



**The University of the State of New York**

**The State Education Department**

**State Review Officer**

**No. 07-027**

**Application of a CHILD WITH A DISABILITY, by his parent, for review of a determination of a hearing officer relating to the provision of educational services by the Board of Education of the Rocky Point Union Free School District**

**Appearances:**

Law Offices of Larry J. McCord and Associates, attorney for petitioner, Mary-Beth Abbate, Esq., of counsel

Hamburger, Maxson, Yaffe, Wishod & Knauer, LLP, attorney for respondent, David H. Pearl, Esq., of counsel

**DECISION**

Petitioner appeals from the decision of an impartial hearing officer which denied her requests to be reimbursed for her son's tuition costs at the SUWS of the Carolinas (private summer program) for summer 2005 and for the portion of the 2005-06 school year that her son attended the Stone Mountain School (Stone Mountain). The appeal must be dismissed.

On the last day of the impartial hearing on December 12, 2006, petitioner's son was 14 years old and attending Little Flower Children and Family Services (Little Flower) (Tr. p. 1017; Dist. Ex. 32 at p. 3). The student's placement at Little Flower is not the subject of this appeal. Rather, petitioner seeks reimbursement for tuition costs for a 2005 private summer program and for Stone Mountain for the 2005-06 school year. Neither Stone Mountain nor the summer program have been approved by the Commissioner of Education as schools with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7)).

During the 2005-06 school year petitioner's son refused to attend respondent's school (Tr. pp. 277-78; Dist. Exs. 5 at p. 7; 31 at p. 5). The student's eligibility for special education services is not in dispute in this appeal; however, when the student became eligible for such services is in dispute.<sup>1</sup>

Initially, two procedural matters must be addressed. Petitioner alleges that the impartial hearing officer erred by admitting into the record journals maintained by respondent's guidance counselor and by excluding a psychiatric evaluation from admission into the record.

With respect to introduction of evidence into the hearing record, the impartial hearing officer may receive any oral, documentary or tangible evidence except that the impartial hearing officer must exclude evidence that he or she determines to be irrelevant, immaterial, unreliable or unduly repetitious (8 NYCRR 200.5[j][3][xii][c]; see Application of the Bd. of Educ., Appeal No. 07-001; Application of the Bd. of Educ., Appeal No. 06-027). The twin criteria for admission of evidence into the record in impartial hearings are relevance and reliability (Application of a Child with a Disability, Appeal No. 03-053; Application of the Bd. of Educ., Appeal No. 02-076; Application of a Child with a Disability, Appeal No. 98-47; see Matter of Sowa v. Looney, 23 N.Y.2d 329, 333 [1968]). Formal rules of evidence that are applicable in civil proceedings generally do not apply in impartial hearings (see Application of a Child with a Disability, Appeal No. 05-051; Application of the Bd. of Educ., Appeal No. 05-007; Application of a Child with a Disability, Appeal No. 99-5; Application of a Child with a Disability, Appeal No. 99-48; see Application of the Bd. of Educ., Appeal No. 91-14; see also Tonette E. v. New York State Office of Children and Family Servs., 25 A.D.3d 994, 995-96 [3d Dep't 2006][strict formal rules of evidence need not be observed at administrative hearings]).

Petitioner asserts that the impartial hearing officer erred by admitting guidance counselor journals (journals) into the record that had been prepared in contemplation of use at the impartial hearing. Respondent's guidance counselor testified that it was his practice and custom to record personal notes regarding the student's counseling (Tr. p. 506). Although the notes in the eighth grade journal were originally typed (Tr. pp. 512, 514; Dist. Ex. 57), the guidance counselor testified that the sixth and seventh grade notes were handwritten at the time of the events and later typed for ease of reading in preparation for the impartial hearing (Tr. pp. 509-10, 512-13; see Tr. pp. 521-73; Dist. Exs. 55, 56). Subsequent to the guidance counselor's testimony at the impartial hearing that the notes represented his "thinking" on each entry date the impartial hearing officer admitted the journals into the record, (Tr. pp. 513, 515; Dist. Exs. 55, 56, 57). I will not disturb the impartial hearing officer's determination to allow the introduction of the journals, particularly given the foundation established at the hearing pertaining to their relevance and reliability through the guidance counselor's testimony.

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<sup>1</sup> In addition, although the student's current eligibility for special education is not in dispute, petitioner argued below that the student's classification as a student with an other health impairment (OHI) (see 34 C.F.R. § 300.8[c][9]; 8 NYCRR 200.1[zz][10]) should be changed to a student with an emotional disturbance (see 8 NYCRR 200.1[zz][4]). The impartial hearing officer directed that respondent's Committee on Special Education reconvene and consider the emotional disturbance classification. Neither party appealed this portion of the impartial hearing officer's decision.

Petitioner also asserts that the impartial hearing officer erred by not admitting into the record a November 13, 2006 report of a psychiatric evaluation (psychiatric evaluation) of the student conducted at Little Flower. Subsequent to his review of the offered psychiatric evaluation report, the impartial hearing officer declined to accept it into the record stating that it was beyond the scope of the hearing (Tr. p. 1033). The impartial hearing officer reached his conclusion after respondent argued that the psychiatric evaluation had nothing to do with the 2005-06 school year in dispute (Tr. p. 1031). Petitioner asserted that the psychiatric evaluation was relevant because it addressed the student's functioning while at the private placement during the 2005-06 school year and also related to the individualized education program (IEP) in dispute (Tr. p. 1032). Because the evaluation is not part of the hearing record, nor has it been submitted on appeal, I have no basis to determine whether it was properly excluded other than reviewing the arguments as they were made at the hearing (Tr pp. 1028-36). Based upon the information before me, I do not find that the impartial hearing officer committed reversible error by his determination to exclude the psychiatric evaluation.

During his kindergarten year, the student was classified as having an emotional disturbance and recommended for a Board of Cooperative Educational Services 8:1+1 special class with individual and group psychotherapy (Dist. Ex. 5 at p. 4). Between first and fourth grades, petitioner's son was classified as a student having an emotional disturbance; however, he gradually moved to less restrictive special education classes (Dist. Ex. 5 at p. 5). By third grade, the student attended an inclusion class and received counseling one time per week (Parent Ex. 5 at pp. 4, 5). In 2002, at the end of his fourth grade school year, a Committee on Special Education (CSE) determined that the student was no longer eligible for special education services (Dist. Ex. 5 at p. 6).

According to petitioner, the student began to dislike school during the fifth grade 2002-03 school year, and by the end of the year his attendance started to "dwindle" (Tr. pp. 200-201; Dist. Ex. 5 at p. 6). The student was absent a total of 46 days: 32 due to illness, 10 for unverified reasons, and 4 due to unexcused absences (Dist. Ex. 14 at p. 1; Dist. Ex. 59 at pp. 1, 2). Although the student's report card indicated that he had difficulty completing his homework and class work on time, the student passed all of his courses (Dist. Ex. 14 at p. 1) and was promoted to sixth grade (Tr. p. 401). The student's behavior at school during the 2002-03 school year was consistently characterized as appropriate or outstanding (Dist. Ex. 14 at p. 1).

