



The University of the State of New York

The State Education Department State Review Officer

No. 07-097

Application of the BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF LONG BEACH for review of a determination of a hearing officer relating to the provision of educational services to a child with a disability

Appearances:

Ingerman Smith, LLP, attorney for petitioner, Christopher Venator, Esq., of counsel

Law Offices of Deusedi Merced, P.C., attorney for respondents, Deusedi Merced, Esq., of counsel

DECISION

Petitioner, the Board of Education of the Long Beach City School District, appeals from the decision of an impartial hearing officer which found that it failed to offer an appropriate educational program to respondents' son and ordered it to reimburse respondents for a portion of their son's tuition costs at the Hyde School (Hyde) for the 2006-07 school year. Respondents cross-appeal from the hearing officer's determination which reduced their award for tuition reimbursement at Hyde for the 2006-07 school year. The appeal must be sustained in part. The cross-appeal must be dismissed.

When the impartial hearing commenced on May 10, 2007, respondents' son was attending and repeating tenth grade at Hyde (Tr. pp. 116, 138, 195; Dist. Ex. 4 at pp. 1, 2; Parent Ex. II at p. 1). Hyde is a private boarding school that has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (Tr. pp. 99, 113; 8 NYCRR 200.1[d], 200.7). The student has deficits in the areas of social/emotional skills and attending skills, and his grades have declined from prior years (Parent Ex. M at pp. 2, 3, 4). The student's eligibility for special education services and classification as a student with an other health-impairment (Dist. Ex. 4 at p. 1; see 8 NYCRR 200.1[zz][10]) are in dispute in this appeal.

Preliminarily, I will address a procedural issue raised by respondents in their answer to the petition. Respondents assert that the petition fails to state a claim upon which relief may be granted. The Regulations of the Commissioner of Education require the petition to clearly indicate the reasons for challenging the impartial hearing officer's decision, identifying the findings, conclusions and orders to which exceptions are taken, and to briefly indicate what relief should be granted by a State Review Officer to the petitioner (8 NYCRR 279.4[a]). A review of the petition shows that the allegations asserted by petitioner are not ambiguous and do not preclude respondents from effectively formulating a responsive answer (see Application of a Child with a Disability, Appeal No. 06-138; Application of a Child with a Disability, Appeal No. 06-097; Application of a Child with a Disability, Appeal No. 06-096). I disagree with respondents' allegation and I will address the petition on the merits (Application of the Dep't of Educ., Appeal No. 05-074).

In September 2003, during his eighth grade year, respondents' son was evaluated for accommodations pursuant to Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. §§ 701-796[l] [1998]) (section 504) (Parent Ex. C). Notwithstanding a diagnosis of an attention deficit hyperactivity disorder (ADHD), petitioner's section 504 committee found no physical or mental impairment that affected a major life function and found the student ineligible to receive section 504 services (Parent Ex. H at p. 2). Petitioner's October 2003 educational evaluation report noted that the student's relative strengths appeared to be in mathematics and spelling, and that his academic skills were within average range (Parent Ex. D at p. 3). The student was in an honors level math class when he attended petitioner's middle school (Tr. pp. 311, 387).

By letter dated January 31, 2004 to petitioner's guidance counselor, the student's mother indicated that her son read with great difficulty and that his reading comprehension was poor (Parent Ex. E). In the letter, the student's mother requested the addition of a reading class to her son's 2004-05 ninth grade class schedule (id.). During the impartial hearing, the student's mother testified that petitioner provided her son with a reading class beginning September 2004 (Tr. p. 185).

In an April 21, 2005 private neuropsychological evaluation report, the neuropsychologist noted that the student received psychiatric care and was treated with medication for attention problems (Parent Ex. G at p. 3). In addition to attending difficulties, symptoms reported to the neuropsychologist included anger management and difficulty with reading, mathematics, and the rapid processing of information (id.). Administration of the Wechsler Intelligence Scale for Children - Fourth Edition yielded a full scale IQ of 99 in the 47th percentile and average range of intellectual functioning (id.). Cognitive testing revealed average findings throughout, with no significant difference between the student's verbal and performance indices (id.). Administration of the Wechsler Individual Achievement Test - II revealed a word reading score (and percentile rank) (age equivalent) of 78 (7th) (11 years), a pseudo word decoding score of 82 (12th) (9 years, 4 months), and a numerical operations score of 89 (23rd) (12 years, 8 months), which were all accessed as significantly below the student's IQ indices (id. at pp. 3-4). The neuropsychologist concluded that there was an approximately two year delay for written mathematics and a four to five year delay for reading and phonological processing (id. at p. 5). Other areas of neuropsychological testing revealed significant attention processing and frontal mediated executive functioning deficits (id.). Neurobehavioral rating scales completed by the student's

mother indicated academic delays, problems with self-control and delinquency, and executive functioning difficulties related to emotional control, planning, self-monitoring, and regulation (*id.*). The neuropsychologist indicated that his findings were consistent with a diagnosis of ADHD, with signs of impulsivity and attention deficits and reported an additional diagnosis of generalized learning disability (*id.* at p. 5). The neuropsychologist also stated that while the student's mathematical delays might be due to attention and executive functioning impairments, indications of reading disability/dyslexia were "not accounted for" by these difficulties (*id.*).

