



The University of the State of New York

The State Education Department State Review Officer

No. 08-015

Application of a STUDENT 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 [REDACTED] District

Appearances:

O'Connell and Aronowitz, attorney for petitioner, Jeffrey J. Sherrin, Esq., of counsel

Ferrara, Fiorenza, Larrison, Barrett & Reitz, PC, attorney for respondent, Susan T. Johns, Esq., of counsel

DECISION

Petitioner, the parent, appeals from a decision of an impartial hearing officer which determined that the educational program and services recommended by respondent district's Committee on Special Education (CSE) for her son for the 2007-08 school year was appropriate. The appeal must be sustained in part.

When the impartial hearing convened in September 2007, the student was attending the Judge Rotenberg Educational Center (JRC) in Massachusetts (Tr. p. 51). JRC is a private school that has been approved by the Commissioner of Education as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7). The student's eligibility for special education programs and services as a student with an emotional disturbance is not in dispute in this appeal (Dist. Exs. 11 at p. 2; 20 at p. 2; see 34 C.F.R. § 300.8[c][4]; 8 NYCRR 200.1[zz][4]).

The student attended the district's elementary school from kindergarten through second grade (Tr. pp. 427-32; Dist. Ex. 3 at p. 8). The parent reports that the student demonstrated intense frustration, secondary to a fine motor deficit (Tr. pp. 427-28). The parent withdrew the student from public school and enrolled him in a private parochial school where he was retained in second grade (Tr. p. 432; Dist. Exs. 3 at p. 8; 6 at p. 1). Although the student's initial

experience in the parochial school was reportedly positive, over time his performance declined and he refused to do schoolwork or homework (Dist. Exs. 3 at pp. 8, 15; 6 at pp. 1-2). The student demonstrated difficulties in math and writing (Dist. Exs. 3 at pp. 8-9; 6 at pp. 1-2). The student became increasingly oppositional, and by the end of sixth grade, he spent most of his class time in the principal's office (Dist. Exs. 3 at p. 15; 6 at p. 1). The parent obtained a private psychoeducational evaluation of the student that was conducted during March and April 2002 (Dist. Ex. 3 at p. 14). The student transferred to the district's middle school for the last five weeks of sixth grade (Dist. Exs. 3 at p. 9; 6 at p. 2). The student's behavior and academic performance in the district's school were described as being similar to his performance at the parochial school (Dist. Ex. 3 at p. 9).

In addition to obtaining the private psychoeducational evaluation, the parent referred the student to the district's CSE in May 2002 due to continuing academic and behavioral concerns (Dist. Exs. 3 at pp. 8-9; 52 at p. 3). Intelligence testing conducted by the district and by the parent's private evaluator yielded full scale IQ scores in the low average to average range, with both evaluators noting that the student demonstrated verbal skills that were stronger than his nonverbal skills (Dist. Ex. 3 at pp. 9, 17-18). In addition, both evaluators reported that the student's reading skills were average or above and that the student had difficulty with math reasoning and written expression (id. at pp. 10, 12, 52-53). Both evaluators also identified the student as exhibiting social-emotional difficulties (id. at pp. 12, 53).

On June 21, 2002, the CSE met and determined that the student was eligible for special education and related services as a student with a learning disability due to his deficits in math reasoning and written expression (Dist. Ex. 3 at p. 1). For the 2002-03 school year, the June 2002 CSE recommended that the student attend a seventh grade general education class at the district's middle school, receive daily resource room services and a weekly occupational therapy (OT) consult (id.). In September 2002, the parent "insisted" that the district transfer the student to a Board of Cooperative Educational Services (BOCES) class that included a behavior management program (Dist. Exs. 6 at p. 2; 52 at p. 3). On September 23, 2002, the district transferred the student to a BOCES class (Dist. Exs. 4 at p. 11; 57 at p. 28). The student demonstrated academic, behavioral and social progress during the 2002-03 school year (Dist. Exs. 4 at pp. 11-14, 19-23; 6 at p. 2; 57 at pp. 12-15, 19-24).

The CSE convened on May 1, 2003 for the student's annual review and recommended that the student continue in the BOCES class for the 2003-04 school year (Dist. Ex. 4 at p. 2). On January 26, 2004, the CSE met at the parent's request to determine if the student required an alternate placement (Dist. Ex. 52). Meeting minutes of the January 2004 CSE indicated that, during the 2003-04 school year, the student had received suspensions for threatening a teacher, sexually harassing a staff member and harassing another student (Dist. Exs. 52 at pp. 1-2; 57 at pp. 29, 31). In addition, the January 2004 CSE minutes indicated that, over the preceding holiday season, the student had presented as a danger to himself and others at home and had been incarcerated (Dist. Exs. 6 at p. 2; 52 at p. 3). As requested by the parent, the January 2004 CSE recommended that the student be placed in a second BOCES 8:1+1 special class and that he receive both individual and group counseling one time per week (Dist. Exs. 52 at p. 3; 57 at p. 2). In addition, the January 2004 CSE recommended a 1:1 teaching assistant for the student (id.). The parent's attorney, who attended the January 2004 CSE meeting, suggested that the student

required a residential program to address his emotional and academic needs (Dist. Ex. 52 at p. 3). The January 2004 CSE recommended that the student undergo a psychiatric/psychological evaluation (id.).