Petitioner reported that the student's attitude toward school continued to decline during the sixth grade 2003-04 school year (Tr. p. 228). She noted that the student was failing his first quarter classes and needed help with subjects like language arts (Tr. pp. 228-29; see Dist. Ex. 15; see also Dist. Ex. 55 at p. 1). On November 12, 2003 the student was diagnosed by his pediatrician with fatigue and major depressive disorder (MDD) and was recommended for home tutoring for one month (Dist. Exs. 47 at p. 2; 49 at p. 4). The student was also placed on medication (Dist. Ex. 47 at p. 2). In a doctor's prescription dated December 4, 2003, the pediatrician reiterated the student's MDD diagnosis and recommended continuation of home tutoring through January 19, 2004 (Parent Ex. G at p. 1). Respondent requested that petitioner provide additional information regarding the student's mental health, preferably from a psychiatrist (Tr. pp. 609-11, 677-80; Dist. Ex. 55 at pp. 3, 4). On December 11, 2003, the student was evaluated by a clinical social worker (CSW) who diagnosed the student with depressive disorder not otherwise specified and separation anxiety disorder (Tr. p. 993; Parent Ex. F at p. 1). The CSW recommended that the student's home instruction continue through

January 4, 2004, noting that this would give the student and his mother time to develop strategies for the student to successfully get up and out to school (Parent Ex. F at p. 1). Subsequent prescriptions from the student's pediatrician indicated that the student was suffering from a physical problem and recommended that the student receive home tutoring for the remainder of the school year (Dist. Exs. 48 at pp. 2, 3; 49 at pp. 5, 6). For sixth grade (2003-04) the student received the following final exam and course grades: reading 75 (C), science 90 (B+), math 92 (B), social studies 84 (B+) and language arts 88 (C-) (Dist. Ex. 15A). The student received Ds in physical education and family and consumer science (*id.*). The student's attendance record for the 2003-04 school year indicated that he was absent 25 days due to illness and 18 days due unexcused absences (Dist. Exs. 50, 52). In addition, the student received home teaching on 96 days (Dist. Exs. 50, 52). During the 2003-04 school year, the student's guidance counselor had numerous contacts with petitioner regarding the student's attendance, medical issues and need for home tutoring (Dist. Ex. 55). The guidance counselor also met with the student on several occasions and the student was given a pass so that he could see the guidance counselor at any time (Dist. Ex. 55 at pp. 1, 2, 4).

According to petitioner, during the 2004-05 seventh grade school year, the student's attitude toward school grew worse, to the point where he no longer wanted to attend school (Tr. p. 244). The student discontinued taking medication (Tr. p. 239-40). Attendance records from the 2004-05 school year indicate that the student missed school 33 days due to illness, was truant 10 days and had 12 unexcused absences (Dist. Ex. 53). In accordance with respondent's comprehensive attendance plan (Dist. Ex. 54 at p. 6), petitioner was notified after the student's fifth, tenth, fifteenth and twentieth absences, and informed of the consequences of continued absences (Dist. Exs. 41, 42, 43, 44). On May 2, 2005 the student's guidance counselor met with petitioner and discussed the possibility of retention due to the student's attendance (Dist. Ex. 56 at p. 1). Three days later the guidance counselor assisted petitioner with completing a Persons in Need of Supervision (PINS) petition; however, the parent's petition was rejected by the probation department because it was for attendance, which was considered a "school issue" (Tr. pp. 540-41; Dist. Ex. 56 at p. 1). According to the guidance counselor, petitioner later indicated that a PINS petition would not help the student because it was the environment at home that was the problem (Dist. Ex. 56 at p. 2). It appears that around this same time a referral was made to child protective services (CPS) (Tr. p. 542-43; Dist. Ex. 56 at p. 2). During the 2004-05 school year, school personnel went to petitioner's house on at least two occasions in an attempt to persuade the student to return to school (Tr. pp. 246-47, 464-65, 541-42, 817-18, 841-43). In addition, the guidance counselor met with the student during lunch on several occasions and helped the student after school (Tr. pp. 461-63, 521-23, 539). The student's final exam and course grades for seventh grade were as follows: English 51 (C), social studies 83 (C+), math 71(C-), science 81 (B-) (Dist. Ex. 16). The student received a final grade of "F" in Italian (Dist. Ex. 16). The student's teachers noted that his absences affected his achievement (Dist. Ex. 16).

By letter dated June 27, 2005, petitioner was informed that her son would be retained in the 7th grade for failing to meet the minimum grade level requirements for promotion (Tr. pp. 250-51; Parent Ex. H). Respondent indicated that the student was being retained based on his lack of attendance (Tr. pp. 253, 260, 787, 793-94). A July 5, 2005 memorandum signed by petitioner indicated that the student would be permitted to enroll in summer school for social studies and mathematics and that in order to be promoted to eighth grade he would need to pass both classes (Tr. p. 263; Dist. Ex. 3). The memorandum further noted that if the student failed a class or was dropped from summer school due to attendance he would be retained in seventh

grade for the 2005-06 school year (Dist. Ex. 3). Petitioner expressed concern that she would not be able to get the student to attend summer school due to his past history of school refusal, and retaking classes that he had already passed (Tr. pp. 259-60, 263-65, 469-70, 790, 820-21). Respondent noted that the student had passed his final exams in social studies and math but his performance in those classes had declined in the third and fourth quarters (Tr. pp. 800-03, 814-16). The student refused to attend respondent's summer school and in July 2005 petitioner hired escorts (Tr. pp. 277-78; Parent Exs. K at p. 2; U at p. 2) to bring the student to a private school in North Carolina for students that exhibited oppositional behavior and refused to attend school (Tr. pp. 267-68, 275-77). An undated letter from the private summer program stated that the student was enrolled in the "Seasons Program" from July 26, 2005 through August 23, 2005 and had successfully completed the program (Dist. Ex. 4; Parent Ex. J; see also Tr. pp. 285-88, 822-24; Dist. Ex. 19). Respondent accepted the student's certificate of completion from the private summer program, in lieu of attendance in respondent's summer program, and agreed to promote the student to eighth grade (Tr. pp. 287-92, 790-91; Dist. Ex. 5 at p. 6).