In September 2005, the student's mother filed a police report regarding a verbal argument she had with her son (Parent Ex. R at p. 2). Petitioner offered respondents' son the opportunity to participate in an anger management program, which began in February 2006 (Parent Ex. S). While attending the eight week anger management program, the student continued to be involved in multiple disciplinary incidents (Tr. pp. 148-50; Parent Exs. R; S).

By letter dated March 7, 2006 to petitioner's coordinator of special education, the student's mother requested academic and psychological evaluations of her son, including a functional behavioral assessment (FBA) (Tr. p. 158; Parent Ex. J). The student's mother completed a social history on March 27, 2006, indicating, among other things, that her son needed assistance with study skills and organizational skills (Parent Ex. K at pp. 2, 6).

On March 21, 2006, during the student's tenth grade year, petitioner's learning disabilities specialist conducted an educational evaluation to determine if cognitive issues were preventing the student from achieving academic success (Parent Ex. H at p. 1). In his report, the evaluator noted that respondents' son passed all of his ninth grade classes, but that his grades and attitude had declined considerably (*id.*). He stated that the student's behavior continued to deteriorate in tenth grade, and noted that in addition to four in-school suspensions since December, the student had been sent to the dean's office for general disturbance, class disruption, pranks, cutting, and in one case, a "dangerous situation" (Parent Exs. H at p. 1; R). Administration of the Woodcock Johnson III Achievement Test revealed an academic skills standard score (and percentile rank) (qualitative description) of 92 (29th) (average), an academic fluency standard score of 85 (16th) (low average), and an academic applications standard score of 99 (47th) (average) (Parent Ex. H at p. 2). The evaluator compared current reading and writing test scores to those obtained in 2003 (*id.* at p. 3). He interpreted the student's 30th percentile ranking in passage comprehension on the 2003 testing as compared to his current 23rd percentile ranking on the same sub-test to mean that the student was able to read in the average range, but did not attend to the best of his ability during the current testing (*id.*). Similarly, when 2003 and 2006 reading fluency scores were compared, the evaluator attributed the discrepancy in scores to attention deficits interfering with the student's ability to succeed in reading rather than a cognitive deficit negatively affecting reading (*id.*). The evaluator stated that the student's low reading scores were not an indication of a cognitive disability, dyslexia, or a reading disability because prior testing did not also show bold limitations (*id.* at p. 4). In addition, the evaluator opined that the student's poor functioning in math was a result of poor attendance in math class, inattention, and lack of homework as reinforcement (*id.*). The evaluator concluded that behavior and other factors impeded the student's academic success and that remedial services would not be beneficial without addressing other factors affecting academic progress (*id.*).

Also in late March 2006, petitioner conducted a psychological evaluation due to parental concerns about their son's academic difficulties (Parent Ex. M at p. 1). In a psychological evaluation report dated March 30, 2006, petitioner's school psychologist reviewed the private January 2005 neuropsychological evaluation report, teacher observation reports, and interviews, and conducted the Beery Visual Test of Motor Integration (VMI) and Behavior Assessment System for Children II - Adolescent Form (BASC - II) (id.). The results of the VMI indicated that the student demonstrated some difficulty overlapping three dimensional lines, but were otherwise unremarkable (id. at p. 2). Administration of the BASC - II revealed that the student's attitude toward school was negative, and that school problems were significant for negative feelings about teachers (id.). The student's level of internalizing problems was in the at-risk and clinically significant range for the sub areas of atypicality, sense of inadequacy, social stress and depression (id.). Hyperactivity and personal adjustment were in the at-risk range, and attention problems were in the clinically significant range (id. at pp. 2-3). The school psychologist reported that respondents' son had issues with respect to anger and depression, for which he was on medication to target mood and was in therapy (id. at p. 3). In addition, she noted that respondents believed their son's prior drug use had subsided (id.). The school psychologist concluded that both internal and external factors could be playing a significant role in the student's poor academic progress during 2005-06, and opined that this was especially true given the student's ability to function well academically in earlier years despite depression, anger, and ADHD (id. at p. 4). Recommendations included: an educational evaluation, continuation of counseling, monitoring of pharmacological interventions, and a behavior modification system to target school behaviors (id.).

In April 2006, teacher evaluation sheets completed in response to the Committee on Special Education (CSE) referral noted the student's poor grades and disruptive or inappropriate behavior in the classroom, and that he had stopped attending academic intervention services (AIS) (Parent Ex. N). During the 2005-06 school year, respondents' son failed two classes (Parent Ex. P at p. 3). He participated in two "family plans" identifying responsibilities, rewards, and consequences relative to his completion of homework, which the student's mother testified were successful (Tr. pp. 134-36; Parent Ex. Q).

