



The University of the State of New York

The State Education Department

State Review Officer

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No. 10-060

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

Appearances:

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

Michael Best, Special Assistant Corporation Counsel, attorney for respondent, Tracy SiligmueLLer, Esq., of counsel

DECISION

Petitioners (the parents) appeal from the decision of an impartial hearing officer which denied their request to be reimbursed for their son's home-based applied behavior analysis (ABA) therapy, related services and tuition costs at the Birch Wathen Lenox School (Birch) for the 2008-09 and 2009-2010 school years. The appeal must be dismissed.

At the time of the impartial hearing, the student was attending second grade in a general education class at Birch (Tr. pp. 473, 496, 534; Parent Ex. E at p. 1).¹ Birch is a private school which has not been approved by the Commissioner of Education as a school with which school 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 (Tr. p. 162; see 34 C.F.R. § 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

The hearing record indicates that when the student was two or three years old he received a diagnosis of a pervasive developmental disorder (PDD) (Tr. p. 526). Additional diagnoses included expressive, receptive and pragmatic language disorders (Dist. Ex. 9 at p. 1). The student

¹ Birch constitutes the student's pendency placement during the instant proceeding pursuant to an unappealed impartial hearing officer's decision dated May 23, 2008 (Tr. pp. 3-11; Parent Ex. C). Pursuant to the pendency order, the student received up to 15 hours per week of home ABA services, up to four hours per week of speech-language therapy by one provider, up to one hour per week of speech-language therapy by another provider, and up to 90 minutes of occupational therapy (OT) per week (id.).

was found to be initially eligible for special education services as a preschool student with a disability in November 2004 and received special education itinerant teacher (SEIT) services, occupational therapy (OT), speech-language therapy and physical therapy (PT) (Dist. Exs. 9 at p. 1, 10 at pp. 1-2; 11 at pp. 1-2). The hearing record indicates that the student made "excellent" progress and the Committee on Special Education (CSE) recommended a general education program with related services at the student's May 2006 "Turning 5" CSE meeting (Dist. Ex. 9 at p. 1).

A January 20, 2006 OT progress report indicated that between September 2005 and January 2006, the student received OT two times per week for 45 minutes (Dist. Ex. 11 at p. 1). The occupational therapist recommended that the student continue to receive OT at the same frequency and duration to address delays in the student's upper body strength/stability, fine motor and sensory processing skills, and to increase his "success and functional independence" (id. at p. 2).

A January 26, 2006 speech-language progress report written when the student was four years old indicated that he received individual speech-language therapy four times per week at home to address delayed receptive/expressive language skills, pragmatic skills and play skills (Dist. Ex. 10 at p. 1). The progress report indicated that the student made "significant and steady gains" with therapy, but continued to experience difficulty (id.). The student was described as having difficulty following complex commands and required that directions be broken down into steps (id.). In addition, the student needed cueing to sustain eye gaze during conversation (id. at p. 2). The student had difficulty recalling and retelling recent/past information; organizing and expressing thoughts and ideas; and initiating, maintaining, and elaborating on a topic of conversation (id.). Although he was interested in other children and enjoyed play, including imaginary play, the student had difficulty negotiating with peers (id.). The speech-language pathologist recommended that the student continue therapy at home to improve receptive/expressive and pragmatic skills; that the student continue to attend his "mainstream setting" with support; and that the student continue ABA therapy and related services at home or after school (id.).

A June 22, 2007 psychoeducational evaluation report indicated that the student was of average cognitive ability and demonstrated "high average" to "superior" academic achievement with a "low frustration tolerance" (Dist. Ex. 9 at pp. 1, 4). The psychoeducational evaluation report indicated that cognitive efficiency was an area of challenge for the student, but that he was able to achieve academic success (id. at pp. 1, 5). The psychoeducational evaluation report also indicated that the student continued to receive instruction in his preschool setting for an additional year during 2006-07 and made "tremendous" academic and social progress (id. at p. 1).

During the 2007-08 school year, the student attended Birch as a kindergarten student (Tr. p. 530; Dist. Exs. 13, 15). An April 16, 2008 student progress report completed by the student's kindergarten teacher at Birch reflected that the student's ability to complete classwork, cooperate in class, and work independently were "good" (Dist. Ex. 13 at p. 1). The April 2008 progress report indicated that the student's class participation, ability to stay focused on task, and organizational skills were "satisfactory"² (id. at p. 1). Regarding the student's communication and socialization skills, he was able to participate in classroom discussions, work with peers and

² The April 16, 2008 progress report reflected that the student needed encouragement and redirection "at times" (Dist. Ex. 13 at p. 1).

respond appropriately to authority figures (id.). Teacher comments included on the student progress report indicated that the student had difficulty expressing his thoughts and ideas with ease (id.). In addition, the progress report indicated that the student at times had difficulty with multi-step directions and initiating play with peers (id.). Regarding the student's academic development, the progress report indicated that he was working above kindergarten level in reading; he had a strong sight vocabulary and continued to build on it; he was learning to decode words when reading; his pre-reading skills were "progressing nicely;" and he was able to retell the sequence of a story, understand story structure, and recall characters and events³ (id. at p. 2). Regarding math, the student's progress report indicated that his math readiness skills were age appropriate and he worked at grade level (id.). The progress report further indicated that the student demonstrated progress in expressive writing during the school year and that he worked hard completing sentences on his own while using his sight word vocabulary; was learning how to sound out words independently and used "inventive" spelling; was beginning to form complete sentences with correct capitalization of the first letter (of the first word); and was beginning to end sentences correctly with a period (id. at p. 3). Regarding socialization skills, the progress report indicated that the student's social skills were not as strong as his academic skills, specifically that the student often needed verbal cues or encouragement to express his thoughts and ideas; the student's expressive language was difficult to understand at times; and he was continually encouraged to slow down when speaking (id.). Also, the student's teacher indicated that he was sensitive and had difficulty expressing himself when upset (id. at p. 4). Although the student was described as immature in speech among peers, his decisions and actions were described as age appropriate (id.). In addition, the student's teacher indicated in the progress report, that the student was "well-liked" and brought "a sense of warmth and nurturing" to the classroom (id.).

The district conducted a classroom observation of the student at Birch on April 18, 2008 (Dist. Ex. 12 at p. 1). Sixteen students were present in the classroom⁴ with two teachers at the time of the observation (id.). According to the student's teachers, the student did well academically, although he had difficulty with spelling and following multi-step directions (id. at p. 2). Also, the student's teachers reported that when the student was frustrated or angry, he was unable to express himself and tended to cry (rather than act out or behave inappropriately) (id.). The observation report further indicated that the student lacked appropriate vocal inflection, which his teachers described as "immature" (id.). The observation report additionally indicated that the student was liked by his peers (id.).

On May 15, 2008 the district CSE met for the student's annual review and to develop his individualized education program (IEP) for the 2008-09 school year (first grade) (Dist. Ex. 6). Meeting participants included the district representative who also acted as a special education teacher, a regular education teacher, a school psychologist, the director of the lower school of

³ The student's grade level for reading comprehension can not be ascertained from this exhibit due to the illegibility of part of the document (see Dist. Ex. 13 at p. 2).