Petitioner reported that the student began the 2005-06 school year with a "very good kind of attitude" (Tr. p. 295). He was attending school and wanted "to take the responsibility of his schooling" (Tr. p. 296). At the end of September, the student quit the football so that he would have more time to devote to homework (Tr. p. 297). However, the student's attendance began to decline about the same time, and he started refusing to do his homework (Tr. pp. 307-08). According to petitioner, the student began experiencing difficulty with some of his academic subjects (Tr. pp. 297-98, 429-31). By mid October the student stopped going to school (Tr. pp. 310, 426-28). Again, petitioner was notified of the student's absences in accordance with school policy (Dist. Ex. 57 at p. 1). Petitioner called the student's guidance counselor, expressing concerns about her son's math scores (id.). On October 25, 2005, the guidance counselor and the assistant principal met with petitioner and her son to discuss the student's difficulties in class (id.). A meeting with the student's core academic teachers was scheduled for November 2, 2005 for the purpose of identifying and implementing strategies that would assist the student (Tr. pp. 545-47; Dist. Ex. 57 at p. 1). On November 2, 2005, petitioner called respondent and cancelled the scheduled team meeting due to her son being ill (Tr. pp. 149-50, 547, 646; Dist. Ex. 57 at p. 1). Respondent's instructional support team, consisting of the guidance counselor, administrators and other related staff members, met that day and recommended that the academic team meeting with petitioner be rescheduled (Tr. p. 645-46, 649-50; Dist. Ex. 57 at p. 1). Over the next several days the student's guidance counselor attempted to contact petitioner by phone, but was unable to reach her (Dist. Ex. 57 at pp. 1-2). Although the guidance counselor left messages for petitioner, petitioner did not return any of his telephone calls (Tr. p. 547; Dist. Ex. 57 at p. 2). On November 9, 2005, respondent sent petitioner a letter notifying her that the student had been absent for 20 days (Parent Ex. E at p. 4; see also Dist. Ex. 57 at pp. 2, 7; Parent Ex. E at pp. 5, 6). On the same day, respondent's instructional support team met and recommended filing a report with CPS and also a PINS petition (Dist. Ex. 57 at p. 2). The student's guidance counselor filed a report with CPS which was accepted on the grounds of educational neglect (Dist. Ex. 57 at p. 2; see also Tr. pp. 313, 549). By the end of the first quarter the student was receiving failing grades in English, social studies and math (Dist. Ex. 17).

The student was subsequently referred to a licensed psychologist (private psychologist), by petitioner's attorney, for a psychological emotional assessment in November 2005 (Tr. p. 1120; Dist. Ex. 5 at p. 2). The private psychologist's report stated that the referral was to determine the appropriateness of the treatment recommendations made when the student was

discharged from the private summer program and to determine if inconsistency in mental health treatment and extra academic support services had negatively impacted the student's emotional health and learning potential, thus leading to his refusal to attend school (Tr. pp. 1070-71; Dist. Ex. 5 at p. 2).

In the course of her assessment, the private psychologist interviewed petitioner, reviewed school records provided by petitioner (Tr. pp. 1067, 1069) and gathered additional information using the Conners' Parent Rating Scales-Revised: Long Version (CPRS-R:L); the Conners-Wells' Adolescent Self-Report Scale: Long Form (CASS, L) and the Behavior Assessment System for Children, Second Edition, Self-Report of Personality-Adolescent (BASC-2/SRP-A) (Dist. Ex. 5 at pp. 1-7, 9-15). The examiner noted that petitioner served as the informant during the interview because the student refused to attend an appointment at the psychology office and refused to speak with the examiner when she visited his home (Tr. pp. 159-61, 1069; Dist. Ex. 5 at p. 2). The private psychologist neither spoke with respondent's staff, nor reviewed respondent's records (Tr. pp. 1082, 1121).

Petitioner reported to the private psychologist that the student began the 2005-06 school year excited and eager to learn but that he became frustrated after asking his math teacher for help and reportedly being told to finish his homework assignments before the teacher would help him (Dist. Ex. 5 at p. 7). Petitioner opined that the student's frustration caused him to regress from the accomplishments he had made while attending special programs and reported that the student eventually refused to go to school (id.). Petitioner indicated that she sought help from local agencies and the police in an effort to get the student to attend school (id.).

The private psychologist indicated that she had spoken with the student's therapist at the private summer program regarding the student's program (Dist. Ex. 5 at p. 6). The private summer program's therapist indicated that the student was extremely oppositional at the beginning of the program and required restraint in a therapeutic hold (Dist. Ex. 5 at p. 7). However, the therapist noted that the student was able to change his disposition and benefit from the program (id.). According to the therapist, the student made behavioral contracts, was able to express his feelings, and was successful in the program's behavioral management plan (id.). The private psychologist reported that while attending the private summer program, the student was diagnosed with oppositional defiant disorder and attention deficit hyperactivity disorder (id.). The private psychologist recommended that the student be placed in a structured environment at both school and home and that educational and emotional support services be continued for the student (id.).

According to the private psychologist, petitioner's rating of the CPRS-R:L placed the student in the "mildly atypical" range on the oppositional scale, restless-impulsive index and DSM:IV inattentive scales, suggesting a possible significant problem in these areas (Dist. Ex. 5 at pp. 9-10). Further, petitioner's ratings placed the student in the "moderately atypical" range on the Conners' attention deficit hyperactivity disorder (ADHD) index and "markedly atypical" range on the cognitive problems inattention scale, both denoting a significant problem (id.). On the CASS: L the student's self-ratings placed him in the "average" or "slightly atypical" range (not a concern) on all scales (Dist. Ex. 5 at pp. 11-12). On the BASC-2 the student's self ratings resulted in "at risk" scores on the locus of control and depression scales and "clinically significant" on the attitude to school and attitude to teachers scales, school problems composite, inattention/hyperactivity composite, and relations with parents scale (Dist. Ex. 5 at pp. 12-14).

The private psychologist confirmed that she gave the scales to petitioner for her son to complete, that she did not observe the student completing the scale and that she could not verify that it was the student who actually completed the scale (Tr. pp. 1069, 1136, 1145-46).

The private psychologist opined that the student was experiencing psychological turmoil that seemed to have affected various aspects of his life, mainly his school attendance (Dist. Ex. 5 at p. 14). She noted that the student's scores on the BASC-2 fell in the "clinically significant" range on measures related to school (*id.*). The private psychologist concluded that when analyzing these scores with the student's school record history, it seemed likely that the student began to develop a sense of hopelessness and frustration with his school experience around the time that he was declassified from special education (*id.*). She further opined that it appeared that the student began to struggle in school when he did not receive the extra support services that he had become accustomed to in special education (*id.*). The examiner stated that the student appeared to have responded to this challenge by retreating from school, as evidenced by his poor attendance, and by becoming depressed, as evidenced by the diagnosis of MDD in November 2003 (*id.*). She noted that the student also expressed somatic complaints during this time that kept him away from school (*id.*). According to the private psychologist, it appeared that the student was able to thrive emotionally and academically when placed in a structured environment, as evidenced by his success at the private summer program (*id.*). The private psychologist suggested that the student sunk into a depressive state, exhibited through oppositional behavior, when he returned to respondent's general education program in September 2005, and faced the risk of failing courses and felt that he did not have the needed support (*id.*). She further suggested that the student's attentional problems added to his frustration once he returned to the general education setting (Dist. Ex. 5 at p. 15).

The private psychologist noted that an additional source of turmoil for the student appeared to be his relationship with his parents and/or his family constellation, as evidenced by his score on the BASC-2 adaptive scales "relations with parents" (Dist. Ex. 5 at p. 15). Additionally, she noted that the student was experiencing some attention deficit problems (*id.*).

The private psychologist concurred with the preliminary diagnosis made by the private summer program personnel (Dist. Ex. 5 at p. 15). In addition, she offered the following diagnoses: major depressive disorder, recurrent, mild; oppositional defiant disorder; and ADHD, inattentive type (*id.*). The private psychologist stated that the student needed to receive special services and be placed in a program where he could feel successful (Dist. Ex. 5 at p. 16). She opined that an ideal environment would have academic and behavioral/emotional support (*id.*). The private psychologist recommended that the student undergo a psychiatric evaluation to assess the need for psychotropic medication to address attention deficits and depression (Tr. p. 1083; Dist. Ex. 5 at p. 16). She further opined that the student required behavioral and/or cognitive behavioral therapy to address his oppositional tendencies and family counseling to address family stressors (Dist. Ex. 5 at p. 16).

