but had "a way to go" (id.). The SETSS teacher further indicated to the psychologist that although the student's word retrieval skills were a weakness and she was "inconsistent" in her skills, her letter recognition ability was an area of strength (id.). The SETSS teacher opined to the psychologist that the student was able to function in a mainstream class with "a lot" of 1:1 support (id.).

On June 20, 2008, the district's Committee on Special Education (CSE) convened to develop the student's individualized education program (IEP) for the 2008-09 school year (Dist. Ex. 6). Participants included the parents, a social worker who was also the district representative, a school psychologist and a district special education teacher (Tr. pp. 51, 70; Dist. Ex. 6 at p. 2).⁷ The June 2008 CSE considered the progress report prepared by the SETSS teacher and various evaluations (Tr. p. 38; Dist. Ex. 4). The CSE found the student eligible for special education services as a student with a speech or language impairment and recommended an educational

⁷ Additionally, I note that the school psychologist who attended the June 2008 CSE meeting was the same individual who conducted the June 13, 2008 observation of the student (see Dist Exs. 5; 6 at p. 2).

placement for her in a 12:1+1 special class with related services of four 30-minute individual speech-language therapy sessions per week in Yiddish, two 30-minute individual OT sessions per week, and initiation of one 30-minute individual counseling session per week (Dist. Ex. 6 at pp. 1, 12, 14). The CSE also recommended special education transportation, bilingual Yiddish instruction, full participation in all school activities and participation in State and local assessments without accommodations (id. at pp. 1, 14).

The district sent the parents a "Final Notice of Recommendation" (FNR) dated July 22, 2008, which offered the student a special class at one of the district's community schools with related services of individual counseling, individual OT, and individual speech-language therapy (Tr. p. 51; Dist. Ex. 7).⁸

By letter dated July 30, 2008 and received by the district on August 5, 2008, the parents rejected the district's recommended program for the student as being too restrictive (Answer Ex. 1). The parents advised that they intended to unilaterally place the student in the private, "Mainstreamed" school that she had attended during the prior year (id.). According to the parents, the private school was willing to accept the student on the condition that the district provides the student with OT, speech-language therapy, individual counseling, and ten hours of SETSS (id.).⁹

By letter to the district's impartial hearing office dated September 2008, the parents advised that they had unilaterally placed the student in a smaller class setting at Bais Blima for the 2008-09 school year, which was a change in private placement from the prior school year (Parent Ex. C). The parents further requested that the district provide a special education teacher in the student's private classroom or 10 to 15 hours of SETSS for tutoring services, as well as an unspecified amount of additional OT at Bais Blima (id.). The parents indicated that the student was progressing developmentally and socially and that although the student's teacher and principal were "doing their utmost to accommodate [the student's] needs," the student "remain[ed] at a loss during much of the school day" without the service of SETSS (id.).

The impartial hearing convened for three days beginning on September 24, 2008 and concluding on October 16, 2008 (Tr. pp. 1, 7, 84). At the impartial hearing, the parents presented documentary evidence and offered testimony by the student's SETSS teacher for the period of January to June 2008 and the parents (Tr. pp. 9, 39, 59; Parent Exs. A-C). The district presented documentary evidence and offered testimony by the assistant principal of the recommended school and the district's school psychologist, who also was the district's representative at the impartial hearing (Tr. pp. 9, 87, 134; Dist. Exs. 1-7).

⁸ I note that the impartial hearing officer accepted into evidence the FNR, which consisted of one page (see Tr. p. 127; Dist. Ex. 7; IHO Decision p. 7); however, the district asserts in its answer that the FNR consisted of two pages, with the second page indicating a handwritten note from the parents stating "I do not agree to your recommendation" (Answer ¶ 51). The hearing record does not include a second page of the FNR as the district alleges.

⁹ It appears from the hearing record that the district treated the parents' July 30, 2008 letter as a request for an impartial hearing and appointed an impartial hearing officer to conduct the hearing that gave rise to this appeal. There is no indication in the hearing record that the district challenged the sufficiency of the complaint or responded to the parents' due process complaint notice (see 34 C.F.R. § 300.508[d], [e], [f]; 8 NYCRR 200.5[i][3], [4], [5]).