⁴ The classroom was comprised of 18 students (Dist. Ex. 12 at p. 1).

Birch,⁵ an additional parent member, and the parent (Tr. pp. 48, 73; Dist. Ex. 6 at pp. 1-2).⁶ The CSE recommended that the student's eligibility for special education services as a student with a speech or language impairment be continued. The CSE further recommended a 10-month placement in a general education class with related services of speech-language therapy, three times per week for 45 minutes individually, and one time per week for 45 minutes in a group of three; OT two times per week for 45 minutes individually; and counseling one time per week for 45 minutes individually, at a separate location (Dist. Ex. 6 at pp. 1-2, 14). Recommended classroom accommodations included redirection to stay focused on task and verbal cues to help organize thoughts (*id.* at pp. 3-4). The CSE also recommended, as a classroom accommodation, that the student be encouraged to participate in class discussions, express thoughts and ideas, speak without rushing, and initiate play with peers (*id.*). Recommended testing accommodations included a separate location, extended time, and directions read and reread (*id.* at p. 14).

The district's May 19, 2008 Final Notice of Recommendation (FNR) notified the parent of the recommended placement for the student for the 2008-09 school year (Tr. pp. 554, 562; Dist. Ex. 8). The parent rejected the recommended placement and the student continued to attend Birch during the 2008-09 school year (Dist. Ex. 20).

The district conducted a classroom observation of the student at Birch on February 6, 2009 (Dist. Ex. 27 at p. 1). The student was observed during a math lesson, in a class of 12 students and one teacher (*id.*). The student's teachers reported that the student was in the highest math and reading groups, demonstrated excellent reading comprehension (especially as to prediction and vocabulary), worked well independently and learned quickly (*id.* at p. 2). The student was noted to have excellent handwriting skills and his teachers described him as kind and popular (*id.*).

A March 6, 2009 private speech-language progress report indicated that the student began seeing his private speech-language pathologist in December 2004, at which time he presented with a severe speech-language disorder, described as a weaknesses in receptive/expressive language, speech production, nonverbal communication skills and attending (Dist. Ex. 26 at p. 1). The student's March 2009 progress report indicated that the student made "significant progress" between December 2004 and March 2009, that the student was cooperative, friendly, and well related (*id.*). Although the student continued to demonstrate difficulties with articulation, he was described as "stimulable for correct production of his error sounds" and the private speech-language pathologist judged his intelligibility of speech as "good" (*id.* at pp. 2-3). Vocal parameters of volume, pitch, and nasal resonance were judged to be within normal limits and occasional grammatical errors in the student's use of verbs and prepositions were noted (*id.*). Overall, the progress report indicated that the student's linguistic difficulties included mild articulation errors and that the student had difficulty using coherent, non-ambiguous language for pragmatic functions (including offering explanations, predicting, comparing, negotiating, rationalizing, and retelling events, using age appropriate grammatical rules) (*id.*). The private speech-language pathologist recommended that the student continue to receive three hours of speech-language therapy per week (*id.* at p. 4).

⁵ The director of the lower school at Birch participated by telephone.

⁶ The hearing record includes two copies of the May 15, 2008 IEP (Dist. Ex. 6; Parent Ex. F). The attendance sheet is included in the district's copy of the IEP, but not in the parent's copy of the same IEP (Tr. p. 521; Dist. Ex. 6 at p. 2; Parent Ex. F at pp. 1-12).

The CSE met on April 21, 2009 for the student's annual review and to develop his IEP for the 2009-2010 school year (second grade) (Dist. Ex. 16). Meeting participants included the district representative who also acted as a special education teacher, a regular education teacher, a school psychologist, the assistant director of the lower school of Birch, the student's homeroom, math and reading teachers,⁷ an additional parent member and the parent (id. at pp. 1-2). The CSE recommended that the student's eligibility for special education services as a student with a speech or language impairment continue. The CSE further recommended a 10-month placement in a general education class with related services of individual speech-language therapy three times per week for 60 minutes, individual OT two times per week for 45 minutes, and individual counseling one time per week for 45 minutes, at a separate location (id. at pp. 1-2, 11). Recommended classroom accommodations included directions read and reread, verbal encouragement of listening skills and cues to express thoughts and ideas (id. at pp. 3-4). In addition, the CSE recommended, as a classroom accommodation, that the student be encouraged to speak with a "big boy" voice (id.). Recommended testing accommodations included a separate location, extended time, and directions read and reread (id. at p. 11).

An April 22, 2009 district FNR notified the parents of the location of the recommended placement at the student's local district school and that the recommended placement was "[d]eferred" until September 2009 (Tr. pp. 182, 554, 562; Dist. Ex. 17). The parent disagreed with the placement and the student continued at Birch for the 2009-10 school year for second grade (Dist. Ex. 20; Parent Ex. L).

The initial due process complaint notice was filed on April 30, 2009 for the 2008-09 school year (Dist. Ex. 1). The amended due process complaint notice was filed on June 25, 2009 (Dist. Ex. 3). The purpose of the amendment was to include the 2009-10 school year as part of the due process request as the parents also contended that the district failed to timely offer a free appropriate public education (FAPE) for the 2009-10 school year commencing on July 1, 2009 (id.).

As to the 2008-09 school year, the allegations in the June 25, 2009 amended due process complaint notice include, among other things, that the district was not ready, willing, and able to implement the student's IEP service mandates; that the district did not recommend a 12-month school year for the student; that the district did not recommend "extended-day" services; that the district did not develop behavioral assessments; that the district did not develop a meaningful "base-lining" of the student's functioning and skill levels; that the district did not properly evaluate and assess the student's present levels of performance; that the IEP goals and objectives were not developed at the IEP meeting with meaningful participation from the student's parents; that the district failed to develop clear IEP goals and objectives; that a specific placement location was not discussed or recommended at the CSE meeting; and that the district did not develop a transition plan (Dist. Ex. 3 at pp. 2-5).

As to the 2009-10 school year, the allegations in the June 25, 2009 amended due process complaint notice include, among other things, that the district was not ready, willing and able to properly fulfill the IEP service mandates; that the related speech-language therapy offered to the student was not sufficient; that the district failed to indicate any reason why the student's speech-language therapy was reduced; that the district failed to timely recommend any placement for the

⁷ The assistant director of the lower school of Birch and the student's teachers participated by telephone.

student for the summer 2009; that the district failed to recommend a 12-month school year for the student; that the district failed to recommend any extended day services for the student; that the IEP goals and objectives were not developed at the CSE meeting with meaningful participation of the student's parents; that the district failed to develop clear IEP goals and objectives; that the district failed to develop any OT or counseling goals; that the district failed to indicate the method of measurement for determining the student's progress towards his goals and objectives; that the district failed to properly evaluate the student's present levels of performance; that the district failed to recommend individual parent training and counseling; that the district failed to conduct an appropriate functional behavioral assessment (FBA) or develop a behavior intervention plan (BIP); that the district failed to indicate a specific placement location at the CSE meeting; that the district engaged in impermissible predetermination; and that a transition plan was not developed (Dist. Ex. 3 at pp. 5-7).