In March 2004, the student was evaluated by a psychiatrist as recommended by the CSE (Dist. Ex. 6). The psychiatrist reported that the student's behavior within the home and in school was becoming dangerous (id. at p. 2). The evaluation report notes that at home the student harassed and threatened his siblings and engaged in property destruction (id. at pp. 2-3). In school, the student's behavior had reportedly become unsafe and essentially unmanageable (id. at p. 4). The psychiatrist opined that the student should be placed in a highly structured residential facility where his education and emotional issues could be addressed and further recommended that a therapeutic component be included if possible (id. at pp. 11-12).

The student demonstrated disruptive and threatening behavior at the second BOCES class and refused to do academic work (Dist. Exs. 6 at pp. 4, 9-10; 53 at pp. 1-2). He was suspended multiple times (Dist. Ex. 6 at p. 4). In April 2004, the parent informed the district that she had unilaterally withdrawn the student from BOCES and demanded that the district seek a residential placement for the student (Dist. Ex. 5). The district's assistant superintendent offered the parent several options for homebound instruction (id. at p. 1).

The CSE reconvened on April 21, 2004 and determined that the student's classification should be changed to emotional disturbance (Dist. Ex. 53 at p. 2). In addition, the April 2004 CSE recommended that the student be placed in a residential setting (id. at p. 3). The student received homebound instruction for the remainder of the 2003-04 school year (Tr. p. 113) while the district attempted to locate an appropriate residential placement for the student. The district sent referral packets to 49 schools, including both in-state and out-of-state residential facilities (Dist. Ex. 54 at p. 1). On June 2, 2004, the CSE met and recommended that the student attend JRC for the 2004-05 school year (Dist. Ex. 7 at p. 2). The student entered JRC on July 16, 2004 (Dist. Ex. 11 at p. 10).

At JRC, the student reportedly demonstrated academic and behavioral progress during the 2004-05 school year (Dist. Ex. 55; see Dist. Exs. 24; 25; 26; 27). However, progress notes also indicate that the student had difficulty in math and, at times, his inappropriate behavior interfered with his academic performance (Dist. Exs. 24 at p. 4; 25 at p. 3). The student's behavior was described as alternating between positive conduct and "flurries" of inappropriate conduct (Dist. Exs. 24 at p. 4; 25 at p. 3; 26 at p. 2; 27 at p. 3; Parent Ex. 3 at pp. 16-20). At times during the 2004-05 school year, the student exhibited dangerous and disruptive behavior that resulted in temporarily transferring the student to an alternative classroom and restraint of the student during transport (Dist. Ex. 25 at pp. 3, 9).

The CSE met on May 23, 2005 for the student's annual review and recommended that the student remain at JRC for the 2005-06 school year (Dist. Exs. 8 at p. 2; 55 at p. 2). Progress reports from JRC indicate that the student demonstrated academic progress during the 2005-06 school year (Dist. Exs. 27 at p. 1; 29; 34 at p. 15). However, the progress reports also indicate that the student demonstrated dangerous behaviors which resulted in transferring him to a more restrictive residence and a short-term transfer to a residential educational program (Dist. Exs. 28;

29 at p. 2; 30; 31; 32; 34 at p. 2; Parent Ex. 3 at pp. 10-16). While the student's progress reports noted that he met most of his weekly median goals for behavior from March through June 2006, the total frequency count across all behavior categories increased (Dist. Ex. 34 at pp. 2, 14).

On June 7, 2006, the student underwent a psychological evaluation as part of the student's triennial evaluation (Dist. Ex. 11 at p. 10). The school psychologist noted that the student never allowed rapport to be established with the examiner, that the student did not take the test seriously and did not appear to give his best effort (*id.* at p. 11). Administration of the Wechsler Adult Intelligence Scale - Third Edition (WAIS-III) yielded a verbal IQ score of 66 and a performance IQ score of 73 (*id.*). The psychologist stated that, due to the student's lack of commitment during testing, a full scale IQ score was not considered a reliable measure of the student's intellectual functioning and would not be reported (*id.*). The psychologist noted that the student demonstrated relative strengths in expressive vocabulary and general fund of knowledge and showed relative weakness in visual-spatial relationship skills and visual attention to details (*id.* at p. 13). Achievement testing administered on June 13, 2006 revealed that the student's academic skills were primarily in the average range, with the exception of math computation and written expression, which were below average (Dist. Exs. 11 at p. 15; 15 at p. 18).

The CSE met on June 20, 2006 for the student's triennial reevaluation and annual review (Dist. Ex. 11 at p. 2). According to the June 2006 CSE meeting minutes, JRC staff reported that the student's behavior fluctuated between having "wonderful" days and having days in which he exhibited approximately 6000 behavioral problems that could consist of aggression and major destruction (Dist. Ex. 56 at p. 1). The student's teacher described him as a bright student who was easily frustrated but capable of completing more work than he did (*id.*). JRC staff indicated that the student seemed to get along well with others and was usually well mannered in the classroom (*id.* at p. 2). According to the June 2006 CSE minutes, the student was on the Regents diploma track; however, he had not yet mastered the entire ninth grade curriculum (*id.*). The student participated in the June 2006 CSE meeting by telephone, and in response to questioning, he indicated that he did not feel that JRC was appropriate for him, had concerns about the behavioral part and "doesn't like it" (*id.*). The June 2006 CSE minutes stated that the CSE chair had sent the student's records to in-state residential facilities to determine, for purposes of least restrictive environment (LRE), whether a facility in New York State could meet the student's needs (*id.* at p. 3). The June 2006 CSE recommended that the student continue to be classified as having an emotional disturbance (Dist. Ex. 11 at p. 2). No in-state facility accepted the student, and therefore, the June 2006 CSE recommended that the student remain at JRC for the 2006-07 school year (Dist. Ex. 56 at p. 3).