By decision dated October 17, 2008, the impartial hearing officer determined that the district offered the student a FAPE for the 2008-09 school year and that the additional special education instruction and OT sought by the parents were not necessary components of a FAPE for the student (IHO Decision at p. 4).¹⁰ The impartial hearing officer held that the educational services the student would have received at the recommended program, together with her related services, provided "a comprehensive program that would have met all of her needs" (*id.* at pp. 4-5). The impartial hearing officer further determined that the program proposed in the June 2008 IEP, at the time it was formulated, was reasonably calculated to enable the student to receive educational benefit and offered the student an appropriate program and placement for the 2008-09 school year (*id.*). Accordingly, the impartial hearing officer denied the relief requested by the parents (*id.* at p. 5).

The parents appeal contending that the impartial hearing officer misread the parents' claim. They argue that the impartial hearing officer erred by stating that the purpose of the impartial hearing was to "add special education teacher services and additional occupational therapy to the student's non-public school program, at school district expense." Rather, the parents maintain that they were requesting "additional services," and that the district was obligated to provide the parents with the requested services that they had previously provided "by virtue of [the student's] pendency." They assert that the impartial hearing officer erred by not considering or determining the student's pendency placement and that the impartial hearing officer had a responsibility to assist the unrepresented parents at the impartial hearing by discerning what the parents' rights and claims were in obtaining a FAPE and the appropriate related services.

The parents further argue that the recommended placement offered by the district was inappropriate as there would have been a two year age difference between the student and her peers and the student spoke a different dialect of Yiddish than what was spoken at the proposed recommended placement, thereby it would have been difficult for the student to understand her teacher, paraprofessional or peers. Lastly, the parents contend that the student's placement at Bais Blima was appropriate. As relief, the parents request that a State Review Officer vacate the impartial hearing officer's decision and award the student 15 hours per week of SETSS and additional SETSS during summer 2009. The parents maintain that services should be awarded based upon pendency and that the costs attributable to the SETSS should be reimbursed by the district. In the alternative, the parents request full tuition reimbursement for the student's 2008-09 placement at Bais Blima.

¹⁰ The district asserts in its answer that the impartial hearing officer, although summarizing the testimony, did not cite to the hearing record in violation of 8 NYCRR 200.5[j][5][v] (Answer n.5). I note that the impartial hearing officer's decision is devoid of any specific cites to transcript pages and only references in three instances specific cites to exhibits to support her conclusions. State regulations provide in relevant part that "[t]he decision of the impartial hearing officer shall set forth the reasons and the factual basis for the determination. The decision shall reference the hearing record to support the findings of fact" (8 NYCRR 200.5[j][5][v]). In order to properly reference the hearing record, pages of transcript and relevant exhibit numbers should be cited with specificity. State regulations further require that an impartial hearing officer "render and write decisions in accordance with appropriate standard legal practice" (8 NYCRR 200.1[x][4][v]). The impartial hearing officer is reminded to comply with State regulations, cite to relevant facts in the hearing record with specificity and provide a reasoned analysis of those facts that reference applicable law in support of her conclusions.

In its answer, the district admits and denies the parents' allegations and maintains that the petition is procedurally and substantively improper. Procedurally, the district argues that the petition should be dismissed because: (1) it was not properly verified pursuant to 8 NYCRR 279.7, and (2) the parents assert allegations in their petition that rely on information that was never introduced in the hearing record. Substantively, the district asserts that: (1) the impartial hearing officer correctly determined that the district offered the student a FAPE, (2) the impartial hearing officer improperly considered the issues of additional SETSS and OT, which were not raised in the due process complaint notice, and (3) the parents failed to sustain their burden that the unilaterally chosen program was appropriate. As relief, the district requests that the parents' appeal be dismissed in its entirety.