In a June 12, 2009 letter⁸ to the district CSE chairperson, the parents rejected the district's recommended placement for the 2009-10 school year (Parent Ex. G at p. 1). The letter indicated in part that the student's mother visited the proposed placement on May 6, 2009 and met with district personnel (Tr. pp. 532, 555; Parent Ex. G at p. 1). In the June 2009 letter, the student's mother wrote that the proposed program was inappropriate for the student for "a number of reasons, including, but not limited to, the fact that it is unable to offer enough of the 1:1 instruction that remains critical for success" (Parent Ex. G at p. 1). In addition the student's mother was "very concerned" about overcrowding at the proposed school (*id.*). The student's mother expressed in the June 2009 letter that the district failed to offer the student an appropriate education in a timely manner for 2009-10 and that the parents would continue the student's placement at Birch, maintain the student's 15 hours per week of "ABA/SEIT" services, five hours per week of 1:1 speech-language therapy, one hour per week of OT, and transportation to and from school, in addition to seeking reimbursement from the district (*id.*).

An impartial hearing convened on July 29, 2009 and concluded on March 25, 2010, after six days of proceedings (Tr. pp. 1, 15, 168, 216, 386, 571). In a decision dated June 1, 2010 the impartial hearing officer found that the district offered the student a FAPE for the 2008-09 and 2009-10 school years (IHO Decision at p. 17). The impartial hearing officer found that the district's programs for the 2008-09 and 2009-10 school years addressed the concerns raised by the student's teachers (*id.* at p. 13). As to the district's recommended program, the impartial hearing officer found that the district placed the student in a general education classroom that was similar to the private school classroom where the student has "thrived" (*id.*). The impartial hearing officer further found, as to related services, that both IEPs provided for related services in speech-language therapy, counseling and OT to address the concerns raised by the student's teachers (*id.*). Moreover, the impartial hearing officer found that the IEPs addressed the student's issues with focus, expression, receptive and expressive language, as well as the student's difficulties with multi-step directions (*id.*). As to IEP implementation, the impartial hearing officer found that the testimony indicated that staff at the recommended placement would have implemented the recommendations of the CSE (*id.*). The impartial hearing officer found that the school carefully implemented the IEPs of students by ensuring communication between related service providers and teachers (*id.*). Also, the impartial hearing officer noted that the teachers worked on multi-step

⁸ A previous letter dated May 20, 2009 from the parents to the district CSE chairperson reflects the same information as the June 12, 2009 letter except for inconsistency regarding dates within the body of the letter (*see* Parent Ex. H at p. 1).

directions and pragmatic language with the students, which were areas of concern for the student (id. at p. 14). The impartial hearing officer rejected the parent's argument that the May 15, 2008 IEP was invalidly predetermined as unpersuasive (id.). The impartial hearing officer noted that it is permissible under the Individuals with Disabilities Education Act (IDEA) for the district to bring a draft IEP to the CSE meeting, as long as the parents are given the opportunity to make objections and suggestions, and further found that the hearing record reflected that the parents were given an opportunity to discuss goals and objectives at both CSE reviews (id.). In addition, the impartial hearing officer found that the goals and objectives were sufficient (id.). As to the parents' contention that the proposed goals and objectives were vague and generic, the impartial hearing officer found that the goals and objectives were reasonably formulated and sufficiently "yoked" to the student's needs (id.). Regarding the parents' contention that there was no goal relating to the student's use of immature speech, the impartial hearing officer noted that the IEP referred to that issue and cited testimony that the general education teachers carefully worked with the entire IEP when developing academic programs for the students (id.). As to the parents' complaint that the CSE did not recommend a 12-month program, the impartial hearing officer found that there was no testimony that the parent raised the issue at the CSE meeting (id.). Moreover, the impartial hearing officer found that there was no testimony showing or suggesting that the child required 12 months of services. (id. at pp. 14-15).

As to the parents' contention regarding related services, the impartial hearing officer found no legal authority to support the parents' claim that the student was denied a FAPE based solely on the assertion that the district offered related services on a "pull-out" basis (IHO Decision at p. 15). As to the parents' contention that speech-language therapy might not have been provided at the recommended school, the impartial hearing officer found no testimony in the hearing record indicating that the parent would have been unable to find a private provider pursuant to a related service authorization (RSA), if provided (id. at p. 16). Also, the impartial hearing officer found testimony to be credible that the school would provide a parent with related services at the school if a parent was unable to find a provider through an RSA and, moreover, the impartial hearing officer found that this particular student would have received speech-language therapy at the recommended school if he had attended for the 2008-09 and 2009-10 school years (id.). As to the parent's contention that a FAPE was denied because of the district's failure to conduct an FBA and develop a BIP, the impartial hearing officer found that the record did not support the need for an FBA (id.). As to the parent's contention that she rejected the school placement because the school might be overcrowded and might be eliminating "specialty classrooms," the impartial hearing officer found that the parents failed to provide authority supporting the contention that a FAPE denial can be based on such an assertion, and, moreover, that the record did not reflect a school that was overcrowded or a school that had eliminated classrooms (id.).⁹

In a petition, the parents allege that the district failed to meet its burden to show that it offered the student a "reasonably calculated" IEP and that it was "ready, willing and able" to

⁹ While the impartial hearing officer found that the IEP should have indicated the student's need for small groupings to receive educational benefit, he concluded that the record did not support a finding that such error denied the student a FAPE (citing evidence of an additional adult in the classroom for both years) because the recommended school provided students with small group instruction (IHO Decision at p. 15). I note that the parents do not contend on appeal that the students IEPs should have indicated the student's need for small group instruction, nor do the parents assert on appeal that the recommended class for either school year was inappropriate based upon a lack of small group instruction (see Petition).

implement the IEP mandates for the 2008-09 and 2009-10 school years. The parents specifically assert, among other things, that the district's proposed IEPs failed to provide adequate or appropriate related services for the student to achieve meaningful educational benefits; that the district's obligation to provide a FAPE cannot be satisfied by an RSA for related services; that the IEPs failed to provide the student with the 12-month services needed to make meaningful progress; that the proposed goals and objectives on the 2008-09 and 2009-10 IEPs were inappropriate and inadequate; that the district failed to indicate the method of measurement for determining the student's progress towards his proposed goals and objectives; that the goals and objectives were not developed at the IEP meeting with meaningful participation of the student's parents; that the district engaged in impermissible predetermination; that the district failed to meaningfully include the student's parents in the development of the student's IEPs; that the district unilaterally chose the student's placement without meaningful input from the student's parents or teachers; and that the district erred by not having a placement officer at the CSE meetings. In addition, the parents asserted that the district failed to conduct an FBA and develop a BIP; that the district failed to recommend individual parent training and counseling; and that the district failed to recommend a transition plan.

The parents further asserted that the student's private placement and program continued to be appropriate for him and that there were no equitable circumstances that would preclude or diminish a reimbursement award.¹⁰

As relief, the parents requested that the State Review Officer reverse the impartial hearing officer's decision regarding the district's provision of FAPE and award reimbursement or remand to the impartial hearing officer.