The student required several emergency restraints between August and October 2006 (Dist. Exs. 35; 37; 40; 41; 42; 44). During that period, the student was suspended on two occasions during which JRC provided a short-term education program in the student's residence (Dist. Exs. 38; 39). The student's JRC progress report, dated November 16, 2006 and covering the period between June and September 2006, indicated that he made minimal academic progress and that his noncompliant, destructive, aggressive and inappropriate verbal behaviors seriously impeded his academic progress (Dist. Ex. 43 at p. 3). The November 2006 progress report indicated that, during the month of August 2006, the student viciously attacked two students,

destroyed several cameras, pulled a fire alarm and destroyed a classroom computer (Dist. Ex. 43 at p. 3; see Parent Exs. 3 at pp. 8-9; 4).

A quarterly progress report from JRC covering the period between September and December 2006 described the student as exhibiting a "vast amount" of inappropriate behaviors that impeded his academic success (Dist. Ex. 15 at p. 39). In November 2006, the student attempted to assault another student with a razor blade while being transported (Dist. Ex. 14 at p. 29; Parent Ex. 3 at p. 6). In December 2006, the student was restrained for aggressive and destructive behavior and was again placed in a short-term residential educational program (Dist. Exs. 14 at pp. 30-32; 46). However, the JRC progress report for this time period noted that, when focused and motivated, the student "does wonderfully with his academic progress" (Dist. Ex. 15 at p. 39). The progress report indicated that the student's behavioral treatment plan continued to be comprised of positive-only programming and that the interventions used provided the student with motivation to remain free of inappropriate behaviors for three to five weeks at a time (id.). According to the progress report, the student was able to meet his social/emotional individualized education program (IEP) objectives with the exception of inappropriate verbal behaviors (id.). However, the progress report also noted that the median weekly behaviors reported did not reflect the fact that the student had engaged in a "flurry" of behaviors throughout the quarter that did not indicate sustained treatment progress (id.). Although the student's "behaviors might not occur consistently enough to be indicated in a weekly median measure," the progress report noted that the severity of his behavior was "immense" (id. at p. 40).

By letter dated December 11, 2006, JRC's director of education requested a CSE meeting within 30 days to discuss the student's education program and a treatment plan to introduce the use of aversive behavioral interventions, including the use of a graduated electronic decelerator (GED), because of the student's lack of significant progress in decelerating the frequency of his inappropriate and severe behaviors (Dist. Ex. 47 at pp. 1, 3-9). The rationale noted by JRC was that during the student's two-plus years at JRC, more than 75 program and contract changes had been made in an attempt to significantly decelerate the frequency of the student's behaviors (id.). JRC staff observed a cyclical pattern of the student's major inappropriate behaviors, noting that the student had been able to go for up to 55 days without exhibiting major inappropriate behaviors; however, long periods of refraining from major inappropriate behaviors were always followed by severe episodes lasting on average 10 to 12 days (id.). The student's clinician at JRC opined that the student had failed to maintain progress for an extended period of time with a positive only program (id.). JRC's director of education opined that without the use of aversive behavioral interventions, the student would not be able to meet the goals and objectives contained in his IEP (id. at p. 1).

In a letter dated December 22, 2006, the district sought additional information regarding JRC's request (see Dist. Ex. 12 at p. 1). In response, JRC provided a narrative detailing the positive behavioral interventions and non-aversive behavioral intervention prevention strategies that were tried previously with the student, a list of program changes that had been made since the student entered JRC in July 2004 and behavior charts indicating that the student had failed to maintain progress for an extended period of time with positive-only behavioral interventions (id. at pp. 4, 10-23).

By letter dated January 23, 2007, the district notified the parent that it had received notice from the State Education Department and was sending referral packets to "all appropriate in-state private schools" in order to afford the student an opportunity to return to New York State to complete his special education program (Dist. Ex. 13). The district sent referral packets to approximately 29 in-state residential treatment facilities (Tr. p. 68).

In February 2007, the student's clinician at JRC conducted a functional behavioral assessment (FBA) of the student (Dist. Ex. 14 at p. 10). Based on her analysis, the student's clinician hypothesized that the student engaged in disruptive behaviors to escape educational demands and engaged in dangerous behaviors to gain peer attention (*id.* at p. 17). The clinician noted that, from a stimulus control perspective, situations that had brought on major problem behaviors had occurred without warning, specifically on the school bus (*id.*). Regardless of the type of behavior, the clinician consistently noted that the student was least likely to engage in inappropriate behavior when engaged in rewarding activities, when contracts with motivating rewards were created, when engaged in activities with other students who were doing well and while off campus on a field trip (*id.* at pp. 13-16).