By letter dated December 22, 2005, petitioner, through her attorney, requested a CSE evaluation (Tr. p. 551; Dist. Ex. 22 at p. 1). Included in the letter was a request from the student's physician for home tutoring and a copy of the private psychologist's report (*id.*)

After numerous attempts, (Tr. pp. 551-52, 557-58, 668-69, 749-54, 773, 862-67; Dist. Exs. 23, 25, 26, 27, 28, 57 at pp. 3, 4, 5) on January 18, 2006 respondent obtained petitioner's

written consent to evaluate the student (Dist. Ex. 57 at p. 5). Two referrals were made to the CSE, one by the student's guidance counselor and one by the student's mother (Tr. p. 558; Dist. Exs. 29, 30). The guidance counselor noted in her referral that the student was doing well in English, social studies and science prior to the start of attendance problems on October 20, 2005 (Dist. Ex. 29 at pp. 2, 4, 5). The guidance counselor's referral also indicated that the student's math teacher had offered the student extra help but he did not take advantage of the offer (Dist. Ex. 29 at p. 3). The referral from petitioner indicated that following the student's declassification in fifth grade he began to experience setbacks in his progress (Dist. Ex. 30 at p. 2). There was a significant difference between petitioner's description of the student's work habits and the description provided by his teachers. The student's teachers indicated that he usually or always completed his class work and homework and was usually or always attentive to task (Dist. Ex. 29 at p. 3). The student's teachers reported that he was sometimes or rarely distractible and exhibited a short attention span (id.). Three teachers indicated that the student was usually motivated to learn, while one teacher indicated that the student was sometimes motivated to learn (id.). Petitioner reported that the student rarely completed his class work or home work and that he was always distractible and usually exhibited a short attention span with regard to school (Dist. Ex. 30 at p. 3). According to petitioner, the student was not responsive to adults, which affected his ability to respond teachers and tutors (Dist. Ex. 30 at p. 5).

On February 3, 2006, respondent's school psychologist conducted a psychological evaluation of the student (Dist. Ex. 31). The school psychologist noted that excessive absences were an ongoing concern in middle school (Dist. Ex. 31 at p. 1). She further noted that petitioner had hired escorts to ensure the student arrived at school for the evaluation, due to his history of school refusal (Tr. p. 317; Dist. Ex. 31 at p. 2).

According to the school psychologist, the student was polite and rapport was relatively easily established (Dist. Ex. 31 at p. 2). She noted that the student spoke readily about his negative feelings regarding school (id.). The school psychologist described the student as cooperative with and agreeable to all tasks presented to him (id.). She indicated that the student appeared to be a hard worker and motivated to do well (id.). Administration of the Wechsler Intelligence Scale for Children -Fourth Edition (WISC-IV) yielded a full scale IQ score of 90, which fell in the average range of intellectual development (id.). The student's four composite scores ranged from average to low average as follows: verbal comprehension index 99 (47th percentile), perceptual reasoning 94 (34th percentile), processing speed 88 (21st percentile), working memory 86 (18th percentile), (Dist. Ex. 31 at pp. 2, 5). The school psychologist noted two areas of relative weakness. On the perceptual reasoning index, the student scored within the borderline range on a task that measured his abstract, categorical reasoning abilities (Dist. Ex. 31 at p. 3). In addition, the student's score on the working memory index was within the borderline range on a task that measured his short-term auditory memory utilizing attention and concentration skills (id.).

As part of the evaluation, the school psychologist requested that petitioner complete the Behavior Assessment System for Children-Parent Rating Scale (BASC-PRS) (Dist. Ex. 31 at p. 4). Petitioner's responses resulted in an elevated F-index, the measure of the respondent's tendency to be excessively negative about the child's behavior or self perceptions (Dist. Ex. 31 at pp. 4, 5). As a result, the school psychologist recommended that the scores should be interpreted with caution (Dist. Ex. 31 at p. 4). Petitioner's responses indicated that the student was within the "clinically significant" range on attention problems and anxiety scales (id.). Petitioner

indicated that the student almost always had a short attention span and had difficulty concentrating (*id.*). In addition, she noted that the student was nervous with regard to his school work and that he worried about things that cannot be changed (*id.*). Based on petitioner's responses, the student was considered to be in the "at risk" range on the depression scale (*id.*). Petitioner reported that the student almost always pouted, was easily upset and his mood almost always changes quickly (*id.*). The school psychologist noted petitioner's indication that she only noticed these behaviors with respect to the student's schoolwork (*id.*). The student's responses on the Beck Youth Inventories placed him within the average range in all areas measured, including inventories of self-concept, anxiety, depression, and disruptive behavior (Dist. Ex. 31 at pp. 4-5).

The school psychologist reported that her review of the BASC-2/SRP-A conducted by the private psychologist, and further assessment of social emotional functioning utilizing the Rotter Incomplete Sentences test revealed that the student was experiencing a significant degree of inner turmoil with regard to some aspects of school (Dist. Ex. 31 at p. 5). According to the school psychologist, the student indicated that he did not want to go to school nor did he see the importance of or any benefit from going to school (*id.*). The student also expressed concern regarding his home situation, including anger and resentment toward his mother (*id.*). The school psychologist concluded that the student was experiencing a significant degree of turmoil about his lack of freedom with regard to educational choices, which was being expressed by his refusal to attend school (*id.*). The school psychologist reported that overall the student expressed a sense of hopelessness regarding his current home and school situation (*id.*). According to the school psychologist, the student indicated that he wanted to be left alone and that it did not matter what he did because his mother had already decided to send him to a boarding school (Dist. Ex. 31 at p. 5; see also Tr. pp. 169-71, 390-91).

By letter dated February 10, 2006 petitioner was informed that, as of the end of the second marking period, the student was failing his core academic courses (Parent Ex. Y). The CSE convened on February 15, 2006 for an initial review of the student (Dist. Ex. 32 at p. 3). Just before the meeting commenced, petitioner indicated that she was waiting for her attorney, who would attend the meeting (Tr. pp. 339-40, 501-02, 517, 735, 870-73). She was advised by the CSE Chairperson that the meeting would need to be adjourned until respondent's attorney was also available to attend (Tr. pp. 517-18, 735). Petitioner left the room to make a phone call and upon returning, she indicated that she was ready to proceed (Tr. p. 474-75, 518, 735-6; see also Tr. pp. 474-75). The CSE found the student eligible for special education as a student with an other health impairment and recommended that he receive direct consultant teacher services four times daily for 41 minutes, a special class for study skills once daily for 41 minutes and individual psychological counseling once weekly for 30 minutes (Dist. Ex. 32 at p. 3). The student's IEP included the results of achievement testing conducted on February 3, 2006, which indicated the student attained standard scores of 83 on the reading composite and 87 on the mathematics composite on the Wechsler Individual Achievement Test, Second Edition (WIAT-II) (Dist. Ex. 32 at p. 5). As noted on the IEP, the student's rate of progress was below average and he was functioning below grade level in written expression and spelling (Dist. Ex. 32 at p. 4). In addition the student demonstrated poor decoding skills (Dist. Ex. 32 at p. 4). With regard to social development, the IEP indicated that the student demonstrated inconsistent social judgment and some behaviors indicating anxiety (Dist. Ex. 32 at p. 5). The IEP described the student as frustrated by school responsibilities and overwhelmed by the school experience (*id.*). It further indicated that the student had mood swings that could interfere with learning and that he could be withdrawn and depressed (*id.*). The student's social adjustment to school was