In an answer, the district asserts that it offered the student a FAPE for the 2008-09 and 2009-10 school years. As to related services, the district asserts that the level of related services recommended was appropriate; that the record supported a finding that there was flexibility regarding whether the services were provided on a "push-in" or "pull-out" basis; and that the claim that the possible issuance of an RSA for the student's speech-language therapy constituted a deprivation of FAPE was without merit. The district further asserts that the goals and objectives on both IEPs were appropriate; that the parents were not deprived of meaningful participation in creation of the goals; and that preparation of draft goals before the May 2008 CSE meeting was not inappropriate. In addition, the district asserts that neither CSE was required to conduct an FBA or create a BIP; that the regulations requiring parent counseling and training do not apply to the student; that the recommended school offers parent training and that there was no indication that the parents required parent training. The district further asserts that the parents' claim that the student needed 12 months of services was frivolous; that the assertion that the student needed a 12-month school year was conclusory; and that at the May 2008 CSE meeting, no one requested and none of the reports recommended a 12-month school year. The district also asserts that the parents' contention that the failure to have a placement officer at the CSE meetings constituted a deprivation of FAPE and/or a violation of the stipulation entered into in the "Jose P." class action

¹⁰ In their petition, the parents "urge" me to recuse myself. State regulations mandate that a State Review Officer have "no personal, economic or professional interest in the hearing which he or she is assigned to review" (8 NYCRR 279.1[c][4]). To the extent that the parents are requesting that I recuse myself, I decline their request because there is no basis for my recusal, I have no interest in the outcome of the case, and I am able to impartially decide the case.

was without merit. In addition, the district asserts that the student's private placement at Birch and the home services were not necessary or appropriate, and that equitable considerations do not favor the parents.

Two purposes of the 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 Forest Grove v. T.A., 129 S. Ct. 2484, 2491 [2009]; 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., 553 F.3d 165, 172 [2d Cir. 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 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 P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; 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 Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d

at 132; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]). Also, a FAPE must be available to an eligible student "who needs special education and related services, even though the [student] has not failed or been retained in a course or grade, and is advancing from grade to grade" (34 C.F.R. § 300.101[c][1]; 8 NYCRR 200.4[c][5]).

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]; Tarlowe v. Dep't of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008]), 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).

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 law took effect for impartial hearings commenced on or after October 14, 2007 (see Application of the Bd. of Educ., Appeal No. 08-016).

Returning to the instant case, upon review of the hearing record, I agree with the impartial hearing officer that the district offered the student a FAPE for the 2008-09 and 2009-10 school years.

Initially, I find that the parents' assertion that the district did not meaningfully include them in the development of the student's May 15, 2008 and April 21, 2009 IEPs is not supported by the hearing record. I find that all of the members of the CSE, including the parent, had the opportunity to participate and express their concerns at both the May 2008 and April 2009 CSE meetings (Tr. pp. 48, 72-73, 77, 91-92). Also, I find that both the May 2008 and April 2009 IEPs were developed by members of the CSE upon review and consideration of the available evaluative information, recent classroom observations conducted by the district, as well as progress reports from Birch and the student's related service providers, from which the CSE identified the student's needs and developed appropriate goals (Tr. pp. 49-50; 78-79; Dist. Exs. 9, 10, 11, 12, 13, 14, 18, 26, 27). Moreover, the record reflects that the student's mother expressed her concerns about the student's related services, pragmatic language skills, and ability to follow multi-task directions and that the CSE addressed the parents concerns through the related service recommendations, annual goals and short-term objectives, and identified management needs (Tr. pp. 72-73; Parent Ex. M at pp. 1, 2).

Next, upon review of the CSE program recommendations, I agree with the impartial hearing officer that the recommendation of a general education class with related services for the student was appropriate for the 2008-09 and 2009-10 school years and find that the level of related

services recommended was also appropriate (see IHO Decision at p. 13).¹¹ I will now address the parents' contention that the district's proposed IEPs failed to provide adequate or appropriate related services for the student; that the district's obligation to provide a FAPE can not be satisfied by an RSA for related services; and that the district was not "ready, willing and able" to implement its IEP mandates.

I will first examine the May 2008 IEP, which recommended related services of counseling, one time per week for 45 minutes individually; OT, two times per week for 45 minutes individually; speech-language therapy three times per week for 45 minutes individually; and speech-language therapy one time per week for 45 minutes in a group of three (Dist. Ex. 6 at pp. 2, 14; Tr. pp. 50-51). In determining that the level of related services was appropriate, I note that the frequency and ratio of related services was determined by recommendations in the provider reports, which the student's parents provided to the CSE (Tr. p. 51). Regarding the April 2009 IEP, which recommends counseling, one time per week for 45 minutes individually; OT, two times per week for 45 minutes individually; and speech-language therapy three times per week for 60 minutes individually, I note that the frequency of speech-language therapy sessions was changed from the May 2008 IEP, but that the duration of total speech-language services (three hours) remained consistent and that the hearing record reflects that the change was made based on a recommendation from the student's speech-language therapist (Tr. pp. 79-80; Dist. Exs. 6 at p. 16; 16 at p. 11; 26 at p. 4).

While I note testimony by district staff that, due to a shortage of available speech-language providers during the 2008-09 and 2009-10 school years, the district issued RSAs to students who were unable to receive speech-language therapy at the district school (Tr. pp. 625-26, 628-29), I find that such does not warrant a finding that the district was not "ready, willing and able" to implement the student's individualized education program (IEP) for each of those school years. First, case law supports a finding that data indicating that a school has not always delivered full special education services to its students does not mean that the school would have been unable to provide the services to another student whose IEP is being challenged in a due process proceeding (see M.S. v. New York City Dept. of Educ., 2010 WL 3377667, at *6-*7 [E.D.N.Y. August 25, 2010]). Moreover, it is permissible for a school district to contract for the provision of special education related services in limited circumstances and with qualified individuals over whom the district has supervisory control according to a June 2, 2010 "Q and A document" issued by the State Education Department to district superintendents:

[S]chool districts also have obligations under the IDEA and Article 89 of the Education Law to deliver the services necessary to ensure that students with disabilities receive FAPE. The Department recognizes that there will be situations in which school districts will not be able to deliver FAPE to students with disabilities without contracting with independent contractors. Where a school district is unable to provide the related services on a student's individualized education program ("IEP") in a timely manner through its employees because of shortages of qualified staff or the need to deliver a related service that requires specialized expertise not available from school district employees, the board of

¹¹ As to ABA services, I note the testimony of the school psychologist that ABA would not have been appropriate for the student because his needs were addressed with the recommended related services and the student was functioning well in a general education setting (Tr. p. 71).

education has authority under Education Law §§1604(30), 1709(33), 2503(3), 2554(15)(a) and 4402(2)(b) to enter into contracts with qualified individuals as employees or independent contractors to provide those related services (see also §§1804[1], 1805, 1903[1], 2503[1], 2554[1]).

(<http://www.emsc.nysed.gov/resources/contractsforinstruction/qa.html>, Question 5;

see <http://www.emsc.nysed.gov/resources/contractsforinstruction/>).