A quarterly progress report from JRC for the period between December 2006 and March 2007 indicated that the student had made sufficient academic and behavioral progress, which was indicated by a recent 58 days with the absence of major behaviors (Dist. Exs. 14 at p. 5; 15 at p. 27). The student's clinician opined that, based on the significant and inevitable cyclical pattern of the student's behaviors, the student continued to require a structured, behaviorally focused setting in order to continue to make excellent academic and social progress (Dist. Ex. 15 at p. 28). The student's report card for the 2006-07 school year indicated that the student showed some progress from March through June 2007, and he was more compliant during his tutoring sessions, which in turn, "increased his academic production" (Dist. Ex. 50 at p. 1).

In March 2007, the student participated in a neuropsychiatric consultation conducted in order to "access [sic] his appropriateness for GED treatment" and the appropriateness of using medication trials instead of the GED (Dist. Ex. 14 at p. 1). The psychiatrist opined that the student's treatment course suggested that, as a practical matter, he was not going to be able to respond satisfactorily to behavior modification without the use of the GED (*id.*). The March 2007 consultation report noted that the student was not taking psychiatric medication and that previous medication trials had not been successful (*id.*). The psychiatrist concluded that a trial of GED as part of a highly structured behavior modification program was an appropriate approach to use with the student and had been shown to be very effective for the kind of behaviors the student exhibited (*id.* at p. 2).

By letter dated April 19, 2007, JRC reiterated its December 2006 request for a CSE meeting to discuss aversive behavioral interventions for the student (Dist. Ex. 15 at p. 1).

In response to a receipt of a district referral packet, Randolph Academy (RA) contacted the district by telephone, indicating that RA might be an appropriate placement for the student and requesting permission to conduct an intake interview with the student and the parent (Tr. pp. 68-69). The parent indicated that she could not transport the student to RA for an interview, and

the district arranged for RA's admissions director to travel to JRC and interview the student (Tr. pp. 69-70, 149-51). The district also arranged for the parent to be transported to RA to tour the facility and meet with the staff (Tr. pp. 69, 151).

In a letter dated June 13, 2007, the RA admissions director informed the district that he had interviewed the student and met with JRC's assistant director of clinical services at JRC on June 1, 2007 (Dist. Exs. 17 at pp. 1, 2; 21 at pp. 2-3; 33 at p. 2). The director developed an admissions report in which he concluded that the student was appropriate for admission to RA (Dist. Ex. 17 at p. 3). By letter to the district dated June 14, 2007, the admissions director indicated that the student was accepted for placement at RA and would reside on the grounds at the Randolph Children's Home (RCH) (Dist. Ex. 18 at p. 1).

On June 19, 2007, JRC submitted to the district's CSE a proposed IEP for the student for the 2007-08 school year (Dist. Ex. 19). The proposed IEP included a behavior intervention plan (BIP) which listed the student's behaviors by category that interfered with learning, behavior changes that were expected, strategies to change behavior, consequences for inappropriate behavior and supports to change behavior (id. at p. 13). The student's proposed transition plan indicated that, behavior permitting, he would participate in an in-school job (id. at p. 15).

The CSE convened on June 21, 2007 for the student's annual review (Dist. Ex. 20 at p. 2). The student's teachers from JRC indicated that the student was bright and capable of making more progress than he had previously (Dist. Ex. 21 at p. 1). JRC staff reported that the student refused to complete assignments, did not put much effort into the assignments he completed and was caught cheating on one assignment (id.). JRC staff reported that the student received content area instruction in a 1:1 setting due to his distractibility and that in group settings, the student was disruptive and distracting to peers (id. at p. 2). The student's clinician reported that the student did well when he had a behavior contract (id.). She noted that the student could go for long periods of time without behavior problems, but then he would have a "flurry" of bad behavior from which it took three to four days for him to recover (id.). Staff from RA participated in the June 2007 CSE meeting and responded to questions regarding RA's ability to deal with severe behavior problems, restraint procedures, medication policies, as well as questions regarding the program's interaction with police agencies and mental health facilities (id. at pp. 3-4).

The June 2007 CSE discussed the request by the parent and JRC for aversive behavioral interventions (Dist. Ex. 21 at p. 4). The parent opined that aversive therapy would accelerate the student's progress and stated that even the student had requested it (id.). The parent noted that the student was more scared of being incarcerated or taken to a psychiatric ward than he was of aversive behavioral interventions (id.). The district's psychologist was not in favor of the use of aversive behavioral interventions (id.). The CSE recommended that the student be placed in the residential program at RA beginning on June 26, 2007 and continuing through the 2007-08 school year (Dist. Exs. 20 at p. 2; 21 at p. 4).

In a due process complaint notice dated June 25, 2007, the parent requested an impartial hearing and asserted that transferring the student to RA, a "new and drastically different" residential placement, was not an appropriate placement, that the student would likely regress at

RA, and that the district inappropriately decided against placing aversive behavioral interventions, such as skin shock and mechanical restraints, on the student's IEP (Dist. Ex. 1). The parent alleged that the aversive behavioral intervention treatment was "warranted and necessary" in order for the student to receive a free appropriate public education (FAPE)¹ (*id.* at p. 2). As relief, the parent requested that the impartial hearing officer determine, among other things, that the student should remain in JRC, that JRC is the LRE for the student, that RA is not appropriate for the student and that the student's IEP be amended to add aversive behavioral interventions for the student (*id.* at p. 3).