Petitioner convened a CSE meeting on May 2, 2006 as a result of the initial referral (Dist. Ex. 4 at p. 1; Parent Ex. T at p. 1). Two individualized education programs (IEPs) were generated: one for the period commencing May 4, 2006 and ending June 14, 2006 (Dist. Ex. 4 at p. 2) and the other for the period commencing September 6, 2006 and ending June 14, 2007 (Parent Ex. T at p. 2). The May 2, 2006 CSE recommended that respondents' son be classified as a student having an other health impairment, and that he receive immediate daily small group resource room services, with subsequent placement in three collaborative classes, one learning lab, and continued daily small group resource room services for the 2006-07 school year (Dist. Ex. 4 at pp. 1, 2; Parent Ex. T at pp. 1, 2). In addition to recommending testing accommodations, goals were recommended for social/emotional/behavioral skills and study skills (Dist. Ex. 4 at pp. 2, 5-6; Parent Ex. T at pp. 2, 5-6). During the impartial hearing, the student's mother testified that she did not disagree with the May 2, 2006 CSE recommendations (Tr. pp. 248, 250).

During summer 2006, respondents' son participated in a five-week summer program at Hyde (Parent Ex. W at p. 1). By letter dated July 15, 2006 to petitioner's director of pupil personnel services, the student's mother requested an emergency CSE meeting regarding an alternate school placement for her son for the 2006-07 school year (Parent Ex. U). In a letter dated July 27, 2006 to respondents, petitioner scheduled a CSE meeting for August 28, 2006 (Parent Ex. V).

On August 11, 2006, respondents signed a boarding enrollment contract with Hyde for the 2006-07 school year (Parent Ex. HH). By letter dated August 21, 2006 to petitioner's director of pupil personnel services, respondents advised petitioner that they had decided to place their son at Hyde for the 2006-07 school year (Parent Ex. W at p. 1). Respondents alleged that their son received detention/suspension more than 20 times between September and June, missing many hours of class time which contributed to his failing two subjects for the school year (id.). Respondents also claimed that the five-week summer program at Hyde helped change their son's attitude and behavior, and that their son's return to petitioner's high school would be detrimental to his education, progress, and future (id.).

Petitioner's CSE reconvened on August 28, 2006 (Parent Ex. X). The August 28, 2006 CSE meeting information on the IEP noted that respondents strongly opined that they did not want their son to return to petitioner's high school (id. at p. 1). However, the August 28, 2006 CSE recommended searching for an appropriate day educational setting that was highly structured and offered therapeutic services, and indicated that it would apply for the student's admission to a program at the Board of Cooperative Educational Services (BOCES) (id.). The August 28, 2006 CSE recommended that the student's September placement prior to alternate placement be at petitioner's high school in special classes with a 15:1 student to teacher ratio and individual and group counseling once a week (id. at pp. 1-2). The August 28, 2006 goals were identical to those included in the May 2, 2006 IEP (Dist. Ex. 4 at pp. 5-6; Parent Exs. T at pp. 5-6; X at pp. 5-6). At the August 28, 2006 meeting, respondents advised the CSE members that they were going to send their son to Hyde in September (Tr. p. 204; Parent Exs. X at p. 1; Y at p. 2). On August 31, 2006 respondents' son "pushed" his mother and the incident was reported to the police (Parent Ex. R at p. 11). The police report noted that the student would be departing for boarding school on September 6, 2006 (id.).

The hearing record includes a functional assessment and behavioral intervention plan dated September 2006 (Parent Ex. Z). By letter dated September 15, 2006, BOCES scheduled an October 16, 2006 screening appointment for the student's possible placement at the BOCES Career Preparatory High School (Parent Ex. AA). As per parental request, the screening appointment was rescheduled for November 20, 2006, during Thanksgiving recess (Tr. pp. 215-16; Parent Ex. AA). By letter dated November 22, 2006, BOCES advised respondents that their son had been accepted into its program (Parent Ex. CC).

Petitioner's CSE reconvened on December 15, 2006 IEP for a program review to determine the student's placement (Parent Ex. DD at p. 2). Three goals were added to those listed on the August 28, 2006 IEP (Parent Exs. X at pp. 5-6; DD at pp. 7-8). After stating that the student's needs were similar to those of students attending the BOCES program under consideration, the December 15, 2006 CSE recommended that the student be placed in the 9:1:2

self-contained class, with counseling, at BOCES (Parent Ex. DD at pp. 2-3). The meeting notes indicated that respondents rejected this recommendation, and that their son would continue his education at Hyde (id. at p. 3).

In a due process complaint notice dated January 16, 2007, respondents requested an impartial hearing (Parent Ex. EE at p. 1). Respondents alleged, among other things, that: 1) the August 28, 2006 CSE was improperly composed and that the resultant IEP was untimely (id. at pp. 1-2, 4); 2) petitioner's annual goals did not appropriately address their son's educational deficits (id. at pp. 3-4); 3) petitioner failed to conduct an FBA prior to the December 15, 2006 CSE meeting (id. at p. 2); 4) petitioner failed to include certain evaluative data on their son's IEP (id. at pp. 2-3); and 5) petitioner failed to provide their son's evaluative material to Hyde, and discuss their son's goals with Hyde representatives participating in a CSE teleconference (id. at p. 4).