I further note, however, that the hearing record supports a finding that this student would have been able to receive speech-language therapy at the recommended school (rather than through an RSA) even though he would have been a new student (see Tr. pp. 256-257, 625-26, 283).¹² Moreover, in the event that an RSA were issued to the parent, the record supports a finding that the school would have provided the student with related services at the school if the parent was unable to find a provider pursuant to the RSA (see IHO Decision at p. 16; Tr. pp. 630-32). In sum, the hearing record does not support a finding that speech-language therapy was unavailable at the start of the 2008-09 or 2009-10 school years, or that the district would have denied the student a FAPE under the circumstances of this case, even if the district had to issue an RSA to the student for the provision of speech-language therapy due to a shortage of providers.

In addition, a review of the hearing record provides strong support for the conclusion that the staff at the recommended placement would have implemented the recommendations of the CSE. I note testimony by the principal which indicates that the proposed school emphasized communication and collaboration between the classroom teacher and the related service providers (Tr. p. 253). According to the principal, for the 2008-09 school year, the proposed school had two full-time speech-language providers, four occupational therapists, one physical therapist, and two guidance counselors that either "push in" to the classroom or "pull out" students from the classroom (Tr. pp. 253-54, 256-57). Related service providers met with teachers during "prep" periods and lunch to discuss what they were working on with students and to give the teachers suggestions about how to carry over related services work into the classroom (Tr. p. 254). The principal explained that regular education teachers always wanted to learn about new strategies to help students who may struggle and to differentiate the instruction in the classroom (id.). In regard to the student in the instant case, the principal indicated that she read his May 2008 IEP and that the related services mandated for the student for 2008-09 could have "absolutely" been provided to him in the proposed school (Tr. pp. 255-57) and she further indicated that the related services mandated for the student for the 2009-10 school year would also have been provided to the student in the proposed school (Tr. p. 283). In addition, testimony by the principal noted that specific goals and short-term objectives would have been addressed by the related service providers as well as through carry over in the classroom (Tr. pp. 258-64).

I further note testimony by the speech-language pathologist assigned to the proposed school that she was familiar with the student's May 15, 2008 IEP and that she would have addressed the student's needs and his annual goals and short-term objectives (Tr. pp. 576-80, 581, 583-590).

¹² In making this finding I have considered testimony indicating that when the related service needs of all students cannot be met due to a shortage of provider availability, the new students would usually receive the RSAs (see Tr. pp. 628, 630-32). However, I note additional convincing testimony indicating that the student's needs and goals are also a factor in deciding whether to issue an RSA and that the school would have been able to provide this student with speech language therapy at the district school. (see Tr. pp. 256-57, 283, 625-26; 631-32, 643).

The areas discussed by the speech-language pathologist included social skills, language comprehension, expressive language and articulation, verbal and non-verbal communication, eye contact, voice level as necessary, social interactions with peers and adults, and sensory processing or sensory awareness skills related to issues with and around the mouth (Tr. pp. 576- 80).

In addition, testimony by the OT supervisor indicated that, as a school-based occupational therapist, her work included addressing social behaviors, fine motor skills, and visual motor skills; provision of sensory diets for students inside and outside the classroom; work on hand functioning and self-care skills, as well as anything that a student needed to help with performance in school regarding socializing, writing, and transitioning from one activity to another (Tr. pp. 641-42). In addition, the OT supervisor testified that the work of school-based occupational therapists included providing services to students classified with a speech or language impairment, and working on communication with students in conjunction with the speech-language pathologist (Tr. p. 642). She explained that occupational therapists were not limited to the classroom and worked with students in school environments such as the cafeteria, on school buses and at recess to improve social interactions with peers, teachers and staff (Tr. p. 643). The OT supervisor noted that occupational therapists engaged in role-playing with students, worked with students in small groups if a larger group was too much for the student to initially handle, and provided strategies to teachers and parents as necessary (*id.*). The OT supervisor testified that she reviewed the student's May 15, 2008 IEP and provided extensive testimony regarding how she would have addressed the student's needs and goals (Tr. pp. 645-49). In addition, I note that at the time of the hearing all students at the recommended school with OT mandates on their IEP were receiving OT services (Tr. p. 652).

A further review of the hearing record regarding the district's proposed classes for the student for the 2008-09 and 2009-10 school years provides additional support for finding that the district offered the student a FAPE. Testimony by the principal of the recommended placement at the student's local school indicated that had the student attended the proposed placement for 2008-09 he would have been in a general education first grade class consisting of 21 students,¹³ a classroom teacher and an assistant teacher (Tr. pp. 229, 231-33).¹⁴ The principal provided extensive testimony regarding the multisensory approach to teaching, the students' daily schedule, the core and non-core curriculum, use of a "workshop" model, small group work with the students, as well as information regarding the set-up of the proposed class (very visual), assessments used, and credentials of the teacher and assistant teacher of the proposed class (Tr. p. 233-242, 252).

The principal indicated that the students' IEPs were used in the classroom and that the teacher adapted instruction and managed or supported a student according to his or her goals and needs (Tr. pp. 242-43). The principal explained that at the proposed school related service providers met with classroom teachers to ensure carry over from the work that the related service providers were doing with the student to the classroom, all relative to a student's IEP (*id.*). The teacher and the related service providers reviewed new students' IEPs in their entirety and "immediately" conducted assessments to determine the students' functioning levels (Tr. p.

¹³ Two other students in the class were classified as students with a speech or language impairment and had IEPs.

¹⁴ Testimony by the principal of the proposed school indicated that the teacher was a district employee and the assistant teacher position was funded by the PTA (Tr. p. 233). Both teachers were present in the classroom for the entire 2008-09 school year (Tr. p. 233).

356). The hearing record reflects that in the proposed classroom students partnered with each other during academic work and creative free play activities, creating situations in the principal's opinion that fostered socialization between students (Tr. pp. 250-51). In addition, upon review of the hearing record, I note the principal's testimony that multistep directions were worked on in the proposed class by being written out, repeated and clarified, step-by-step so that students could focus on one step at a time (Tr. pp. 246-47). The principal also explained that first-graders in the proposed class use and practice "inventive" spelling strategies that developmentally would lead to conventional spelling; that inflection and fluency would be addressed through reading aloud; that students were encouraged to participate in class discussions and conversations; and that students were encouraged to take risks by expressing their thoughts (Tr. pp. 247-49). The principal noted that the classroom teacher provided verbal cues to help students organize their thoughts (Tr. p. 249). The classroom teacher set the tone within the classroom community in order to create a respectful environment and provided dialogue and support to help students with low confidence or frustration tolerance be unafraid to take risks (*id.*). In addition, the principal noted that when presented with confidence concerns, the school's guidance counselor would also be involved in some group work or in role-playing activities (Tr. p. 250).

According to the principal the various aspects of social/emotional functioning in the proposed class were imbedded in the curriculum through learning, conversation, sharing, speaking, and negotiating with other students in the classroom or outside during recess (Tr. p. 264).¹⁵ She indicated that students worked on language and social coaching in spontaneous and directed peer situations where students interacted (*id.*). She also indicated that in her review of the May 2008 IEP the proposed school would have been able to provide the classroom accommodations as noted above (Tr. p. 266). The principal opined that based on her review of the student's May 15, 2008 IEP he would have been appropriately placed in the proposed school and class for 2008-09 (Tr. pp. 265-66).