The parents filed a reply to the district's answer contending that the district's answer should be dismissed because it was not properly filed on a timely basis. Pursuant to State regulations, a reply is limited to any procedural defense interposed by a respondent or to any additional documentary evidence served with the answer (8 NYCRR 279.6). In this case, the parents' reply does not respond either to procedural defenses interposed by the district or address additional documentary evidence served with the answer (Application of a Student with a Disability, Appeal No. 08-102; Application of a Student Suspected of Having a Disability, Appeal No. 08-002; Application of a Child with a Disability, Appeal No. 06-046; Application of a Child with a Disability, Appeal No. 04-064; Application of a Child with a Disability, Appeal No. 02-009; Application of a Child with a Disability, Appeal No. 98-37).¹¹

At the outset, I will address the procedural matters arising on appeal. First, the district asserts that the petition for review was not properly verified in accordance with State regulations (8 NYCRR 279.7), and therefore should be dismissed. State regulations require that "[a]ll pleadings shall be verified. The petition shall be verified by the oath of at least one of the petitioners..." (*id.*). The district argues that the parents' verification of the petition was dated October 3, 2008, which was well in advance of the impartial hearing officer's decision of October 17, 2008, the parents' notice of intention to seek review dated October 28, 2008 and the undated notice of petition and petition, served on or about November 19, 2008. Notwithstanding the district's contention, I find that the petition for review received by the Office of State Review in this appeal was verified by a notary public on October 30, 2008 and not October 3, 2008. As such, I will not dismiss the petition on this ground (see Application of the Bd. of Educ., Appeal No. 04-104; Application of a Child with a Disability, Appeal No. 04-099).

Second, the district argues that the parents' petition fails to comply with the procedural requirements of 8 NYCRR 279.12¹² and asserts that the parents raised allegations in their petition that relied upon information that was not introduced at the impartial hearing, such as "[t]he [district] provided SETSS services to the student in her 2006-2007 and 2007-08 IEP which was her last agreed upon IEP" and the district provided services for the student for the summer 2007 and 2008 (Answer ¶ 66). Although the 2006-07 and 2007-08 IEPs were not made part of the hearing record, the district provided related services to the student during the 2006-07 school years

¹¹ The New York State Education Department's Office of State Review maintains a website at www.sro.nysed.gov. The website explains in detail the appeals process and includes State Review Officer decisions since 1990.

¹² 8 NYCRR 279.12(a) states that "[t]he decision of the State Review Officer shall be based solely upon the record before the State Review Officer."

by virtue of a December 2006 impartial hearing officer's order and during the 2007-08 school year by virtue of a December 2007 stipulation between the parties (Parent Exs. A at p. 14; B at pp. 2-3).¹³ The hearing record reflects that the parents raised the issue of whether the district provided SETSS services to the student in her 2006-07 and 2007-08 IEPs during the course of the impartial hearing and the district had an opportunity to object (Tr. pp. 130-31). Accordingly, I am not persuaded that the parents' petition should be dismissed on this ground.

Two purposes of the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]).

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 (A.C. v. Bd. of Educ., 2008 WL 5505470, at *4 [2d Cir. Jan. 16, 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if a procedural violation is alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

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, 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

¹³ The district contends that the December 2006 impartial hearing officer's order required the district to provide related services to the student from "January 1, 2007 through June 30, 2007" (Answer ¶ 29). I note, however, that the hearing record did not reflect the time period during which the related services were provided to the student. I, further, note that the December 2007 stipulation stated that the district provided related services to the student from January 2, 2008 through June 30, 2008 (Tr. p. 10; Parent Ex. B at pp. 2-3).

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 student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see P. v. Newington Bd. of Educ., 546 F.3d 111, 114 [2d Cir. 2008]; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs (34 C.F.R. § 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals related to those needs (34 C.F.R. § 300.320[a][2]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (34 C.F.R. § 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see 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). Subsequent to its development, an IEP must be properly implemented (8 NYCRR 200.4[e][7]; Application of a Child with a Disability, Appeal No. 08-087).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for the student by his or her parents if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]). 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, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 C.F.R. § 300.148).

The New York State Legislature amended the Education Law to place the burden of production and persuasion upon the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of production and 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; therefore, it applies to the instant case (see Application of the Bd. of Educ., Appeal No. 08-016).