By decision dated July 10, 2007, the impartial hearing officer determined that petitioner offered a provisional IEP to respondents on August 28, 2006 (IHO Decision at p. 15). The impartial hearing officer found that the lack of Hyde personnel at the August 28, 2006 CSE meeting, petitioner's failure to provide a copy of the August 28, 2006 IEP to respondents at the beginning of the school year, and petitioner's classification of respondents' son as a student with an other health-impairment did not result in a denial of a free appropriate public education (FAPE)¹ (id. at pp. 15-17, 21). However, he noted that recommendations from evaluations were not integrated into the goals in the May 2, 2006 and August 28, 2006 IEPs, that there was a paucity of information regarding the student's needs in the August 28, 2006 IEP, and that no information generated from the FBA and behavioral intervention plan (BIP) was included in the December 15, 2006 IEP (id. at pp. 22-25). The impartial hearing officer found that petitioner denied respondents' son a FAPE based on: 1) petitioner's failure to conduct an FBA for consideration by the May 2, 2006 CSE (id. at p. 23); 2) petitioner's offer of a provisional placement for the student at the district and failure to consider a residential placement for the student (id. at p. 24); 3) petitioner's failure to offer comprehensive IEPs as a result of the August 28, 2006 and December 15, 2006 CSE meetings (id. at pp. 25-26); and 4) petitioner's failure to include in the December 15, 2006 IEP positive FBA-based behavioral interventions and strategies to address the student's behaviors (id.). The impartial hearing officer concluded that respondents' unilateral placement was reasonable and awarded respondents reimbursement of tuition and related costs for their son's attendance at Hyde for the 2006-07 school year, reduced by 35 percent because of the over-inclusive nature of the placement (id. at pp. 26-28).

On appeal, petitioner asserts that: 1) petitioner offered the student an appropriate educational program; 2) the impartial hearing officer erred in finding that petitioner's failure to

¹ The term "free appropriate public education" means special education and related services that--
(A) have been provided at public expense, under public supervision and direction, and without charge;
(B) meet the standards of the State educational agency;
(C) include an appropriate preschool, elementary school, or secondary school education in the State involved;
and
(D) are provided in conformity with the individualized education program required under section 1414(d) of this title.
(20 U.S.C. § 1401[9]).

conduct an FBA in May 2006 and to incorporate positive behavioral strategies to address the student's behaviors denied the student a FAPE; 3) the impartial hearing officer erred by finding that petitioner's description of the needs and goals in the IEP were insufficient; and 4) Hyde is not an appropriate placement for respondents' son because Hyde does not provide a therapeutic program or special education services; respondents have not proved that their son requires residential treatment; and Hyde is not the least restrictive environment (LRE).

In their cross-appeal and answer respondents assert that petitioner's CSE failed to: 1) ensure the participation of Hyde personnel at the August 28, 2006 CSE program review; 2) conduct an FBA and develop an appropriate BIP; 3) recommend counseling and secure an appropriate placement for the student in a timely manner; 4) provide a copy of the August 28, 2006 IEP to respondents at the beginning of the school year; 5) appropriately classify the student; 6) develop appropriate annual goals for the student; and 7) offer an appropriate program in the LRE. Respondents also argue that the program provided by Hyde is appropriate to meet their son's educational needs and that the tuition reimbursement awarded by the impartial hearing officer may not be reduced or denied.

In its reply and answer to the cross-appeal, petitioner argues that: 1) Hyde personnel were not required participants at the August 28, 2006 CSE meeting; 2) the student was not denied a FAPE as a result of the CSE's decision not to develop an FBA and a BIP prior to September 2006; 3) the lack of mandated counseling in the student's May and August 2006 IEPs did not deny the student a FAPE; 4) the CSE developed appropriate goals for the student; 5) the delayed provision of the IEP to respondents did not affect their son's right to a FAPE; 6) petitioner diligently attempted to secure an appropriate placement for the student in a timely manner; 7) petitioner offered the student a FAPE in the LRE; 8) Hyde's program was not appropriate for the student; and 9) the impartial hearing officer's award of 65 percent tuition reimbursement cannot be sustained.

The central purpose of the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) is to ensure that students with disabilities have available to them a FAPE (20 U.S.C. § 1400[d][1][A]; see Schaffer v. Weast, 546 U.S. 49, 51 [2005]; Bd. of Educ. v. Rowley, 458 U.S. 176, 179-81, 200-01 [1982]; Frank G. v. Bd. of Educ., 459 F.3d 356, 371 [2d Cir. 2006]). A FAPE includes special education and related services designed to meet the student's unique needs, provided in conformity with a written IEP (20 U.S.C. § 1401[9][D]; 34 C.F.R. § 300.17[d];² see 20 U.S.C. § 1414[d]; 34 C.F.R. § 300.320).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a child by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359 [1985]; Florence County Sch. Dist. Four v. Carter,

² The Code of Federal Regulations (34 C.F.R. Parts 300 and 301) has been amended to implement changes made to the IDEA, as amended by the Individuals with Disabilities Education Improvement Act of 2004. The amended regulations became effective October 13, 2006. For convenience, citations in this decision refer to the regulations as amended because the regulations have been reorganized and renumbered.