The principal further opined that the student would have been appropriately placed in the proposed school and recommended second grade class, comprised of 26 students, during the 2009-10 school year (Tr. pp. 273, 293).¹⁶ Classroom staff consisted of one teacher and up to two student teachers (Tr. p. 272). The principal indicated that the second grade class schedule operated "very much the same" as the previously described first grade class for 2008-09 (Tr. pp. 276-77). The principal's testimony indicated that if a student in the second grade class had an IEP it would be used in the classroom, and as explained above for the 2008-09 school year, the classroom used a multisensory approach to instruction throughout the day in the various subject areas (Tr. pp. 277-78). The principal affirmed that, as necessary, the classroom teacher would remind students to speak in age-appropriate voices, maintain eye contact, work on pragmatic language skills, read and reread directions in class, encourage students to listen to their peers when speaking, use verbal encouragement and cues with students, and direct and encourage students to express their thoughts and concerns (Tr. pp. 278-79). Students in the proposed second grade class were grouped for instruction and

¹⁵ Testimony by the principal of the proposed school indicated that the school had a recess program for first grade that was staffed by a school aide and two paraprofessionals (Tr. p. 342).

¹⁶ One other student in the class had an IEP and was eligible for special education services as a student with a speech or language impairment (Tr. pp. 271-72).

participated in guided reading groups and partnerships that were ability based (Tr. pp. 279-80). The principal indicated that the teacher created small math groups based on assessment in order to work on a concept or a strand when students needed extra help (Tr. p. 280).

Furthermore, the principal's testimony indicated that in order to address the different levels and abilities in the second grade classroom, the classroom teacher either "extend[ed] or remediate[d]" instruction so that some students who were able to do the work had opportunities to further their work opportunities, and others were provided with support by the teacher such as breaking down certain assignments or providing organizational tools to help students grasp the information (Tr. pp. 290-91). In addition, the principal indicated that the proposed school had a math coach and provided professional development that addressed how to differentiate (instruction) in the classroom (Tr. p. 291). The principal also noted that through the aforementioned groupings, guided reading groups, and math groups, there was opportunity to address various learners and the range of abilities in the classroom (*id.*). The principal explained that the classroom teacher would address different levels of social/emotional functioning in the classroom (Tr. pp. 291-92). The teacher supported students' abilities to handle conflicts or negotiate relationships and work in partnerships by encouraging their possible need to talk things through, or through visual cues and reminders, checklists, and by creating a community where everyone respected and listened to each other and shared (Tr. p. 292). I note that the hearing record reflects that the classroom teacher communicated with all of the related service providers through meetings during preparatory periods, lunch time, or after school, as well as informally when the related service providers were in the classroom (Tr. pp. 281, 283-88). Accordingly, after review of the entire hearing record, I find that the proposed school would have been able to provide the student with all of his IEP mandated related services for 2009-10 and that the student's needs would have been addressed by the recommended program.

I now turn to the parents' assertion that the district's preparation of draft goals prior to the May 2008 and April 2009 CSE meetings was improper and that the parents were denied an opportunity to participate in the preparation of goals. It is permissible under the IDEA for school district personnel to bring a draft IEP to the IEP meeting, provided that the parents are informed it is a draft subject to review and the parents have the opportunity to make objections and suggestions (see Nack v. Orange City Sch. Dist., 454 F.3d 604, 610 [6th Cir. 2006] ["predetermination is not synonymous with preparation"]; C. S. v. Rye City Sch. Dist., 454 F.Supp. 2d 134 [S.D.N.Y. 2006] [a school district should not be precluded from suggesting an outcome at a CSE meeting]; Application of a Student with a Disability, Appeal No. 08-077; Application of a Child with a Disability, Appeal No. 06-102; Application of a Child with a Disability, Appeal No. 05-087; Application of a Child with a Disability, Appeal No. 02-029; Application of a Child with a Disability, Appeal No. 01-073). Moreover, conversations about possible recommendations for a student, prior to a CSE meeting, are not prohibited as long as the discussions take place with the understanding that changes may occur at the CSE meeting (see Danielle G. v. Dep't of Educ., 2008 WL 3286579, *5-*6 [a CSE's preconference to discuss a student's case did not deprive the parents of meaningful participation in the formulation of an IEP]).

A review of the hearing record reflects that the student's mother provided the CSE with draft goals written by the student's service providers, which were used to create the draft goals on the student's IEPs (Tr. pp. 197-98). Also, I note that the impartial hearing includes significant testimony pertaining to the reasons for creation of the goals, the student need that each goal was designed to address and how the goals would be implemented (Tr. pp. 58-67; 84-88). I also note

testimony that goals are reviewed with parents at the CSE meetings (Tr. p. 176). I find that the hearing record reflects that the parent had a meaningful opportunity to participate in the creation of the IEP, including the goals (see Tr. pp. 48, 72-73, 77, 91-92), and further find that the goals and objectives on both IEPs were appropriate and demonstrate the requisite alignment with the student's identified needs.

The May 15, 2008 IEP included 11 annual goals and 41 short-term objectives¹⁷ that would be reported on three times during the school year (Dist. Ex. 6 at pp. 6-8, 11-13). Goals and objectives addressed the student's needs to improve eye contact; improve pragmatic skills; increase assertiveness and appropriately stand up for himself; improve perceptual motor/graphomotor skills to maximize reading, writing skills, and classroom abilities; complete the bathroom routine independently; improve sensory processing to maximize environmental awareness in the school environment; improve receptive/expressive language skills; use age-appropriate expressive language and age appropriate speech articulation; use prepositions (in, on, at) appropriately during speech opportunities; and use pronouns accurately (he, she, his, her, their and they) (Dist. Ex. 6 at pp. 6-8, 11-13). Upon review, I find that the hearing record reflects that reports written by the student's related service providers and teacher provided a basis for the goals and objectives included in the May 2008 IEP (see Tr. pp. 57-67, 68).

The April 21, 2009 IEP included five annual goals and 15 short-term objectives that would be reported on three times during the school year (Dist. Ex. 16 at pp. 6-8). Goals and objectives addressed improvement in the student's perceptual motor/graphomotor skills to maximize reading, writing skills, and classroom abilities; the student's use of verb tenses and prepositions during speech opportunities; improvement in the student's pragmatic language skills; increased use of eye contact to sustain intermittent contact throughout a conversation; and increased range of conversational topics that followed a peers lead without relating the topic to video games (*id.*). The annual goals specific to eye contact and interaction involving peer chosen conversational topics were specific and measurable (*id.* at p. 7). The goals' associated short-term objectives clarified either the situations within which the student would participate in the goal or the progressive increments of time for which the student was expected to participate in the goal related activity (*id.*). Similar to the manner in which the goals included in the 2008-09 were written, the other four annual goals on the 2009-10 the IEP had corresponding measurable short-term objectives that clarified what the student would be expected to achieve (*id.* at p. 6). In reference to the annual goal that indicated the student would use verb tenses and prepositions appropriately during speech opportunities and the corresponding short-term objective that noted the student would use "these [three] prepositions correctly with 90% accuracy," testimony by the principal of the proposed school indicated that if she had written the goal she would have identified the prepositions that the student needed to address (Tr. p. 326). However, the principal also indicated that to clarify the matter she would have looked at the student's 2008-09 IEP to see if the student met the previous year's goal specific to prepositions or if that goal needed to be changed (Tr. pp. 325-26). She also opined that based on the student's needs his classroom teacher would know which prepositions should be addressed (Tr. p. 326). Furthermore, the principal indicated that if the student came to her school with an IEP that required some clarification, the school would "absolutely" reach out to the CSE that created the IEP as well as the student's previous school and

¹⁷ A review of the 11 goals and 41 short-term objectives included in the May 15, 2008 IEP reveals that each goal had multiple corresponding short-term objectives that clarified each goal and that were specifically detailed and measurable regarding what the student would be expected to achieve (see Dist. Ex. 6 at pp. 6-8, 11-13).

teachers for clarification (Tr. pp. 354-55). She noted that the IEP would be reviewed in totality rather than just the goals, and that the teachers and the related service providers in the proposed school conducted assessments of new students who enter the school in order to determine their functioning levels (Tr. pp. 355-56). In consideration of the hearing record before me, I find that an overall review of the goals and short-term objectives for both the 2008-09 and 2009-10 school years reflects that they were appropriate for the student.