The parents argue that they requested "additional services" for the student and that the district failed to provide those additional services. State Review Officers have awarded equitable relief in the form of additional educational services to students who remain eligible to attend school and have been denied appropriate services, if such deprivation of instruction could be remedied through the provision of additional services before the student becomes ineligible for instruction by reason of age or graduation (see Application of the Bd. of Educ., Appeal No. 08-060; Application of a Child with a Disability, Appeal No. 06-079; Application of the Bd. of Educ.,

Appeal No. 04-085; Application of a Child with a Disability, Appeal No. 02-042; Application of a Child with a Disability, Appeal No. 02-030). In general, the award of additional educational services for a student who is still eligible for instruction, requires a finding that the student has been denied a FAPE. As such, I find that the parents' request for additional services requires a finding of whether or not a FAPE was offered to the student for the 2008-09 school year.

The parents maintain that although the student spoke Yiddish, she was "only" dominant in the Hungarian dialect of Yiddish (Pet. ¶ 1). They assert that the Yiddish spoken in the district's recommended class is not the same dialect that is spoken at home; thereby the student would not be able to understand her teachers and the paraprofessional in the recommended class (Pet. ¶¶ 1, 10). The student's father testified that the student required classroom instruction in Hungarian Yiddish, otherwise the student would be confused and feel out of place (Tr. pp. 41-42, 143-44).

The April 2007 bilingual Yiddish psychoeducational evaluation report indicated that testing was conducted mainly in Yiddish (Dist. Ex. 1 at p. 2). The report noted that in response to a story retell task, which was administered in Yiddish and English, "[the student] only responded to the questions about the Yiddish story" (*id.* at p. 5). The student was able to identify the simplest elements of the story in one or two word sentences and recalled the days of the week in Yiddish (*id.*). The June 2007 bilingual Yiddish/English speech-language evaluation indicated that, "Yiddish [was] spoken in the home along with English" and that the student spoke "mostly Yiddish" (Dist. Ex. 2 at pp. 1, 3). Based on formal testing and informal measures in Yiddish, the student demonstrated "good" speech intelligibility with and without a shared referent (*id.* at p. 2). The April 2008 psychological evaluation indicated that the student spoke Yiddish and was "most comfortable with that language" (Dist. Ex. 3 at p. 2). The May 2008 student progress report, which was written by the student's bilingual SETSS teacher, indicated that the student was a "Yiddish dominant girl" (Dist. Ex. 4 at p. 1). The progress report stated that the student was able to "handle" English and Yiddish, if the languages were taught separately and although the student's weakness was communication skills, it was important for the student to communicate her feelings and thoughts in either Yiddish or English (Tr. pp. 32, 34). The student's mother testified that the student learned the alphabet and letters in Yiddish, Hebrew and English; numbers in English; and how to pronounce words and put words together in Yiddish and Hebrew at Bais Blima (Tr. pp. 64-68).

I note that the above reports do not distinguish between Yiddish and a Yiddish dialect. The hearing record indicates that the student was taught Yiddish, Hebrew and English throughout her school day at Bais Blima. Therefore, I am not persuaded by the parents' argument that the student would not be able to understand instruction unless it was provided in the Hungarian Yiddish dialect.

Turning to the appropriateness of the June 2008 IEP, the IEP reflected the student's need for bilingual instruction in Yiddish (Dist. Ex. 6 at pp. 1, 14), improvement in attention span, and communication and language skills, in order to participate in educational activities and function age appropriately in school and/or other social settings (*id.* at p. 4). The student also required counseling to address socialization skills (*id.* at p. 5). Ten annual goals and 28 short-term objectives addressed the student's needs regarding attention, math, reading, spelling, socialization, fine motor and language skills (*id.* at pp. 7-11). The June 2008 IEP primarily reflected information from the May 28, 2008 progress report written by the student's SETSS teacher (Dist. Exs. 4 at pp. 1-2; 6 at pp. 1-3). Although evaluative information regarding the student's speech-language skills included in the IEP was sparse, it was generally consistent with the aforementioned progress report