510 U.S. 7 [1993]). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (Burlington, 471 U.S. at 370-71; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the child a FAPE (Burlington, 471 U.S. at 370-371; see 20 U.S.C. § 1412[a][10][C][ii]; 34 C.F.R. § 300.148).

A FAPE is offered to a child 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]). Under the IDEA, if 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]; 34 C.F.R. § 300.513[a][2]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007]).

The IDEA directs that, in general, an impartial hearing officer's decision must be made on substantive grounds based on a determination of whether the child 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 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 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 burden of persuasion in an administrative hearing challenging an IEP is on the party seeking relief (see Schaffer, 546 U.S. at 59-62 [finding it improper under the IDEA to assume that every IEP is invalid until the school district demonstrates that it is not]).

Turning to respondents' allegation that the CSE was not responsible for the choice of the recommended BOCES program, it is well settled that each CSE has the responsibility to ascertain a student's needs and to recommend the necessary services to address those needs, and may not delegate to others the task of determining the amount or nature of those services to a BOCES or anyone else (Application of the Bd. of Educ., Appeal No. 03-062; Application of a Child with a Handicapping Condition, Appeal No. 91-25; see Application of a Child with a Disability, Appeal No. 93-15; Application of a Child with a Handicapping Condition, Appeal No. 90-12). Moreover, a CSE cannot recommend a placement in a non-district facility prior to a decision by the facility to accept the student, and that any such recommendation by a CSE is by nature premature (Application of a Child with a Disability, Appeal No. 05-075; Application of a Child with a Disability, Appeal No. 04-044; Application of a Child with a Disability, Appeal No. 03-025; Application of a Child with a Disability, Appeal No. 01-078; Application of a Child with a Disability, Appeal No. 00-020; Application of a Child with a Disability, Appeal No. 98-32; Application of a Child with a Disability, Appeal No. 96-73; Application of a Child with a Disability, Appeal No. 93-38; Application of a Child with a Disability, Appeal No. 93-15). In the instant case, petitioner applied for the student's entrance into BOCES and, by letter dated November 22, 2006, the parties were notified of an available seat for the student (Parent Exs. CC; DD at p. 2). At the December 15, 2006 CSE meeting, with, among others, Hyde and BOCES representatives participating by telephone, petitioner's director of pupil services testified that the CSE discussed whether the program recommended by BOCES would offer an appropriate placement for respondents' son, and ultimately recommended the 9:1:2 self-contained class at BOCES (Tr. p. 450; Dist. Ex. DD at pp. 2-3). As such, the record does not support respondents' allegation that the CSE did not recommend the student's program.

With respect to the issue of classification, I have reviewed both the manner in which the issue was raised and the substance of respondents' claim. Federal and state law provide that a party requesting an impartial hearing may not raise issues at the impartial due process hearing that were not raised in its original due process request unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 C.F.R. §§ 300.511[d], 300.508[d][3][i]; 8 NYCRR 200.5[j][1][ii]) or the original request is amended prior to the impartial hearing per permission given by an impartial hearing officer at least five days prior to the hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 C.F.R. § 300.508[d][3][ii]; see Application of the Dep't of Educ., Appeal No. 07-059; Application of the Dep't of Educ., Appeal No. 07-046; Application of a Child with a Disability, Appeal No. 06-065; Application of a Child with a Disability, Appeal No. 06-139). In the instant case, respondents did not raise the issue of inappropriate classification in their due process complaint notice or amend their due process complaint notice accordingly (Parent Ex. EE). I also note testimony from the student's mother that respondents did not raise any objection to their son's classification as a student with an other-health impairment at the May, August or December 2006 CSE meetings (Tr. pp. 187, 223, 257-58; see Application of the Bd. of Educ., Appeal No. 06-129). Rather, the student's mother testified that she did not raise such an objection at the December 15, 2006 CSE meeting because her son's diagnosis was ADHD at the time of the meeting (Tr. p. 258). I concur with the impartial hearing officer and find that, based on the information before the December 15, 2006 CSE at the time it was devised, the student's classification as a student with an other-health impairment was reasonably calculated to enable the student to receive educational benefits and did not result in a denial of FAPE (Rowley, 458 U.S. at 206-07; see

Viola v. Arlington Cent. Sch. Dist., 414 F. Supp. 2d 366, 382 [S.D.N.Y. 2006] citing J.R. v. Bd. of Educ., 345 F. Supp. 2d 386, 395 n.13 [S.D.N.Y. 2004]; Cerra, 427 F.3d at 192; Antonaccio v. Bd. of Educ., 281 F. Supp. 2d 710, 724 [S.D.N.Y. 2003]; Application of the Bd. of Educ., Appeal No. 07-043; 8 NYCRR 200.1[zz][10]; IHO Decision at pp. 20, 21; Parent Ex. DD at p. 3). Respondents, however, are not precluded from seeking a change in their son's classification at a future CSE meeting.