described as poor (*id.*). The student's IEP included one study skills goal, three writing goals and four social/emotional/ behavioral goals (Dist. Ex. 32 at p. 6). The minutes from the CSE meeting indicated that the student attended counseling outside of school (Tr. pp. 913, 947; Dist. Exs. 32 at p. 5; 34). Petitioner indicated that she would develop a plan with the student's counselor to get him back to school on Monday February 27, 2006 (Tr. pp. 896-97, 908; Dist. Ex. 32 at p. 6). The CSE minutes did not indicate that petitioner was dissatisfied with the recommended plan; however, petitioner stated that she would wait until she saw a copy of the final IEP to sign consent for the program (Tr. pp. 397-98, 520, 744; Dist. Exs. 32 at p. 6; 57 at p. 6).

Petitioner did not inform the CSE that she had investigated residential school placements or that she intended to place her son in a private residential school the following day (Tr. pp. 165, 171, 172-78, 475-76, 520, 730-31, 737, 875). On February 16, 2006, petitioner had her son escorted to Stone Mountain (Tr. pp. 367-69; Parent Ex. K at p. 1).

By letter to the CSE Chairperson dated February 27, 2006, petitioner indicated that she had not received a written copy of her son's IEP (Dist. Ex. 37). Petitioner stated that she was displeased to have her legal/educational advocates excluded from the CSE meeting where the IEP was developed (*id.*). Petitioner further indicated that she did not agree with the CSE proposed placement and believed that a residential placement would be more appropriate for the student (*id.*). Petitioner concluded by stating she would challenge the CSE decision and IEP (*id.*). On the same day, respondent received a written request from Stone Mountain for the student's school records from respondent's middle school (Dist. Ex. 36; see also Dist. Exs. 39; 40; 57 at p. 6).

As of March 1, 2006, the student had not returned to respondent's middle school (Dist. Ex. 6 at p. 1; Dist. Ex. 38 at p. 1). By letter dated March 6, 2006, the CSE informed petitioner of its recommendations, and enclosed a copy of the IEP (Dist. Ex. 7 at p. 1). Respondent also requested petitioner's consent for the student to receive special education services (*id.*).

On or about July 19, 2006, petitioner submitted a due process complaint notice and complaint to respondent (Pet. ¶ 7; Dist. Exs. 1, 2). In her due process complaint, petitioner alleged that respondent was negligent by failing to reclassify her son after his initial declassification (Dist. Ex. 2 at p. 3),<sup>2</sup> and petitioner requested that the impartial hearing officer find that respondent's 2005-06 IEP did not provide her son with a free appropriate public education (FAPE) (Parent Ex. 2 at p. 7). In addition, petitioner requested that the impartial hearing officer direct respondent to reimburse petitioner: 1) costs related to her son's attendance at the private summer program; 2) for attorney fees associated with her defense of PINS and CPS legal actions initiated by respondent; and 3) for the costs of the private psychological evaluation, the escort service transporting her son to Stone Mountain, and the "current tuition" and fees for

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<sup>2</sup> Petitioner did not identify a specific date or time frame by which respondent should have reevaluated the student.

her son's enrollment at Stone Mountain. Petitioner also sought continuation of her son's education at Stone Mountain at respondent's expense (id.).

In its response to petitioner's due process complaint notice, respondent claimed that petitioner never raised residential placement for consideration by its CSE (Dist. Ex. 10). Respondent noted that pursuant to parental request, the student had been on home instruction since January 3, 2006, pending the CSE outcome, and stated that petitioner had agreed to help the guidance counselor develop a plan to return her son to school on February 27, 2006 (id.). Respondent stated, however, that the student never returned to school, but rather was unilaterally placed by petitioner in an out-of-state residential setting without sufficient notice to respondent (id.).

The impartial hearing convened on September 12, 2006 and ended on December 12, 2006, after seven days of testimony. By decision dated February 8, 2007, the impartial hearing officer addressed issues related to child find, classification, truancy, and educational program appropriateness, in addition to petitioner's request for reimbursement for the private psychological evaluation as an independent educational evaluation (IEE)<sup>3</sup> and request for tuition costs (IHO Decision at pp. 2, 17, 20, 22, 24).

The impartial hearing officer found that respondent met its child find responsibilities under federal and state regulations (IHO Decision at p. 17). The impartial hearing officer concluded that the student's 2005 private summer program placement was part of a regular education program, and he denied tuition reimbursement for its cost (IHO Decision at p. 15). The impartial hearing officer also denied petitioner's request for reimbursement of an IEE on the grounds that the IEE had been prematurely conducted prior to the date of respondent's educational evaluation (IHO Decision at pp. 18, 22) and that the IEE assessment results were neither valid nor reliable (IHO Decision at p. 18). He also found that respondent's psychological evaluation was comprehensive and concluded that it provided the February 15, 2006 CSE with sufficient information to develop an appropriate IEP (IHO Decision at pp. 20-21). With respect to the issue of classification, the impartial hearing officer was persuaded by petitioner's argument that the classification of emotional disturbance, rather than other health-impairment, was "more suited" to the student (IHO Decision at p. 20). However, the impartial hearing officer did not change the student's classification.<sup>4</sup>

Notwithstanding his finding that the IEP developed at the February 15, 2006 CSE meeting was reasonably calculated to address the unique needs of the student both academically and emotionally (IHO Decision at p. 22), the impartial hearing officer reviewed the appropriateness of the student's unilateral placement at Stone Mountain. He found that Stone Mountain did not provide the student with access to non-disabled peers or provide petitioner with

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<sup>3</sup> The impartial hearing officer referred to the private psychological evaluation as the independent educational evaluation.

<sup>4</sup> As previously indicated, the parties do not appeal the impartial hearing officer's order directing respondent's CSE to convene to reconsider classifying her son as a student having an emotional disturbance.

access to the student's treatment on an ongoing basis (IHO Decision at p. 23). The impartial hearing officer denied petitioner's claim for Stone Mountain tuition reimbursement and directed respondent's CSE to reconvene to reconsider recommending that the student be classified as having an emotional disturbance, and to provide the student with age appropriate transition services (id.).

On appeal, petitioner alleges that the impartial hearing officer erred in concluding that petitioner had an opportunity to meaningfully participate at the February 15, 2006 CSE meeting. Petitioner claims that respondent violated its child find obligation. In addition, petitioner alleges that the impartial hearing officer erred by determining respondent's psychological report was sufficient to develop an appropriate IEP. Petitioner also asserts that respondent developed an IEP for the 2005-06 school year that did not offer her son a FAPE, that her son's placement at Stone Mountain was appropriate and that equitable considerations weigh in favor of reimbursement. As such, petitioner seeks an order directing respondent to reimburse her for the cost of tuition and other expenses related to her son's summer school, and Stone Mountain placements, the IEE, and attorneys' fees.<sup>5</sup>

Respondent asserts that petitioner's child find allegation is untimely and "baseless." Respondent further asserts that petitioner's request for reimbursement for an IEE was properly denied by the impartial hearing officer and petitioner's heavy reliance on the private psychological evaluation was misplaced. Respondent asserts that petitioner failed to meet her burden of proof to demonstrate that the 2005-06 IEP was not reasonably calculated to allow her son to receive educational benefits in the least restrictive environment. Respondent alleges that petitioner failed to demonstrate the appropriateness of her son's unilateral placement at Stone Mountain. Respondent claims that petitioner failed to provide sufficient notice that she was rejecting the 2005-06 IEP or that she intended to enroll her son at Stone Mountain at public expense.