(Dist. Ex. 6 at p. 4). The IEP reflected the student's academic and social needs that were identified in the April 2007 bilingual Yiddish psychoeducational evaluation report (Dist. Ex. 1 at pp. 5-6), the June 2007 bilingual Yiddish/English speech evaluation report (Dist. Ex. 2 at p. 3), the April 2008 psychological evaluation report (Dist. Ex. 3 at pp. 3-4), and the May 2008 student progress report (Dist. Ex. 4 at pp. 1-2). For example, the April 2007 bilingual Yiddish psychoeducational evaluation report indicated low level age equivalent scores on the VABS-Parent Ed. for the communication, daily living skills, and socialization domains (Dist. Ex. 1 at p. 5). The IEP contained goals and objectives specific to communication and socialization skills (Dist. Ex. 6 at pp. 10-11). The June 2007 bilingual Yiddish/English speech evaluation report reflected that the student had difficulty comprehending and responding to "wh" questions, poor critical thinking skills, and poor phonemic awareness (Dist. Ex. 2 at p. 3). The IEP contained goals and objectives that specifically addressed each of these areas of need (Dist. Ex. 6 at pp. 8-11). The April 2008 psychological evaluation report reflected that all adaptive, academic, and other evaluative instruments indicated that the student's functioning was more than two years delayed (Dist. Ex. 3 at p. 4). Goals and objectives included in the IEP addressed the student's math and reading readiness skills, sensory processing skills for enhanced school participation at age/grade appropriate level, and muscle strength and fine motor coordination in the classroom using manipulatives to an age/grade appropriate level (Dist. Ex. 6 at pp. 7-9). Furthermore, testimony by the student's father indicated that during the June 2008 CSE "we discussed everything" and "went through everything" (Tr. p. 56). The student's father noted that each of the student's skills was discussed, including what the student had gained and what she still needed (*id.*). Although the student's mother's testimony indicated that she thought the students in the proposed class would not improve the student socially, she admitted that the program recommended by the CSE would enable the student to "gain in learning" (Tr. p. 157).

Testimony by the assistant principal in charge of special education at the proposed school indicated that there were 16 self-contained special education classrooms in the school (Tr. p. 89). Six of these special education classes were bilingual in Yiddish (*id.*). The assistant principal was the supervisor of the proposed class (Tr. p. 93). She indicated that the proposed class had a student to staff ratio of 12:1+1 and was bilingual in Yiddish (Tr. pp. 90-91, 100). Students enrolled in the proposed class participated in standardized testing (Tr. p. 91). Furthermore, the teacher of the proposed class held a license in Yiddish and was certified as a special education teacher (Tr. pp. 92-93). The assistant principal noted that there was a paraprofessional in the class who spoke Yiddish and Hebrew (Tr. pp. 93, 107).

The hearing record reflects that at the time of the impartial hearing there were seven students in the proposed class between five and six years of age (the student in the instant case was seven years old), and all were bilingual Yiddish (Tr. pp. 93-94, 101, 106). Mainstreaming opportunities for academics, music, art, computers, assemblies and group events were available (Tr. pp. 94-95, 114). After lunch, the bilingual Yiddish special education students had the opportunity to participate in play activities with general education students (Tr. p. 95). The proposed school also offered adapted physical education with a teacher that was bilingual Yiddish (Tr. p. 96). Furthermore, the assistant principal indicated that she was "always available" to speak to parents, and that parents could make an appointment to speak with a teacher, or leave a message for a call back from the teacher when the teacher was not teaching the class (Tr. p. 97). There were also scheduled parent/teacher conferences (Tr. p. 98). The proposed school had a school psychologist, a health coordinator, and a guidance counselor, all of whom spoke Yiddish (*id.*).

The assistant principal opined that the recommended class placement was appropriate for the student because classroom instruction was differentiated according to each student's IEP (Tr. p. 103). The assistant principal indicated that the students in the proposed classroom had similar functional levels to the student, and that the students in the bilingual Yiddish program had opportunities to socialize with other bilingual Yiddish and general education kindergarten classes in the school (Tr. pp. 106-07). Within the six bilingual Yiddish classes, there was a total of 40 bilingual Yiddish students that the student would have had opportunity to communicate with, in addition to the opportunity to communicate with bilingual Yiddish staff (Tr. pp. 113-14).