Next, I turn to respondents' allegation that petitioner failed to develop an IEP for the student that contained appropriate goals. An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs, establishes annual goals related to those needs, and provides for the use of appropriate special education services (20 U.S.C. § 1414[d]; Application of a Child with a Disability, Appeal No. 04-101; Application of a Child with a Disability, Appeal No. 01-105). The IEP must include a statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum; and meet each of the student's other educational needs that result from the student's disability (see 20 U.S.C. § 1414[d][1][A][i][III]; 34 C.F.R. § 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). Each annual goal shall include the evaluative criteria, evaluation procedures and schedules to be used to measure progress toward meeting the annual goal during the period beginning with placement and ending with the next scheduled review by the committee (8 NYCRR 200.4[d][2][iii][b]; see 20 U.S.C. § 1414[d][1][A][i][III]; 34 C.F.R. § 300.320[a][3]).

In the instant case, the May 2, 2006 CSE reviewed the student's April 2006 social history, the March 2006 educational evaluation report, the March 2006 report card, the March 2006 teacher report, the March 2006 psychological evaluation report, and the January 2005 neuropsychological evaluation report, and recommended two IEPs, varying only as to program recommendations for the end of the 2005-06 school year and the 2006-07 school year, as discussed above (Tr. pp. 324-26, 336-37; Dist. Ex. 4; Parent Exs. G; H; K; L; M; T).

A review of the record shows that the May 2, 2006 CSE developed an IEP that accurately described the student's present levels of performance and individual needs. Formal testing administered in January 2005 and April 2006 addressed the student's cognitive, educational, social, emotional, and behavioral abilities (Parent Ex. T at pp. 1, 3-4). Results of cognitive testing conducted in January 2006 yielded scores in the average range (id. at p. 1). Although results of educational testing ranged between the 9th and 64th percentiles (id. at p. 3), petitioner's learning disabilities specialist noted that the student's erratic test scores were an indication that factors other than cognitive deficits were inhibiting the student's ability to succeed academically (Parent Ex. H at p. 4). He noted that the student was able to succeed academically during the previous school year; that his academics deteriorated during the 2005-06 school year; that behavioral and other factors impeded the student's academic success, and that remedial services would not be beneficial without addressing other factors impacting on academic progress (id.)

The May 2, 2006 IEP also included goals that addressed the student's organizational and study skills needs (Parent Ex. T at pp. 5-6). The IEP indicated that there had been a "steady decline in academic and behavioral functioning and emotional stability" in the two years prior to

the May 2, 2006 CSE meeting (*id.* at p. 1). In addition, the IEP indicated that the student's "classroom behavior moderately interferes with instruction" (*id.* at p. 4), but did not specify the disruptive classroom behaviors exhibited by the student or how the behaviors interfered with classroom instruction or the student's ability to learn or complete assignments. In consideration of the student's history of academic abilities and the foregoing steady decline in the student's academic and behavioral functioning (Parent Ex. H at p. 4), his history of in-school suspensions and detentions during tenth grade in 2005-06, and testimony by the guidance counselor that the student received disciplinary referrals for, among other things, class disruption, and bullying another student (Tr. p. 396), an FBA should have been conducted for consideration at the meeting (*see* 8 NYCRR 200.1[r]; 200.4[b][1][v], 200.4[d][3][i]). The goals that addressed the student's social/emotional/behavioral needs did not reflect the recommendations for a behavior modification program to target the student's distractibility, focus, talking in class, and managing daily assignments, per the psychological evaluation report written by petitioner's school psychologist (Parent Ex. M at p. 4). The goals did not sufficiently reflect a progression of appropriate behaviors and coping strategies for the student to build upon. Instead, the IEP required the student to turn his homework assignments in on time and seek out appropriate people to ask for help when he was under stress (*id.* at p. 6).

A review of the August 28, 2006 IEP shows that it included comments regarding the student's discipline record that reflected impulsive behaviors, and resulted in, among other things, in-school suspensions (Parent Ex. X at p. 1). Additional comments in the IEP noted that the student failed several subjects and that his behavior remained consistent, despite non-mandated counseling opportunities in school (*id.*). Although individual and group counseling services were added to the August 28, 2006 IEP, the August 28, 2006 goals were identical to those included in the May 2, 2006 IEP (Dist. Ex. 4 at pp. 5-6; Parent Exs. T At pp. 5-6; X at pp. 5-6), and were insufficient for the same reasons, as discussed above. Moreover, the August 28, 2006 IEP did not include counseling goals that targeted how his emotional issues played a role in his academic performance and school behavior as recommended by petitioner's school psychologist in the March 2006 psychological evaluation report (Parent Exs. M at p. 4).