The central purpose of the Individuals with Education Act (IDEA) (20 U.S.C. §§ 1400-1482)<sup>6</sup> is to ensure that students with disabilities have available to them a FAPE (20 U.S.C. § 1400[d][1][A]; Schaffer v. Weast, 126 S. Ct. 528, 531 [2005]; Bd. of Educ. v. Rowley, 458 U.S. 176, 179-81, 200-01 [1982]; Frank G. v. Bd. of Educ., 459 F.3d 356, 371 [2d Cir. 2006]). A FAPE includes special education and related services designed to meet the student's unique needs, provided in conformity with a written IEP (20 U.S.C. § 1401[9][D]; 34 C.F.R. § 300.17; see 20 U.S.C. § 1414[d]; 34 C.F.R. § 300.22).<sup>7,8</sup> The burden of persuasion in an administrative

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<sup>5</sup> The IDEA does not authorize an administrative officer to award attorneys' fees or other costs to a prevailing party, and entitlement, if any, to costs must be determined by a court of competent jurisdiction (see 20 U.S.C. § 1415[i][3][B]; Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ., 402 F.3d 332 [2d Cir. 2005]).

<sup>6</sup> On December 3, 2004, Congress amended the IDEA, however, the amendments did not take effect until July 1, 2005 (see Individuals with Disabilities Education Improvement Act of 2004 (IDEA 2004), Pub. L. No. 108-446, 118 Stat. 2647). The citations contained in this decision are to the newly amended statute, unless otherwise noted.

<sup>7</sup> The Code of Federal Regulations (34 C.F.R. Parts 300 and 301) has been amended to implement changes made to the Individuals with Disabilities Education Act, as amended by the Individuals with Disabilities Education Improvement Act of 2004. The amended regulations became effective October 13, 2006. In this case, none of the

hearing challenging an IEP is on the party seeking relief (see Schaffer, 126 S. Ct. at 532, 537 [finding it improper under the IDEA to assume that every IEP is invalid until the school district demonstrates that it is not]).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parent, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parent were appropriate, and equitable considerations support the parent's claim (Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359 [1985]; Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). 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). "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 developed a proper IEP" (Burlington, 471 U.S. at 370-71; Application of a Child with a Disability, Appeal No. 06-121; see 20 U.S.C. § 1412[a][10][C][ii]).

The first step is to determine whether the district offered to provide a FAPE to the student (see Mrs. C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]). 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, 427 F.3d at 192). While school districts are required to comply with all IDEA procedures, not all procedural errors render an IEP legally inadequate under the IDEA (Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at \*10 [S.D.N.Y. Feb. 9, 2007]). Pursuant to the IDEA, when procedural violations are alleged, an administrative officer may find that a child did not receive a FAPE only if the procedural inadequacies (a) impeded the child'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 child, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; see 34 C.F.R. § 300.513[a][2]; see also Matrejek v. Brewster Cent. Sch. Dist., 2007 WL 210093, at \*2 [S.D.N.Y. Jan. 9, 2007]). Also, an impartial hearing officer is not precluded from ordering a school district to comply with IDEA procedural requirements (20 U.S.C. § 1415[f][3][E][iii]).

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new provisions contained in the amended regulations are applicable because all relevant events occurred prior to the effective date of the new regulations. However, for convenience, and unless otherwise specified, citations herein refer to the regulations as amended because the regulations have been reorganized and renumbered.

<sup>8</sup> The term "free appropriate public education" means special education and related services that-  
(A) have been provided at public expense, under public supervision and direction, and without charge;  
(B) meet the standards of the State educational agency;  
(C) include an appropriate preschool, elementary, or secondary school education in the State involved; and  
(D) are provided in conformity with the individualized education program required under section 1414(d) of this title.  
(20 U.S.C. § 1401[9]).

Both the Supreme Court and the Second Circuit have noted that the "IDEA does not itself, articulate any specific level of educational benefits that must be provided through an IEP" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 130 [2d Cir. 1998]; see Rowley, 458 U.S. at 189), although the Supreme Court has specifically rejected the contention that the "appropriate education" mandated by the IDEA requires states to maximize the potential of students with disabilities (Rowley, 458 U.S. at 197 n.21, 189, 199; see Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). What the statute guarantees is an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [internal quotation omitted]; see Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Thus, a school district satisfies the FAPE standard "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203).

The IDEA directs that, in general, a decision by an impartial hearing officer shall be made on substantive grounds based on a determination of whether or not the child received a FAPE (20 U.S.C. § 1415[f][3][E][i]). The Second Circuit has determined that "a school district fulfills its substantive obligations under the IDEA if it provides an IEP that is 'likely to produce progress not regression'," and if the IEP affords the student with an opportunity greater than mere "trivial advancement" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130; see also Perricelli, 2007 WL 465211, at \*15), in other words, is likely to provide some "meaningful" benefit (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]). Objective factors, such as "the attainment of passing grades and regular advancement from grade to grade are generally accepted indicators of satisfactory progress" and one important factor in determining educational benefit (Viola v. Arlington Cent. Sch. Dist., 414 F. Supp. 2d 366, 382 [S.D.N.Y. 2006]; see Rowley, 458 U.S. at 203-04, 207 n.28; Walczak, 142 F.3d at 130). 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 200.6[a][1]; see Walczak, 142 F.3d at 132). The LRE is defined as "one that, to the greatest extent possible, satisfactorily educates disabled children together with children who are not disabled, in the same school the disabled child would attend if the child were not disabled" (Carlisle Area Sch. v. Scott P., 62 F.3d 520, 535 [3d Cir. 1995]).

Petitioner first asserts that the impartial hearing officer erred in concluding that petitioner had an opportunity to meaningfully participate at respondent's February 15, 2006 CSE meeting. For the reasons set forth below, I concur with the impartial hearing officer and I find that petitioner failed to demonstrate that any procedural error impeded her son's right to a FAPE, significantly impeded their opportunity to participate in the decision making process surrounding the provision of FAPE to her son, or caused a deprivation of educational benefits.