Next, I will consider whether the hearing record supports a finding that the student required a 12-month school year (and/or 12 months of services).

According to State regulations, students shall be considered for extended school year [ESY] special services and/or programs "in accordance with their needs to prevent substantial regression" (8 NYCRR 200.6[k]; Application of the Bd. of Educ., Appeal No. 09-047; Application of a Student with a Disability, Appeal No. 08-078; Application of a Child with a Disability, Appeal No. 07-089; Application of a Child with a Disability, Appeal No. 07-082; Application of a Child with a Disability, Appeal No. 07-039; Application of the Dep't of Educ., Appeal No. 07-037; Application of a Child with a Disability, Appeal No. 07-004; Application of the Bd. of Educ., Appeal No. 04-102; see 34 C.F.R. § 300.106 [defining ESY]; 8 NYCRR 200.4[d][2][x] [noting that a student's IEP shall indicate whether the student is eligible for a special service or program on a 12-month basis]). The State regulations define substantial regression as "the student's inability to maintain developmental levels due to a loss of skill or knowledge during the months of July and August of such severity as to require an inordinate period of review at the beginning of the school year to reestablish and maintain IEP goals and objectives mastered at the end of the previous school year" (8 NYCRR 200.1[aaa]).¹⁸

Upon review, I find that the hearing record does not contain documentary or testimonial evidence establishing that the student required ESY services during the summer of 2008 or 2009 in order to prevent substantial regression of his skills or knowledge level. Accordingly, the hearing officer properly determined that the student did not require ESY services to prevent a likelihood of substantial regression and the denial of ESY services by the May 2008 and April 2009 CSEs was justified under the State regulations.

The parents also contend that the district's decision not to offer the student ESY services for summer 2008 and summer 2009 was not based upon the student's needs, but was predetermined by the district based upon standard practice. I find that this contention does not find persuasive support in the hearing record (see Tr. 51-52, 149-50; 184-86; Dist. Ex. 6 at p. 1). Moreover, although the parents request "ABA/SEIT services" during the summer of 2008 and 2009 and assert

¹⁸ In February 2006, the Office of Vocational and Educational Services for Individuals with Disabilities (VESID) published a guidance memorandum, dated February 2006, which states the following regarding ESY services:

A student is eligible for a twelve-month service or program when the period of review or reteaching required to recoup the skill or knowledge level attained by the end of the prior school year is beyond the time ordinarily reserved for that purpose at the beginning of the school year. The typical period of review or reteaching ranges between 20 and 40 school days. As a guideline for determining eligibility for an extended school year program a review period of eight weeks or more would indicate that substantial regression has occurred.

(<http://www.vesid.nysed.gov/specialed/publications/policy/esy/qa2006.htm>).

that the student needed a 12-month school year, the hearing record does not support a finding that the student had previously been enrolled in a 12-month program (Parent Ex. AA). In addition, the testimony reflects that services for the student were "inconsistent" over the summer because the family traveled (Tr. pp. 471-72). Moreover, the only documentation in the hearing record for summer services consisted of six hours of "supervision services" on July 22, 2009 (Parent Exs. DD, HH, II). In addition, the hearing record reflects that at the May 2008 IEP meeting, no one requested and none of the progress reports recommended a 12-month school year (Tr. pp. 184-86). Accordingly, the impartial hearing officer properly determined that the student did not require a 12-month program to make meaningful progress and I further conclude that the evidence contained in the hearing record does not support the parents' allegation of predetermination.

I now turn to the district's assertion that the impartial hearing officer erred in determining that the district denied the student a FAPE because parent counseling and training were not specifically provided for on the student's IEP (see IHO Decision at p. 31).

State regulations require that an IEP indicate the extent to which parent training will be provided to parents, when appropriate (8 NYCRR 200.4[d][2][v][b][5]). State regulations further provide for the provision of parent counseling and training for the purpose of enabling parents of students with autism to perform appropriate follow-up intervention activities at home (8 NYCRR 200.13[d]). Parent counseling and training is defined as: "assisting parents in understanding the special needs of their child; providing parents with information about child development; and helping parents to acquire the necessary skills that will allow them to support the implementation of their child's individualized education program" (8 NYCRR 200.1[kk]).

First, I note that the hearing record reflects that the student is classified as a student with a speech or language impairment, not as a student with autism, because that is his "most prevalent disorder," and that the parents do not contest the student's classification (Tr. pp. 50, 79, 163; Dist. Exs. 6 at p. 1; 16 at p. 1). Although I note that the psychoeducational evaluation indicates that the student had a diagnosis of a "PDD",¹⁹ and that the student's mother testified that he received a diagnosis of a PDD when he was two or three years old, by the time of the May 2008 and April 2009 CSE meetings, the hearing record reflects that the student no longer presented with a PDD diagnosis (Tr. pp. 161-62, 212-213). After review of the hearing record, I find that the district's recommended placement offered parent training that was consistent with State regulations and that the parents would have had the opportunity to receive appropriate parent training (Tr. p. 227; see 8 NYCRR 200.13[d]). In finding that parent training would have been available to the parents, I need not reach a determination as to whether the regulations requiring parent counseling and training apply to the student or whether the record supports a finding that the parents require parent training or counseling.

I will now consider the parents' assertion that the district was required to conduct an FBA and develop a BIP. In the case of a student whose behavior impedes his or her learning or that of others, the CSE shall consider, when appropriate, strategies, including positive behavioral interventions, and supports to address that behavior (20 U.S.C. § 1414[d][3][B][i]; 34 C.F.R. § 300.324[a][2][i]; see 8 NYCRR 200.4[d][3][i]; see also A.C., 553 F.3d at 172; J.A. v. East Ramapo Cent. Sch. Dist., 603 F. Supp. 2d 684, 689 [S.D.N.Y. 2009]; M.M. v. Dep't of Educ., 583 F. Supp.

¹⁹ I note that the student's 2008 physical examination report indicates that the student has a "speech problem," but does not indicate that the student has autism (Dist. Ex. 14).