The CSE reconvened on December 15, 2006 IEP for a program review to determine the student's placement (Parent Ex. DD at p. 2). Despite the student's history of receiving non-mandated and mandated counseling services that had already proved unsuccessful, the CSE recommended no new services or strategies to assist the student in targeting specific behaviors that affected his ability to learn in school. Instead, one social/emotional/behavioral goal and two math goals were added to those listed on the August 28, 2006 IEP (Parent Exs. X at pp. 5-6; DD at pp. 7-8). The social/emotional/behavioral goals on the December 15, 2006 IEP were insufficient for the reasons discussed above (Parent Ex. DD at pp. 7-8), as they did not address specific behaviors that interfered with the student's learning in school. Consistent with the August 28, 2006 IEP, the December 15, 2006 IEP included no counseling goals designed to assist the student with his problems and their affect upon his academic performance and school behavior, even though counseling was recommended as a mandated service (*id.* at p. 3). Rather than offer the student additional supports or accommodations so that he might learn, the CSE added math goals that placed the onus on the student to elicit the assistance of his teacher when having difficulty with calculation and word problems, and one social/emotional/behavioral goal

that indicated that the student would remain on task for 30 minutes during unstructured or independent work.

The hearing record shows that the student's behavior impeded his learning. Based on the above, petitioner failed to conduct a timely FBA. Moreover, the student's IEP goals did not sufficiently address the student's social/emotional/behavioral needs. Accordingly, I find that petitioner's failure to offer respondents' son appropriate goals for the 2006-07 school year and the failure to recommend appropriate positive behavioral interventions on the IEP resulted in an educational program that was not designed to confer educational benefit and amounted to a denial of a FAPE (Rowley, 458 U.S. at 206-07; see Application of the Bd. of Educ., Appeal No. 02-018). I find that respondents have prevailed with respect to the first criterion of the Burlington/Carter analysis for tuition reimbursement.

I must now consider whether respondents have met their burden of demonstrating that the placement selected for the student for the 2006-07 school year was appropriate (Burlington, 471 U.S. 359; Application of the Bd. of Educ., Appeal No. 03-062; Application of a Child with a Disability, Appeal No. 02-080). The private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the child's special education needs (see Gagliardo, 489 F.3d at 112, 115; Frank G., 459 F.3d at 363-64; Walczak, 142 F.3d at 129; Matrejek, 471 F. Supp. 2d at 419). A parent's failure to select a program approved by the state in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. 7; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-105).

Parents are not held as strictly to the standard of placement in the LRE as school districts are; however, the restrictiveness of the parental placement may be considered in determining whether the parents are entitled to an award of tuition reimbursement (Rafferty v. Cranston Pub. Sch. Comm., 315 F.3d 21 [1st Cir. 2002]; M.S. v. Bd. of Educ., 231 F.3d 96, 105 [2d Cir. 2000]). However, this must be balanced against the requirement that each child with a disability receive an appropriate education (Briggs v. Bd. of Educ., 882 F.2d 688, 692 [2d Cir. 1989]). The test for a parental placement is that it is appropriate, not that it is perfect (Warren G. v. Cumberland Co. Sch. Dist., 190 F.3d 80, 84 [3d Cir. 1999]; see also M.S., 231 F.3d at 105).

Petitioner asserts that Hyde was inappropriate placement for respondents' son because Hyde does not provide a therapeutic program or special education services, respondents have not demonstrated that their son requires residential treatment, and, as a residential school hours away from the student's home, Hyde is too restrictive. Respondents appeal that part of the impartial hearing officer's decision that found respondents placed their son at Hyde for reasons unrelated to their son's educational needs.

As discussed above, the student demonstrated difficulties in the areas of attending, anger management, impulse control, behavior, reading, mathematics, and the rapid processing of information (Parent Exs. G at pp. 3-5; H at p. 4; M at p. 4; Z at p. 2). Recommendations included, among other things: counseling; a behavior modification system; assistance in reading

and math; accommodations; and daily sheets recording the student's behavior and academic performance presented to respondents for the imposition of rewards and consequences at home (Parent Exs. H at p. 6; M at p. 4; Z at p. 2).

During the impartial hearing, petitioner's CSE Chairperson testified that, based on a review of evaluative data and on the student's request for a program with structure and support, the August 28, 2006 CSE recommended a therapeutic and structured environment in an out-of-district setting closer to home and less restrictive than a residential setting (Tr. pp. 425-27; Parent Ex. X at p. 1). Respondents' private psychiatrist, who is not an employee of Hyde but works at Hyde once a week, stated that respondents' son needed a behaviorally intense milieu 24 hours a day, explaining that if the student went to school and tried to return home at night, he would regress (Tr. p. 20). No psychological or psychiatric evaluation report in the record directly refutes this testimony. The private psychiatrist also testified that the student had comorbid diagnoses of ADHD (severe and combined type) and ODD (Tr. pp. 7-9, 14, 29), and recommended a three part program, which included the provision of a mood stabilizing medication, psychological treatment in the form of dialectical behavior therapy and cognitive behavior therapy, and social treatment (Tr. pp. 15-16). He stated that he provided the biological and psychological components for the student (Tr. pp. 15, 31) and that Hyde provided the integrated, behavioral educational plan (Tr. p. 19). With respect to the student's progress at Hyde, the private psychologist testified that the student was struggling with the biological and psychological components of the program, and that it was his understanding from Hyde staff that the student was responding to Hyde's behavioral approach by needing fewer interventions (Tr. pp. 30-32).