In consideration of the above, I find that the district's recommended 12:1+1 special class in a district community school with related services, as indicated in the student's June 20, 2008 IEP, would have appropriately addressed the student's academic, language and social/emotional needs, was reasonably calculated to enable the student to receive an educational benefit and would have provided the student with a FAPE. Accordingly, the district offered an appropriate program to the student with sufficient supports for the 2008-09 school year. Therefore, I decline to award additional services to the student for the 2008-09 school year as the student was offered a FAPE by the district.

The parents also assert that the student is entitled to the requested SETSS by virtue of pendency as the district provided SETSS services to the student during the 2006-07 and 2007-08 school years.¹⁴ The IDEA and the New York State Education Law require that a student remain in his or her then current educational placement, unless the student's parents and the board of education otherwise agree, during the pendency of any proceedings relating to the identification, evaluation or placement of the student (20 U.S.C. § 1415[j]; Educ. Law §§ 4404[4], 4410[7][c]; 34 C.F.R. § 300.518[a]; 8 NYCRR 200.5[m]; see also Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *20 [E.D.N.Y. Oct. 30, 2008]; Bd. of Educ. of Poughkeepsie City Sch. Dist. v. O'Shea, 353 F. Supp. 2d 449, 455-56 [S.D.N.Y. Jan. 18, 2005]; Application of the Dep't of Educ., Appeal No. 08-061; Application of a Student with a Disability, Appeal No. 08-050; Application of the Dep't of Educ., Appeal No. 08-009; Application of a Student with a Disability, Appeal No. 08-003; Application of a Student with a Disability, Appeal No. 08-001; Application of a Child with a Disability, Appeal No. 07-095; Application of a Child with a Disability, Appeal No. 07-062). Pendency has the effect of an automatic injunction, and the party requesting it need not meet the requirements for injunctive relief such as irreparable harm, likelihood of success on the merits, and a balancing of the hardships (Zvi D. v. Ambach, 694 F.2d 904, 906 [2d Cir. 1982]; see Wagner v. Bd. of Educ., 335 F.3d 297, 301 [4th Cir. 2003]; Drinker v. Colonial Sch. Dist., 78 F.3d 859, 864 [3d Cir. 1996]). The purpose of the pendency provision is to provide stability and consistency in the education of a student with a disability and "strip schools of the unilateral authority they had traditionally employed to exclude disabled students . . . from school" (Honig v. Doe, 484 U.S. 305, 323 [1987]; Evans v. Bd. of Educ., 921 F. Supp. 1184, 1187 [S.D.N.Y. 1996], citing Bd. of Educ. v. Ambach, 612 F. Supp. 230, 233 [E.D.N.Y. 1985]). The pendency provision does not mean that a student must remain in a particular site or location (Concerned Parents and Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751 [2d Cir. 1980]; Application of a Student with a Disability, Appeal No. 08-107;

¹⁴ I note that SETSS services were provided to the student pursuant to the December 2006 impartial hearing officer order, as well as, the December 2007 stipulation between the parents and the district (Parent Exs. A at p. 14; B at pp. 2-3). Additionally, I note that the stipulation submitted by the parents and entered into evidence at the impartial hearing was not the entire document, but only an excerpt (Parent Ex. B).

Application of the Bd. of Educ., Appeal No. 07-125; Application of a Child with a Disability, Appeal No. 07-076; Application of the Bd. of Educ., Appeal No. 05-006; Application of the Bd. of Educ., Appeal No. 99-90), or at a particular grade level (Application of a Child with a Disability, Appeal No. 03-032; Application of a Child with a Disability, Appeal No. 95-16).