The impartial hearing was convened on September 10, 2007 and concluded on October 30, 2007 after five days of testimony. In a decision dated January 30, 2008, the impartial hearing officer denied the parent's requested relief (IHO Decision at p. 10). The impartial hearing officer placed the burden of persuasion on the district (*id.* at pp. 4, 7). With regard to the parent's argument that the June 2007 IEP was likely to cause the student to regress, the impartial hearing officer determined that the parent offered no proof to substantiate her claim (*id.* at p. 7). The impartial hearing officer found that the June 2007 IEP was "never a point of contention," although the decision to transfer the student to RA and the request to implement aversive behavioral interventions was in dispute (*id.* at p. 8). According to the impartial hearing officer, "no proof was offered to convince anyone that [RA] could not provide a meaningful program which would result in as much or more progress than JRC was producing" (*id.*). Among other things, the impartial hearing officer determined that the parent did not meet her burden to prove that JRC was an appropriate placement for the student (*id.* at pp. 9-10). The impartial hearing officer noted, among other things, that the admissions director at RA conducted a comprehensive assessment of the student's records, met with the parent and student, and was certain that RA could provide an appropriate program for the student (*id.* at p. 10). The impartial hearing officer concluded that RA was appropriate for the student and that aversive behavioral interventions for the student was unwarranted (*id.*).

The parent appeals, arguing that the district failed to obtain meaningful knowledge about how RA's program would appropriately meet the student's individualized needs. The parent alleges that she was not afforded an adequate opportunity to participate in the June 2007 CSE and that JRC was never truly considered as a placement for the 2007-08 school year. According to the parent, the CSE did not provide a valid reason in writing for transferring the student from JRC to RA, and therefore, failed to offer the student a FAPE. The parent argues that the June 2007 IEP proposes to transfer the student to a "new and experimental" environment at RA, in which the student would regress to very violent behaviors. The parent asserts that there are almost no students at RA in his age group. Contending that the June 2007 CSE was required to review, among other things, current evaluative data, observations from teachers and other providers and recent information regarding the student's academic, developmental and functional

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]).

needs, the parent argues that the June 2007 CSE failed to give meaningful consideration to the opinions of the student's teachers and service providers at JRC.

According to the parent, the June 2007 CSE did not discuss how RA's "peer confrontation" culture and lack of rewards would meet the needs of the student. With regard to the June 2007 IEP, the parent argues that it made no mention of the student's fine motor deficit or improved functional capabilities with computer learning programs, which rendered the IEP impermissibly vague thus violating the student's right to a FAPE. The parent asserts that the student was not properly evaluated prior to changing from JRC's "behavioral approach" to RA's "normative peer culture approach," and that JRC is the least restrictive appropriate environment for the student. More specifically, the parent asserts that the CSE lacked recent psychological or psychiatric evaluations describing the student's social emotional functioning at JRC, and that the CSE failed to consider the potential effect of the proposed change in placement on the student's individualized needs. The parent also alleges that the decision of the impartial hearing officer denied the student a FAPE, noting, among other things, that the decision was unsupported by and did not cite to the hearing record. The parent contends that the hearing officer improperly shifted the burden of proof to the parent and incorrectly determined that RA was an appropriate placement for the student. The parent requests that the decision of the impartial hearing officer be annulled and that the district be directed to implement the student's last agreed upon IEP.

In its answer, the district denies the parent's allegations that the student was not properly evaluated, and asserts that the student was not making meaningful educational progress at JRC. The district also contends that testimony by JRC staff that the student would regress at RA was speculative and that JRC staff has a direct pecuniary interest in having the student remain at JRC. According to the district, JRC's assertion that the student requires aversive behavioral interventions demonstrates the student has not been successful at JRC. The district alleges that several matters that the parent identified in the petition for review, including failure to provide written reasons for changing the student's placement, failure to include the student at the June 2007 CSE meeting and failure to conduct a triennial evaluation of the student, were not raised in the parent's due process complaint notice. Among other things, the district also argues that the burden of proof remained on the parent since the statutory change shifting the burden of proof to school districts had not yet become effective.

In her reply, the parent asserts that the district's defense that the parent is limited to the issues raised in the due process complaint notice was waived because the district did not object to the sufficiency of the due process complaint notice. The parent also responds that she alleged that the student was denied a FAPE on procedural and substantive grounds in the due process complaint notice.

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). While school districts are required to comply with all IDEA procedures, not all procedural errors render an IEP legally inadequate under the IDEA (Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if a procedural violation is alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007]).

The IDEA directs that, in general, an impartial hearing officer's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (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).

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

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 first to the parties' allegations regarding the burden of proof, I note that the New York State Legislature amended the Education Law to place the burden of proof upon the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement would continue to have the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c], as amended by Ch. 583 of the Laws of 2007). The amended statute took effect for impartial hearings commenced on or after October 14, 2007 (see Application of the Bd. of Educ., Appeal No. 08-016).