The Hyde director of studies testified that Hyde was not a special education school (Tr. pp. 58, 103), and that there were no psychiatrists, psychologists, social workers, guidance counselors or speech pathologists on staff (Tr. pp. 101-03). In addition, he stated that there was virtually no direct interaction between the private psychiatrist and the Hyde staff (Tr. p. 114), and that Hyde did not provide a school-based or school-wide behavior plan, using a consequence and reward system (Tr. p. 111).³

The Hyde assistant dean of students (assistant dean) testified that she was the counselor coordinator who counseled students in crisis approximately four to six times, and if they needed outside counseling, referred them to a therapist in the community, with whom she stayed in contact (Tr. pp. 281, 291-92). In this regard, the assistant dean stated that she had counseled respondents' son approximately five times, and that he had received treatment from a private psychiatrist and a private therapist (Tr. pp. 301-02).

The assistant dean also testified that Hyde was not a traditional therapeutic school in the sense that such a school would make assistance available all day to children who were in trouble or crisis (Tr. pp. 297-98). Rather, the Hyde program was structured throughout the day, and staff assigned academic, dormitory, and athletic responsibilities to their students, believing that more important than therapy was the idea of challenging their students (Tr. p. 298). With regard to

³ I note that the integrated behavioral education plan to which the private psychiatrist referred was not a school-based or school-wide behavior plan using a consequence and reward system. Rather, it was a system of behavioral interventions, referred to as two-four interventions (Tr. pp. 31-32, 282).

students who had "attitude issues or have broken" ethical standards, the assistant dean testified that the students were removed from the community to do physical work and to have time to reflect (Tr. pp. 282-83). According to the assistant dean, respondents' son has struggled with a bad attitude and she, along with other deans, had "put him out to work" (Tr. p. 303). Although the student has a lot of unresolved anger and can be "pretty shut down," the assistant dean testified that the student has made a lot of progress with respect to expressing his feelings (Tr. pp. 297-99).

Academically, respondents' son transferred from a writing enhancement program to a guidance study hall to receive more general support for all of his subjects, all as part of the Learning Enhancement and Academic Development (LEAD) program (Tr. pp. 291, 293-94). The assistant dean testified that Hyde provided the LEAD program at extra cost (Tr. pp. 294-95).

With respect to appropriateness of the student's placement at Hyde, "[u]ltimately, the issue turns on" whether that placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see also Gagliardo, 489 F.3d at 112). While evidence of progress at a private school is relevant, it does not itself establish that a private placement is appropriate to meet a student's unique special education needs (Gagliardo, 489 F.3d at 115). In addition, parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F. 3d at 364-65). In the instant case, there is no dispute that the student required counseling services. As discussed above, the record shows that Hyde provided the student with a structured program (Tr. p. 298), but that the counseling and resource room type services recommended in the student's evaluations were privately provided (Tr. pp. 8, 26, 301-02; see Tr. pp. 294-95). In this regard, I note that the student began receiving psychiatric counseling in February 2007, five months after his admission to Hyde, and, according to the private psychiatrist, missed approximately one out of four sessions because he was angry at a challenge provided by the private psychiatrist or "out of program and . . .out to work" (Tr. pp. 16-17).

Supplementation of the regular education services at Hyde by private therapy does not support a finding here that the services at Hyde were appropriate to provide or meet the student's emotional and therapeutic needs (see Application of the Dep't of Educ., Appeal No. 06-114; Application of a Child with a Disability, Appeal No. 06-094). Nor is the evidence of the student's progress with respect to expressing his feelings adequate to alter the conclusion that his placement at Hyde was not appropriate because the school did not sufficiently provide the special education services required to meet his emotional needs (see Application of a Child with a Disability, Appeal No. 03-088; see Werner v. Clarkstown Cent. Sch. Dist., 363 F. Supp. 2d 656, 660 [S.D.N.Y. 2005]). As such, the hearing record does not support reimbursement for the regular education services provided at Hyde (Application of the Dep't of Educ., Appeal No. 06-114; Application of a Child with a Disability, Appeal No. 05-008). Based upon my review of the record in its entirety, I find that the evidence does not demonstrate that Hyde was appropriate to meet the student's needs for the 2006-07 school year (Werner, 363 F. Supp. 2d at 660; see Gagliardo, 489 F.3d at 112; Frank G., 459 F.3d at 364; Application of the Dep't of Educ., Appeal No. 06-037; Application of a Child with a Disability, Appeal No. 03-088). Because respondents have not met their burden of proving that Hyde was an appropriate placement for the 2006-07

school year, I need not address the issue of whether equitable considerations support respondents' claim.

In light of my determination, I need not discuss the parties' other contentions.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the hearing officer's decision is hereby annulled to the extent that it awarded respondents reimbursement for their son's attendance at the Hyde School during the 2006-07 school year.

Dated: Albany, New York
October 19, 2007

PAUL F. KELLY
STATE REVIEW OFFICER