The IDEA sets forth procedural safeguards that include providing parents an opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child" (20 U.S.C. § 1415[b][1]). Federal and state regulations governing parental participation require that school districts take steps to ensure that parents are present at their child's IEP meetings or are afforded the opportunity to participate (34 C.F.R. § 300.322; 8 NYCRR 200.5[d]). In deciding whether parents were afforded an opportunity to participate in the development of their child's IEP, courts have considered the extent of the participation (Cerra, 427 F.3d at 193 [finding meaningful parental participation when the student's mother attended numerous CSE meetings and a CSE meeting transcript reflected that she "participated

actively" in the development of her daughter's IEP and was "frequently consulted for input about the CSE's proposed plan"]; Perricelli, 2007 WL 465211 at \*14-\*15 [finding no denial of a meaningful opportunity to participate when the student's mother was in "frequent contact" with teachers and school officials, "active[ly] participat[ed]" at her daughter's CSE meetings, and questioned the CSE about documents that she did not understand]; Viola, 414 F. Supp. 2d. at 378-79 [finding that the school district's failure at the time of the CSE meeting to have completed an annual report concerning the student's progress toward goals and objectives did not deprive the parents of meaningful participation where the parents attended the CSE meeting and admitted that they were informed of the information to be contained in the report]; see also Paolella v. District of Columbia, 2006 WL 3697318, at \*1 [D.C. Cir. Dec. 6, 2006] [finding no denial of a meaningful opportunity to participate when the parents were involved in the development of the IEP, had a "special education representative," and visited the school recommended by the school district]; A.E. v. Westport Bd. of Educ., 2006 WL 3455096 [D. Conn. Nov. 29, 2006]).

In the instant case, respondent's policy required its attorney to attend a CSE meeting when a student's parent was accompanied by an attorney (Tr. p. 871). With respect to the February 15, 2006 CSE meeting, the CSE Chairperson testified that she advised petitioner of respondent's policy regarding the presence of attorneys at CSE meetings (Tr. p. 872). Attempts were made to contact counsel for both parties (Tr. pp. 518, 872). Respondent's attorney was unavailable (Tr. p. 872). The CSE Chairperson, special education coordinator, guidance counselor and school psychologist testified that petitioner did not want to postpone the meeting and then indicated that she would proceed with the meeting without counsel (Tr. pp. 518, 694, 735-36, 872-73). The non-parent CSE members also testified that petitioner participated at the meeting (Tr. pp. 518, 694, 736, 873). When petitioner was asked if she participated at the CSE meeting, petitioner testified, "I sat there. I can't quote that I didn't say some words, but I know my lawyer was not present so, therefore, I would not agree with what they had to say at all" (Tr. pp. 167-68). The CSE Chairperson testified that at the conclusion of the meeting, petitioner did not object to the IEP, and did not advise the CSE that she had already enrolled her son at a private school (Tr. pp. 874-75); rather, petitioner informed the CSE that she had a plan to return her son to school and that he would start on February 27, 2006 (Tr. p. 874; Dist. Ex. 10).

Testimony offered by respondent's staff members was both consistent and persuasive (Tr. pp. 518, 694, 736, 873). The record shows that petitioner was afforded the opportunity to participate at the February 15, 2006 CSE (20 U.S.C. § 1414[d][1][B][i]; 34 C.F.R. § 300.322; 8 NYCRR 200.5[d]). Based on the foregoing, I find that petitioner was not denied the opportunity to meaningfully participate in the development of her son's IEP for the 2005-06 school year (see Perricelli, 2007 WL 465211 at \*14-\*15).

With respect to petitioner's child find claims, the IDEA places an affirmative duty on state and local educational agencies to identify, locate, and evaluate all children with disabilities residing in the state (20 U.S.C. § 1412[a][3]; 34 C.F.R. § 300.111[a][1][i]; 8 NYCRR 200.2[a][7]; New Paltz Cent. Sch. Dist. v. St. Pierre, 307 F. Supp. 2d 394, 400, n. 13 [N.D.N.Y. 2004]). The child find requirements apply to "children who are suspected of being a child with a disability . . . and in need of special education, even though they are advancing from grade to grade" (34 C.F.R. § 300.125[a][2][ii]; 8 NYCRR 200.2[a][7]). To satisfy the requirements, a board of education must have procedures in place that will enable it to find such children (Application of a Child Suspected of Having a Disability, Appeal No. 05-090; Application of a

Child with a Disability, Appeal No. 04-054; Application of a Child Suspected of Having a Disability, Appeal No. 01-082; Application of a Child with a Disability, Appeal No. 93-41).

In his decision, the impartial hearing officer concluded that the record did not support a finding that respondent violated its child find obligations (IHO Decision at p. 17). I agree. The impartial hearing officer noted testimony from the private psychologist and family physician which stated that the student's fifth and sixth grade absences were due to physical and medical problems, (IHO Decision at pp. 14-15), and further noted that, once in school, the records showed that the student progressed in a manner similar to his peers (IHO Decision at p. 15). Although there was extensive testimony regarding the student's truancy, the impartial hearing officer stated that behavioral issues and failing grades were not "prevalent" in school (IHO Decision at p. 16). He further noted that respondent provided counseling to petitioner and her son during his sixth, seventh, and eighth grades as "educationally related support services" (IHO Decision at p. 16).

Moreover, subsequent to declassification, the student's final grades were satisfactory, with the exception of one failed course (Italian) at the end of seventh grade, and the evidence demonstrates that most of his absences were medically related (Tr. pp. 401, 830; Dist. Exs. 15A, 16, 50, 51, 52, 53). The student was doing well academically at the time that he stopped attending school in eighth grade in October 20, 2005 (Dist. Ex. 57 at p. 3) and did not exhibit any behavior problems in school (Tr. pp. 537, 908). Neither party referred the student to the CSE immediately prior to the 2005-06 school year (Tr. p. 878). Based on teacher reports which indicated that the student was performing well both academically and behaviorally, respondent's guidance counselor and middle school principal testified that they did not refer the student to the CSE (Tr. pp. 544, 829-30). Given petitioner's claims for relief, the only time period relevant to a determination of whether respondent evaluated the student in a timely manner, is the time period just prior to the placement of the student in the pre-eighth grade summer 2005 program. Given the student's overall performance in seventh grade, I concur with the impartial hearing officer and do not find that respondent failed to meet its child find responsibility by not referring the student for an evaluation prior to the student's placement in the summer 2005 program. With the record not demonstrating that the student was eligible for classification just prior to the placement in the summer 2005 program, petitioner cannot prevail in her claim for tuition reimbursement for the summer 2005 program (Application of a Child with a Disability, Appeal No. 07-003).

Petitioner also claims that the impartial hearing officer erred by concluding that respondent's psychological report provided a sufficient basis upon which to develop an appropriate IEP and requests reimbursement for the private psychological evaluation. Respondent argues that petitioner's request for reimbursement for an IEE was properly denied by the impartial hearing officer and petitioner's reliance on the private psychological evaluation was misplaced.

A parent has a right to an IEE at public expense if the parent disagrees with an evaluation obtained by the school district (20 U.S.C. §§ 1415[b][1], [d][2][A]; 34 C.F.R. § 300.502[b][1]; 8 NYCRR 200.5[g][1]). An IEE is "an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question" (34 C.F.R. § 300.502[a][3][i]; see 8 NYCRR 200.1[z]). If a parent requests an IEE at public expense, the school district must, without unnecessary delay, ensure either an IEE is provided at public

expense or initiate an impartial hearing to show that its evaluation is appropriate or that the evaluation obtained by the parent does not meet the school district criteria. Here, there is no indication that petitioner disagrees with any evaluation conducted by respondent.