In this case, the impartial hearing officer's decision placed the burden of persuasion on the district to prove that RA was appropriate for the student and thereafter, for reasons that are not apparent from his decision, made a determination that the parent failed to offer proof that the June 2007 IEP was inappropriate and that the parent failed to establish that JRC was an appropriate placement for the student (IHO Decision at pp. 4, 7-10). However, the hearing record is clear that the impartial hearing commenced well before October 14, 2007, and therefore, the provision of Education Law placing the burden of production and persuasion on the district does not apply to this case (Tr. p. 1; Dist. Ex. 1 at p. 1; see Educ. Law § 4404[1][c]; Schaffer, 546 U.S. at 59-62). Accordingly, the parent had the burden to establish that the identification, evaluation or educational placement of the student recommended by the June 2007 CSE was inappropriate and that the student was not provided a FAPE (see 34 C.F.R. § 300.503[a][1]-[2]; 8 NYCRR 200.5[i][1]).

With regard to the parent's contentions that a FAPE was not offered to the student because she was not afforded an adequate opportunity to participate in the June 2007 CSE meeting and that the student did not attend the meeting, the party requesting an impartial hearing may not raise issues at the due process hearing that were not raised in its original due process request unless the parties agree to amend the request prior to the impartial hearing (see 20 U.S.C. § 1415[c][2][E][I], [f][3][B]; 34 C.F.R. §§ 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[i][7][i][a], [j][1][ii]; Application of a Child with a Disability, Appeal No. 07-122; Application of the Bd. of Educ., Appeal No. 07-114; Application of a Child with a Disability, Appeal No. 07-072; Application of a Child with a Disability, Appeal No. 07-051), or the original complaint is amended prior to the impartial hearing per permission given by an impartial hearing officer at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 C.F.R. § 300.508[d][3][ii]; 8 NYCRR 200.5[i][7][i][b]; see Application of a Child with a Disability, Appeal No. 07-109; Application of the Dep't of Educ., Appeal No. 07-046; Application of a Child with a Disability, Appeal No. 06-139; Application of a Child with a Disability, Appeal No. 06-065). Here, I note that the parent failed to allege these procedural defects or identify specific facts regarding her alleged inability to participate or improper composition of the June 2007 CSE in the due process complaint notice (Dist. Ex. 1), nor does the hearing record indicate that these issues were specifically identified at the impartial hearing for the impartial hearing officer to resolve. Furthermore, the hearing record does not indicate that the impartial hearing officer granted petitioner permission to amend her due process complaint notice. Therefore, I find that

the parent's objections, specifically identified now for the first time on appeal, are not properly before me (Application of a Child with a Disability, Appeal No. 07-051).

Even if the parent had raised these issues before the impartial hearing officer, the parent's claim would nevertheless fail. School districts must provide an opportunity for parents to participate in the development of a student's IEP; however, mere parental disagreement with a school district's proposed IEP and placement recommendation does not amount to a denial of meaningful participation (see Sch. for Language and Communication Dev. v. New York State Dep't of Educ., 2006 WL 2792754, at *7 [E.D.N.Y. Sept. 26, 2006] ["Meaningful participation does not require deferral to parent choice"]; Perricelli, 2007 WL 465211, at *1). A CSE should, where appropriate, invite a student with a disability to participate and consider his or her input (20 U.S.C. § 1414[d][1][B][vii]; 34 C.F.R. § 321[a][7]; 8 NYCRR 200.3[a][1][x]; see Application of a Child with a Disability, Appeal No. 06-079).

Here, the hearing record reveals that the parent, JRC staff and the parent's attorney actively participated at the June 2007 CSE meeting (Tr. pp. 71-73, 75-77, 711, 728, 761, 776, 879-80, 892; Dist. Ex. 21). The June 2007 CSE meeting minutes show that the participants considered the student's progress at JRC, behaviors that interfere with his education, the use of aversive behavioral interventions,² and the program available at RA (Dist. Ex. 21). Under these circumstances, I find that the parent's arguments regarding meaningful participation at the CSE meeting are without merit. With regard to the student's participation at the June 2007 CSE meeting, the hearing record contains no information with regard to whether it would have been appropriate to invite the student to this meeting, noting only that the student was "home on vacation" when the meeting was conducted (Tr. p. 201). In addition, the parent did not establish that the June 2007 CSE meeting was improperly composed.³

Turning next to the parent's assertion that the student was not properly evaluated by the June 2007 CSE prior to making its recommendations, I note that the impartial hearing officer indicated that an appropriate educational program begins with an IEP that accurately reflects the results of evaluations and that the June 2007 IEP, with regard to the student's individual needs, was not in contention (IHO Decision at p. 7-8). However, for the reasons described more fully below, I disagree with the conclusion of the impartial hearing officer and find that the petitioner did challenge the educational program formulated in the student's June 2007 IEP (see Dist. Ex. 1 at p. 2). An evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the

² Although the hearing record indicates that June 2007 CSE members were considering the parent's request for aversive behavioral interventions (Dist. Ex. 21 at p. 4), I note that the hearing record does not contain information indicating that the district complied with the procedures for considering whether a child-specific exception is warranted (8 NYCRR 200.22[e]). I remind the district that whenever individual members of a CSE, be it the parent, the district or other providers, are considering whether a child-specific exception is warranted for a student whose behavior impedes learning, the school district shall submit a written application to the Commissioner of Education seeking a recommendation from a panel comprised of professionals with appropriate clinical and behavioral expertise (8 NYCRR 200.22[a], [e][3]-[6], [8], see 8 NYCRR 200.1[r]).