Under the IDEA, the pendency inquiry focuses on identifying the student's then current educational placement (Mackey v. Bd. of Educ., 386 F.3d 158, 163 [2d Cir. 2004], citing Zvi D., 694 F.2d at 906). Although not defined by statute, the phrase "then current placement" has been found to mean the last agreed upon placement at the moment when the due process proceeding is commenced (Murphy v. Bd. of Educ., 86 F. Supp. 2d 354, 359 [S.D.N.Y. 2000] *aff'd*, 297 F.3d 195 [2002]; Application of a Student with a Disability, Appeal No. 08-107; Application of a Child with a Disability, Appeal No. 01-013; Application of the Bd. of Educ., Appeal No. 00-073). The U.S. Department of Education has opined that a student's then current placement would "generally be taken to mean current special education and related services provided in accordance with a child's most recent [IEP]" (Letter to Baugh, 211 IDELR 481 [OSEP 1987]; see Susquenita Sch. Dist. v. Raelee, 96 F.3d 78, 83 [3d Cir. 1996]). However, if there is an agreement between the parties on placement during the proceedings, it need not be reduced to a new IEP, and it can supersede the prior unchallenged IEP as the then current placement (Evans, 921 F. Supp. at 1189 n.3; see Bd. of Educ. v. Schutz, 137 F. Supp. 2d 83 [N.D.N.Y. 2001] *aff'd*, 290 F.3d 476, 484 [2d Cir. 2002]; see also Letter to Hampden, 49 IDELR 197 [OSEP 2007]). Moreover, a prior unappealed impartial hearing officer's decision may establish a student's current educational placement for purposes of pendency (Student X, 2008 WL 4890440, at *23; Letter to Hampden, 49 IDELR 197 [OSEP 2007]; Application of a Student with a Disability, Appeal No. 08-107; Application of a Student with a Disability, Appeal No. 08-050; Application of the Dep't of Educ., Appeal No. 08-009; Application of the Dep't of Educ., Appeal No. 07-140; Application of the Dep't of Educ., Appeal No. 07-134).

By stipulation dated December 29, 2007, the parents and the district agreed to a settlement and withdrawal of the parents' then pending due process complaint notice (Parent Ex. B). The district agreed to fund ten hours of SETSS per week administered by a licensed special education teacher for the student for the period from January 2, 2008 through June 30, 2008 (*id.* at p. 2). In exchange, the parents agreed to release and discharge the district from any and all liability, claims, and/or rights arising from allegations in connection of with the 2006-07 and 2007-08 school years (*id.* at p. 3). In cases involving stipulations between parents and boards of education, the determinative issue when deciding whether a stipulation becomes the basis for a student's pendency placement is whether the stipulation was explicitly limited to a specific school year or definite time period (Evans v. Bd. of Educ., 921 F. Supp. 1184 [S.D. N.Y. 1996]; Application of a Child with a Disability, Appeal No. 06-062; Application of a Child with a Disability, Appeal No. 04-064; Application of the Bd. of Educ., Appeal No. 03-028; Application of the Bd. of Educ., Appeal No. 02-061; Application of a Child with a Disability, Appeal No. 98-25). In the instant case, the hearing record shows that the settlement agreement at issue set forth a definite time period (Parent Ex. B at pp. 2, 3).

In Zvi D., the Second Circuit determined that the agreement in that case expressly limited the time period the school district had agreed to pay tuition and as such the private school was not the student's pendency placement (Zvi D., 694 F.2d at 907-08; see also Verhoeven v. Brunswick Sch. Comm., 207 F.3d 1, 9-10 [1st Cir. 1999]; Peter G. v. Chicago Pub. Sch. Dist. No. 299 Bd. of Educ., 2002 WL 818008, at *4-*5 [N.D. Ill. 2002]; Mayo v. Baltimore City Pub. Sch., 40 F.

Supp.2d 331, 334 [D. Md. 1999]; Application of a Child with a Disability, Appeal No. 06-062; Application of a Child with a Disability, Appeal No. 04-064; Application of the Bd. of Educ., Appeal No. 02-061; Application of a Child with a Disability, Appeal No. 98-25).

In the instant matter, the parties' stipulation was intended to settle their differences with respect to the 2006-07 and 2007-08 school years (Parent Ex. B at p. 3). Under the circumstances, I am unable to find that the student's pendency placement includes the services set forth in the settlement agreement executed December 29, 2007. The school district's obligation to provide SETSS pursuant to the settlement agreement ceased on June 30, 2008.