Petitioner obtained a private psychological evaluation report dated November 16, 2005 (Parent Ex. N). Respondent's school psychologist evaluated the student on February 3, 2006 (Parent Ex. 31). Because respondent's psychological evaluation was completed three months after petitioner's private evaluation (Tr. p. 1087), petitioner did not obtain a private evaluation as a result of a disagreement with respondent's psychological evaluation (see 20 U.S.C. §§ 1415[b][1], 1415[d][2][A]; 34 C.F.R. 300.502[b][1]; 8 NYCRR 200.5[g][1]). Moreover, subsequent to an examination of documentary evidence during the impartial hearing, the private psychologist testified that the information provided by petitioner for evaluation purposes was inconsistent with the student's grades and attendance record (Tr. pp. 1146-47, 1162-63; Dist. Ex. 16). The private psychologist's reliance upon information inconsistent with the record casts doubt on the validity of her determinations. Under the circumstances presented, I find that petitioner's request for reimbursement for an IEE was properly denied by the impartial hearing officer.

Petitioner also alleges that respondent's February 15, 2006 did not offer her son a FAPE. As a result of its February 15, 2005 meeting, the CSE recommended that the student be classified as a student having an other health-impairment and developed an IEP. With respect to petitioner's challenge to the IEP, intelligence testing revealed that the student's intellectual development was in the average range (Dist. Ex. 31 at p. 2). The testing further revealed that the student performed in the borderline range on a task measuring his short term auditory memory utilizing attention and concentration skills (Dist. Ex. 31 at p. 3). The majority of student's eighth grade academic teachers reported that, while the student was in school, he rarely exhibited frustration, distraction, or a short attention span (Dist. Ex. 29 at p. 3).

Although the school psychologist did not diagnose the student with depression as part of her February 2006 evaluation, she noted that the student expressed a sense of frustration and hopelessness with regard to his current situation both at home and school (Dist. Ex. 31 at p. 5). She further noted that the student indicated he did not want help with his current situation and that he was content with staying home from school and keeping things the way they were (*id.*). Respondent did not observe any oppositional tendencies of the student in the school setting (Tr. pp. 714, 731). However, oppositional tendencies were noted by petitioner (Tr. pp. 714, 731), and the school psychologist confirmed that the student's absences from school were consistent with oppositional behavior (Tr. pp. 731-32). The school psychologist could not confirm the private psychologist's ADHD diagnosis (Tr. p. 707). According to the student's IEP, his rate of academic progress was below average and he was functioning below grade level in written expression and spelling (Dist. Ex. 32 at p. 4). The student exhibited poor decoding skills (*id.*). The record contains little additional information regarding the student's academic abilities. With regard to social development, the student demonstrated inconsistent social judgment and some behaviors that indicated anxiety (Dist. Ex. 32 at p. 5). The IEP indicated that the student exhibited mood swings and could be withdrawn and depressed (*id.*).

Petitioner testified that at the beginning of eighth grade her son struggled with Italian and math (Tr. p. 429) and that the student was not getting the help he needed from his math teacher

(Tr. pp. 297-98, 381-82). The student's teachers for Italian and English were reportedly responsive to his requests for help (Tr. p. 298). When the student's guidance counselor was made aware of the student's difficulties, he scheduled a team meeting with petitioner and the student's academic team; however, petitioner cancelled the meeting (Tr. 545-47; Dist. Ex. 57 at p. 1). Petitioner acknowledged that the student was getting good grades, albeit with her help (Tr. pp. 429-30), and there is no evidence that petitioner expressed concerns regarding the student's ability to focus in school or that petitioner requested that respondent evaluate the student, prior to petitioner's December 2005 CSE referral.

To address the student's needs the CSE classified the student as having an other health impairment and recommended that he attend a regular eighth grade classroom where he would receive direct consultant teacher services four times daily for 41 minutes, special class (15:1) for study skills once daily for 41 minutes, and individual psychological counseling once weekly for 30 minutes (Dist. Ex. 32 at p. 3). The IEP included academic goals related to improving the student's spelling and written expression, a study skill goal related to independently seeking assistance from teachers, and social/emotional goals related to identifying anxiety related to school attendance and methods for dealing with anxiety (Dist. Ex. 32 at pp. 6, 7). The IEP also included the following testing accommodations: simplified directions, extended time (1.5) and directions read (Dist. Ex. 32 at p. 4). Petitioner's private psychologist agreed that, with the exception of a psychiatric evaluation, respondent's IEP included the services she recommended (Tr. pp. 1164-65). She further indicated that if the student attended school, the IEP services would be appropriate to address his needs (Tr. pp. 1128, 1181). Although the private psychologist expressed some concern over the type of counseling services the student would receive, she opined that if the school psychologist were a behavior therapist the services provided by the school would possibly be appropriate (Tr. pp. 1188-89). The CSE Chairperson testified that the frequency of counseling services was discussed at the CSE meeting and that counseling one time per week was deemed sufficient because petitioner was pursuing counseling for the student outside of school (Tr. p. 947; Dist. Exs. 32 at p. 6; 34). Although the IEP did not include a plan for getting the student to leave his home and to attend school, petitioner reportedly indicated that she had a plan for doing so (Tr. pp. 736-39, 874, 897, 907-08; Dist. Ex. 32 at p. 6). The student's need for additional academic support during the 2005-06 school year appeared to be minimal. Despite missing 55 days of school during the previous school year the student managed to maintain passing grades in all classes except Italian (Dist. Ex. 16). In addition, the student's eighth grade teachers reported that he was "doing fine" while in attendance (Dist. Ex. 29 at p. 4).

Petitioner did not demonstrate that her son was not offered a FAPE for the 2005-06 school year. Based upon the information before me, I find that the program proposed in the February 15, 2006 IEP, at the time it was formulated, was reasonably calculated to enable the child to receive educational benefit (Viola, 414 F. Supp. 2d at 382 [citing to J.R. v. Bd. of Educ. of the City of Rye Sch. Dist., 345 F. Supp. 2d 386, 395 n.13 [S.D.N.Y. 2004]; see Cerra, 427 F.3d at 195; see also Mrs. B., 103 F.3d at 1120; Application of a Child with a Disability, Appeal No. 06-112; Application of a Child with a Disability, Appeal No. 06-071; Application of the Bd. of Educ., Appeal No. 06-010; Application of a Child with a Disability, Appeal No. 05-021). I concur with the impartial hearing officer for the reasons set forth above, and I find that that respondent offered the student an appropriate program for the 2005-06 school year. Having determined that the challenged IEP offered the student a FAPE for the 2005-06 school year, I need not reach the issue of whether petitioner's program was appropriate, and the necessary

inquiry is at an end (Mrs. C. v. Voluntown Bd. of Educ., 226 F.3d 60 at 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).<sup>9</sup> Petitioner's request for reimbursement of tuition costs for Stone Mountain for the 2005-06 school year is denied.

**THE APPEAL IS DISMISSED.**

**Dated: Albany, New York  
April 25, 2007**

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**PAUL F. KELLY  
STATE REVIEW OFFICER**

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<sup>9</sup> However, I do note that I concur with the impartial hearing officer that petitioner's failure to satisfy notice requirements regarding her son's unilateral placement at Stone Mountain and at the private summer program at public expense would result in a denial of tuition reimbursement on equitable grounds (20 U.S.C. § 1412[a][10][C][iii]).