³ To the extent that the parent argues that the district "waived" its right to limit the issues at the impartial hearing to the issues identified in the due process complaint notice by failing to render an objection on the basis of sufficiency, the parent has identified no authority to support this proposition, and State regulations do not provide for such a waiver (8 NYCRR 200.5[j][1][ii]).

student, including information provided by the parent, that may assist in determining, among other things the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 C.F.R. § 300.304[b][1][ii]; see Letter to Clark, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 C.F.R. § 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 C.F.R. § 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]), and evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 C.F.R. § 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]; see Application of the Dep't of Educ., Appeal No. 07-018). A district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 C.F.R. § 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree (34 C.F.R. § 300.303[b][1]; 8 NYCRR 200.4[b][4]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]).

In this case, the student's social emotional difficulties were identified in the initial psychological evaluations conducted in 2002 (Dist. Ex. 3 at pp. 8-9, 10-12, 15, 33-47, 57-58). At that time the student was noted to have numerous difficulties with both externalizing (aggression) and internalizing (anxiety, depression) behaviors (id. at p. 53). He was described as a "very angry young man" who was suspicious of adults and had an extremely high need of control over his environment (id. at p. 11).

The student's April 2004 psychiatric evaluation was conducted at the request of the CSE (Dist. Ex. 6). The evaluation consisted of a history of presenting problems, a developmental history, a social/family history, a medical history and a mental status evaluation (id. at pp. 1-6). The psychiatrist indicated that she reviewed the student's previous psychological and psychoeducational evaluations, a health and social history form from the district, CSE meeting minutes, the student's IEP and progress notes (id. at p. 1). In addition, the psychiatrist spoke with the student's outpatient therapist, spoke with and reviewed the psychiatric records of the student's physician, spoke with staff from the student's BOCES placements, met individually with the student and the parent, and observed the student at his second BOCES placement (id.). The psychiatrist indicated that in school the student's behavior reportedly had become unsafe and essentially unmanageable (id. at p. 4). The psychiatrist indicated that the student was suspended numerous times and refused requests to complete academic work (id.). The psychiatrist noted that, while the student could be polite and charming, he also had poor social skills around his peers and had not made any lasting friendships with appropriate same age peers (id. at p. 3). She also observed that the student had a fascination with violence (id. at p. 6). According to the psychiatrist, the student met the DSM-IV-TR criteria for depressive disorder not otherwise specified (NOS) (with possible paranoia/psychotic features); oppositional defiance disorder; separation anxiety disorder; obsessive-compulsive features; and conduct disorder - provisional (mild) (id. at p. 11). She further opined that the student met the criteria for a disorder of written

expression, a mathematics disorder and a personality disorder NOS (features of several Cluster B type disorders) (id.).

With regard to assessments conducted during the 2006-07 school year, I note that the evaluations used to support the June 2007 CSE's recommendation offer varying conclusions (Dist. Exs. 12; 14; 47). Information provided to the district by the student's clinician at JRC in January 2007, relative to the parent's request for aversive behavioral interventions, indicated that using "DSM-IV" nosology the student's disorder was best described by intermittent explosive disorder and depressive disorder NOS (Dist. Ex. 12 at pp. 3, 4). At that time, the student's clinician also indicated that there were no known psychological or health issues which were relevant to the request for aversive behavioral interventions (id. at p. 5). An FBA of the student conducted by the clinician in February 2007, indicated that, from a stimulus control perspective, situations that had brought on major problem behaviors had occurred without warning, specifically on the school bus (Dist. Ex. 14 at p. 17).

In contrast to the opinion of the student's JRC clinician, the consulting psychiatrist for JRC indicated that the student's history of clinically significant depression along with the student's description of hypo-manic episodes was strong enough to suggest that he may "usefully be thought" of as having a diagnosis of bipolar disorder, type II (Dist. Ex. 14 at p. 2). In his neuropsychiatric consultation report, the psychiatrist listed the student's past diagnoses, described the student's current presentation, provided a brief overview of past medication trials, included a brief patient interview and a brief mental status examination (Dist. Ex. 14). According to the psychiatrist, the student's history and examination were consistent with the following diagnostic impressions: rule out bipolar disorder, type II; status post-separation anxiety; rule out personality disorder; learning disabilities; and self-injurious behavior (id. at p. 2). Additional medical diagnoses were offered (id.). The psychiatrist stated that in trying to understand the optimal approach for treating the student it was important to try and understand where the student's behaviors came from and what was sustaining them (id.). He opined that the nature, frequency and seriousness of the student's aggressive maladaptive behaviors made it appear most likely that they represented his over-learned and habitual responses to relatively innocuous environmental stressors (id.). The psychiatrist also noted that the failure of medication trials placed the student in the category of treatment refractory psychiatric illness (id.).