The parents also argue that impartial hearing officer had a responsibility to assist them, as they were unrepresented at the impartial hearing, by discerning what the parents' rights and claims were in obtaining a FAPE and the appropriate related services.¹⁵ At all stages of the impartial hearing, an impartial hearing officer may "assist an unrepresented party by providing information relating only to the hearing process" (8 NYCRR 200.5[j][3][vii]). An impartial hearing officer must render a decision that is based solely upon the hearing record (8 NYCRR 200.5[j][5][v]; see Application of a Student Suspected of Having a Disability, Appeal No. 08-100; Application of a Child with a Disability, Appeal No. 00-063; Application of a Child Suspected of Having a Disability, Appeal No. 00-036; Application of a Child with a Disability, Appeal No. 98-55). State regulations do not impair or limit the authority of an impartial hearing officer to ask questions of counsel or witnesses for the purpose of clarification or completeness of the record (8 NYCRR 200.5[j][3][vii]). In this case, the parents proceeded pro se (IHO Decision at p. 1). After reviewing the entire hearing record, including the impartial hearing officer's interaction with the parents and the language of her decision, I find that the impartial hearing officer assisted the parents "by providing information relating only to the hearing process" in accordance with State regulations. In addition to asking questions of the parents' witnesses, the impartial hearing officer asked numerous questions from the witnesses called by the district, and ruled in favor of both parties when objections were raised (see, e.g., Tr. pp. 12-14, 31, 66, 80, 87, 89, 93, 101, 103-05, 109-10, 130-31, 139, 147-48, 158). Although the parents disagree with the conclusions reached by the impartial hearing officer, their disagreement does not provide a basis for finding that the impartial hearing officer acted inappropriately.

I will also address the parents' request on appeal that the student's SETSS be provided during summer 2009. A request for future additional services, where no IEP has yet been proposed, cannot be considered (see Diaz-Fonseca v. Puerto Rico, 451 F.3d 13 [1st Cir. 2006] [parents could not be reimbursed for "anticipated" expenses for private tuition and related services]; see also Application of a Student with a Disability, Appeal No. 08-043; Application of the Dep't of Educ., Appeal No. 07-037; Application of the Bd. of Educ., Appeal No. 04-034; Application of a Child with a Disability, Appeal No. 00-039 [upholding the denial of request for prospective relief because the district had not had the opportunity to recommend the student's educational programs for those years]). As a matter of law, the school year runs from July 1 through June 30 (Educ. Law § 2[15]). The student's IEP is required to be reviewed periodically, but not less frequently than annually (20 U.S.C. § 1414[d][4][A]; 34 C.F.R. § 300.324[b]; N.Y. Educ. Law § 4402[1][b][2]; 8 NYCRR 200.4[d][2][xi], [f]). The CSE must determine a student's

¹⁵ It appears from the hearing record that the impartial hearing officer did not conduct a prehearing conference in this matter. Among other purposes, State regulations provide that a prehearing conference may be held for simplifying or clarifying the issues (8 NYCRR 200.5[j][3][xi]).

need for extended school year (ESY) services (34 C.F.R. § 300.106[a]; see 8 NYCRR 200.6[j][1]). Based upon the hearing record, at the time of the impartial hearing, the CSE had not yet conducted its annual review for the student's educational program for the 2009-10 school year, which would begin on July 1, 2009 and would address, if necessary, the student's need for ESY services during summer 2009 in the 2009-10 school year. Thus, the parent's request for SETSS during summer 2009 is denied as premature (see Application of a Child with a Disability, Appeal No. 07-050; Application of the Dep't of Educ., Appeal No. 07-037; Application of a Child with a Disability, Appeal No. 00-006).

Lastly, in the alternative, the parents assert that if a State Review Officer denies the parents' requested relief, the district should be mandated to reimburse the parents for the student's annual tuition at Bais Blima during the 2008-09 school year. As the district offered the student a FAPE in the LRE and the recommended placement was appropriate for the 2008-09 school year, I find that the parents are not entitled to reimbursement from the district for the tuition costs associated with their daughter's placement at Bais Blima for the 2008-09 school year (see Mrs. C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134; Application of a Child with a Disability, Appeal No. 05-038; Application of a Child with a Disability, Appeal No. 03-058). I further note that the parents did not request tuition reimbursement in their due process complaint notice nor present sufficient evidence concerning the appropriateness of Bais Blima.

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

THE APPEAL IS DISMISSED.

**Dated: Albany, New York
January 23, 2009**

**PAUL F. KELLY
STATE REVIEW OFFICER**