2d 498, 510 [S.D.N.Y. 2008]; Tarlowe, 2008 WL 2736027, at *8; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 149-50 [S.D.N.Y. 2006]; Application of a Student with a Disability, Appeal No. 10-055; Application of a Student with a Disability, Appeal No. 08-028; Application of the Dep't of Educ., Appeal No. 07-120). In addition to the federal requirement, State regulations require that an evaluation include an FBA 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 that contribute to the suspected disabilities (8 NYCRR 200.4[b][1][v]; see Connor v. New York City Dep't. of Educ., 2009 WL 3335760, at *4 [S.D.N.Y. 2009]). An FBA is defined as "the process of determining why a student engages in behaviors that impede learning and how the student's behavior relates to the environment" (8 NYCRR 200.1[r]). Upon review of the hearing record, testimony by the teacher who participated in the May 15, 2008 CSE meeting indicated that no BIP was developed as it was emphasized by the student's private school teachers that his behavior was not a problem as far as classroom disruptions, the student was not aggressive toward other students, and the student was not self-injurious (Tr. pp. 203-04). I note that the student's teachers indicated that the student was "delightful" and functioning "very well" (Tr. pp. 71, 91, 203; Dist. Ex. 27). I further note that the student's report cards from Birch during the 2008-09 school year consistently reflect the student's appropriate behavior in class (see Dist Exs. 18 at pp. 1-10; 25 at pp. 1-10). Review of the April 21, 2009 IEP reflects that the student's behavior in school was age-appropriate and his teachers described him as excited to learn new things, friendly, and cooperative (Dist. Ex. 16 at p. 4). Accordingly, I find that the hearing record supports the impartial hearing officer's conclusion that the district was not required to conduct an FBA or develop a BIP.

I now turn to the parents' assertion that the formulation of the student's IEP at the May 2008 and April 2009 CSE meetings without identifying a specific school denied the student a FAPE. The Second Circuit has established that "'educational placement' refers to the general educational program – such as the classes, individualized attention and additional services a child will receive – rather than the 'bricks and mortars' of the specific school" (T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 419-20, cert. denied, 130 S. Ct. 3277 [2010]; see M.S., 2010 WL 3377667, at *7-8; Concerned Parents & Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751, 756 [2d Cir. 1980]). While statutory and regulatory provisions require an IEP to include the "location" of the recommended special education services (20 U.S.C. § 1414[d][1][A][i][VII], 34 C.F.R. § 320[a][7], 8 NYCRR 200.4[d][2][v][b][7]), it does not follow that an IEP must identify a specific school site. (T.Y., 584 F.3d at 419-20). The United States Department of Education (USDOE) has noted that it "referred to 'placement' as points along the continuum of placement options available for a child with a disability, and 'location' as the physical surrounding, such as the classroom, in which a child with a disability receives special education and related services" (Placements, 71 Fed. Reg. 46588 [August 14, 2006]). (Placements, 71 Fed. Reg. 46588 [August 14, 2006]).^{20, 21} This view is consistent with the opinion of the

²⁰ The federal and State continuums of alternative placement options are identified in 34 C.F.R. § 300.115 and 8 NYCRR 200.6.

²¹ The USDOE previously discussed "location" regarding the 1997 amendments to the IDEA, which for the first time required an IEP to identify the "location" of services. In discussing this provision of the 1997 amendments, the USDOE noted that "[t]he 'location' of services in the context of an IEP generally refers to the type of environments that is the appropriate place for provision of the service. For example, is the related service to be provided in the child's regular classroom or in a resource room?" (Content of IEP, 64 Fed. Reg. 12594 [March 12, 1999]). Current provisions requiring that the location of services be identified on an IEP are found at 20 U.S.C. § 1414[d][1][A][i][VII]; 34 C.F.R. § 300.320[a][7]; 8 NYCRR 200.4[d][2][v][b][7]).

USDOE's Office of Special Education Programs (OSEP), which indicates that the assignment of a particular school is an administrative decision provided it is made in conformance with the CSE's educational placement recommendation (Letter to Veazey, 37 IDELR 10 [OSEP 2001]; see Application of a Student with a Disability, Appeal No. 10-055; Application of a Student with a Disability, Appeal No. 09-082; Application of a Student with a Disability, Appeal No. 09-074; Application of a Student with a Disability, Appeal No. 09-063; Application of a Student with a Disability, Appeal No. 08-103; Application of a Child with a Disability, Appeal No. 07-049; Application of the Bd. of Educ., Appeal No. 99-90; Application of a Child with a Disability, Appeal No. 96-51; Application of a Child with a Disability, Appeal No. 93-5). Thus, as held by the Second Circuit, the lack of a specific school location on a student's IEP does not constitute a *per se* violation of the IDEA (K.L.A. v. Windham Southeast Supervisory Union, 2010 WL 1193082, at *2 [2d Cir. March 30, 2010]; T.Y., 584 F.3d at 420; see White v. Ascension Parish Sch. Bd., 343 F.3d 373, 379 [5th Cir. 2003]; Veazey v. Ascension Parish Sch. Bd., 2005 WL 19496 [5th Cir. Jan. 5, 2005]; A.W. v. Fairfax Co. Sch. Bd., 372 F.3d 674, 682 [4th Cir. 2004]; Concerned Parents, 629 F.2d at 756; but see A.K. v. Alexandria City Sch. Bd., 484 F.3d 672 [4th Cir. 2007]; but see A.K. v. Alexandria City Sch. Bd., 484 F.3d 672 [4th Cir. 2007]).

Here, the CSE formulated an IEP for the 2008-09 and 2009-10 school years for the student that recommended a general education class with related services of speech-language therapy, OT, and counseling. As reviewed herein, I find that the CSE recommendations of a general education class with related services for both school years were reasonably calculated to enable the student to receive educational benefits and I further find that the recommended program at the district's local school for the student was appropriate for both school years. As pertaining to the instant case, I find the fact that a specific school location was not offered by the district at the CSE meetings did not deprive the student of a FAPE (see K.L.A., 2010 WL 1193082, at *2; T.Y., 584 F.3d 412; see also M.P.G. v. New York City Dept. of Educ., 2010 WL 3398256, at *9 (S.D.N.Y. August 27, 2010)). Furthermore, I find that the failure to identify a specific school location on the student's IEP at the time of the CSE meetings did not impede the student's right to a FAPE, significantly impede the parents' meaningful participation in the CSE process, or cause 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]; see A.H., 2010 WL 3242234, at *2; E.H., 2008 WL 3930028, at *7; Matrejek, 471 F. Supp. 2d at 419).

In summary, I find that the district offered the student a FAPE for the 2008-09 and 2009-10 school years (Rowley, 458 U.S. at 206-07; Cerra, 427 F.3d at 192). In addition, I find that the hearing record demonstrates that the district's proposed program is consistent with LRE requirements (see 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]). Having determined that the district offered the student a FAPE, I need not reach the issue of whether Birch was appropriate for the student and the necessary inquiry is at an end (M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134; Application of a Student with Disability, Appeal No. 08-158; Application of a Child with a Disability, Appeal No. 05-038).

I have considered the parties' remaining contentions and find that they are either without merit or I need not address them in light of my determinations.

THE APPEAL IS DISMISSED.

**Dated: Albany, New York
September 9, 2010**

**PAUL F. KELLY
STATE REVIEW OFFICER**