The June 2007 CSE had a report from the student's JRC clinician that both diagnosed the student with an intermittent explosive disorder and depressive disorder NOS and indicated that the student did not have a psychological disorder relevant to the use of aversive behavioral interventions (Dist. Ex. 12 at p. 5). In addition, the CSE had the recent neuropsychiatric consultation report that indicated the need to rule out bipolar disorder, type II and personality disorder (Dist. Ex. 14). Minutes from the June 2007 CSE meeting indicated that RA's admissions director questioned whether the student had a mood disorder, to which staff from JRC responded that there is "no consideration of a mood disorder" and suggested that the student had a depressive disorder, NOS (Dist. Ex. 21 at p. 2). I note that the hearing record is replete with references to the cyclic nature of the student's aggressive behavior (see, e.g., Tr. pp. 54-55, 73, 196, 534, 681, 683, 706, 730, 877; Dist. Exs. 12 at p. 5; 15 at p. 28; 21 at p. 2; 47 at p. 3), and that as early as April 2004, the student's private counselor noted the possible presence of a major

mood disorder because the student seemed to develop "incredible rages out of nowhere" (Dist. Ex. 6 at p. 8). Despite the questions raised by recent evaluations and observations regarding the student's mental health status and the cause of his behavior, the June 2007 CSE formulated the student's IEP relying on the results of the April 2004 psychiatric evaluation of the student and failed to further assess the student's psychiatric needs prior to reaching a conclusion regarding the student needs and placement (Tr. pp. 155-56; 804-05; Dist. Exs. 14 at p. 2; 20 at p. 5).

In this case, I find that the student's need for a restrictive placement is predicated on his behavior. The psychiatrist who examined the student in March 2007 noted that while the student was being safely contained, he was not showing the type of clinical progress that would be expected to allow him to transition to a less structured setting or to reenter the community in general (Dist. Ex. 14 at p. 1). I find persuasive his conclusion that it is important to try and understand where the student's behaviors come from and what is sustaining them (*id.* at p. 2). I also note that on two occasions prior the CSE's 2007 annual review, JRC requested that a CSE be convened for the purpose of adding aversive behavioral interventions to the student's IEP (Dist. Exs. 15 at p. 1; 47 at p. 1), a point which strongly suggests that additional evaluation of the student had become necessary in order to assess the student's needs (34 C.F.R. §§ 300.303[a][2]; 300.305[c]; 8 NYCRR 200.4[b][3], [4], [5][ii][d], [iii]).⁴ While the April 2004 psychiatric evaluation offered a significant quantity of probative data from the time period in which it was conducted (Dist. Ex. 6), its value, by June 2007 had necessarily diminished given the length of the intervening period and continuing behavioral issues faced by the student. In light of the forgoing, I agree with the parent that the June 2007 CSE did not have sufficient evaluative data to conclude that RA was an appropriate placement for the student.⁵ I find that a complete independent psychiatric evaluation is necessary to determine whether the student has a psychiatric illness, and the extent to which such illness, if any, contributes to his aggressive behavior (see *J.B. v. Killingly Bd. of Educ.*, 990 F. Supp. 57, 80 [D. Conn. 1997]; *Application of a Child with a Disability*, Appeal No. 94-2). This evaluative data and any attendant recommendations are essential to provide the CSE with information for developing an appropriate IEP, FBA and BIP for the student and reaching a decision regarding his educational placement. Accordingly, I find that the June 2007 IEP was deficient insofar as it was developed without adequate data regarding the student's individual needs (*Application of the Dep't of Educ.*, Appeal No. 07-098; *Application of a Child with a Disability*, Appeal No. 07-018; *Application of a Child with a Disability*, Appeal No. 94-2).

The parent requests that I direct the district to implement the student's June 20, 2006 IEP going forward. I decline to do so. The student's IEP must be reviewed periodically, but not less frequently than annually (20 U.S.C. § 1414[d][4][A]; 34 C.F.R. § 300.324[b][1]). The June 2006 IEP is nearly 22 months old, and has expired by its own terms, and any evaluative data, including behavioral information, upon which the June 2006 CSE relied, is equally dated (Dist. Ex. 11 at p. 2). Furthermore, implementation of the student's previous IEP would have the effect of preventing

⁴ I note the distinction between the obligation to conduct triennial reevaluation of all students with a disability, which occurs merely by virtue of the passage of time (8 NYCRR 200.4[b][4]), and conducting additional evaluations or assessments regarding a particular student with a disability due to his or her unique needs (8 NYCRR 200.4[b][3]).

⁵ In the absence of sufficient evaluative data, it is not appropriate, at this stage, to reach a determination regarding whether RA may be an appropriate placement for the student.

consideration of the results of a new psychiatric evaluation. Consequently, I will direct the district to convene the CSE and develop a new IEP for the student. I remind the district that, if appropriate, the student should participate in the CSE meeting (20 U.S.C. § 1414[d][1][B][vii]; 34 C.F.R. § 300.321[a][7]; 8 NYCRR 200.3[a][1][x]). In the interest of expediency in determining an appropriate placement for the student, the district should endeavor to have the evaluation completed and convene the CSE prior to the end of this school year.

I have examined the parent's remaining contentions and find that they are without merit.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the impartial hearing officer's decision dated January 30, 2008 is hereby annulled; and

IT IS FURTHER ORDERED that, unless the parties otherwise agree, respondent district shall order an independent psychiatric evaluation of the student within 10 days from the date of this decision and within 10 days after receipt of the psychiatric evaluation report, convene a CSE meeting to determine appropriate services and an educational placement for the student.

Dated: **Albany, New York**
 May 1, 2008

ROBERT G. BENTLEY
STATE REVIEW OFFICER