



# The University of the State of New York

## The State Education Department State Review Officer

No. 08-039

**Application of a STUDENT WITH A DISABILITY, by his parents, for review of a determination of a hearing officer relating to the provision of educational services by the Board of Education of the [REDACTED] School District.**

### **Appearances:**

Shaw, Perelson, May & Lambert, LLP, attorney for respondent, Michael K. Lambert, Esq., of counsel

### **DECISION**

Petitioners (the parents) appeal from the decision of an impartial hearing officer which found that the neuropsychological evaluation performed by respondent (the district) was appropriate and that the parents were not entitled to an independent educational evaluation (IEE) of the student at public expense. The appeal must be dismissed.

The student's eligibility for special education services is not in dispute in this appeal. However, there is a controversy over the student's special education classification. This controversy arose in March 2007 after a request by the student's mother to have the student's classification changed from speech or language impaired to autism (Dist. Exs. 1g at p. 6; 29; 30; see also 34 C.F.R. § 300.8[c][1], [c][11]; 8 NYCRR 200.1[zz][1], [zz][11]).<sup>1, 2</sup>

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<sup>1</sup> State regulations define speech or language impairment as "a communication disorder, such as stuttering, impaired articulation, a language impairment or a voice impairment, that adversely affects a student's educational performance" (8 NYCRR 200.1[zz][11]).

<sup>2</sup> State regulations define autism as "a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age 3, that adversely affects a student's educational performance. Other characteristics often associated with autism are engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences" (8 NYCRR 200.1[zz][1]). The regulations further state that "the term does not apply if a student's educational performance is adversely affected primarily because the student has an emotional disturbance . . . A student who manifests the characteristics of autism after age 3 could be diagnosed as having autism if the criteria in this paragraph are otherwise satisfied" (*id.*).

The student has been classified as a student with a speech or language impairment since July 2002 (Dist. Exs. 1a at p. 1; 1b at p. 1). However, the student was also diagnosed as being on the autism spectrum as a result of a neurological evaluation report dated April 28, 2001 (Dist. Ex. 2 at pp. 1, 4). The evaluating neurologist reported that the student had impaired social skills, a lack of interest in other children, aggression toward other children and his mother, stereotypic flapping of hands at his side when he was excited, self-injurious banging of his head, obsessive behavior involving the repeated wearing of the same outfit or clothing, obsessive carrying of juice boxes, obsessive rewinding of portions of videotapes, and a tendency to tantrum if there was a change in routine (id. at pp. 2, 4). The neurologist opined that the student's history of delayed communication skills, impaired language expression and comprehension, impaired social skills, delayed play skills and a limited range of behavioral interests were compatible with someone on the autism spectrum (id. at p. 4). Two follow-up reports from the same doctor dated August 31, 2005 and March 12, 2007 further supported this diagnosis of autism (see Dist. Exs. 16; 26).

Since 2001, the student has received speech-language therapy, occupational therapy (OT), physical therapy (PT), and has been evaluated numerous times by many health and educational professionals (Dist. Exs. 3; 5; 6; 7; 11; 12; 14; 17; 18; 19; 20; 21; 23; 24; 25; 27; 34). Most of these evaluations concerned the student's speech-language deficits, his fine motor skills deficits, and delays in his social and behavioral skills.

On November 4, 2001, the student was evaluated by a speech-language pathologist (Dist. Ex. 3). Administration of the Preschool Language Scale, Third Edition (PLS-3) revealed that the student had a mild to moderate receptive language delay with suspected auditory processing difficulties, as well as a mild expressive language delay (id. at p. 2). In addition, administration of the Goldman Fristoe Test of Articulation (GFTA) revealed that the student's articulation skills were severely delayed, which in turn reduced the student's speech intelligibility (id. at pp. 2-3). The speech-language pathologist reported that the student was a related and friendly child who responded to and initiated social interactions with familiar adults and peers (id. at p. 1). She noted that at times the student's play became repetitive and he required models or prompting to expand upon or terminate a preferred play schema (id.).

On November 27, 2001, the student was evaluated by an occupational therapist (Dist. Ex. 5). According to the occupational therapist, the student displayed increased distractibility and decreased attention span and eye contact (id. at p. 2). Based on the student's performance on the Peabody Developmental Motor Scales-Second Edition (PDMS-2), the occupational therapist found that the student's fine motor skills were delayed, especially in the areas of grasp and dexterity (id.). As measured by the Beery-Buktenica Developmental Test of Visual Motor Integration (VMI), the student's visual motor skills were in the average range (id.).

On December 20, 2001, the student's preschool teacher reported that the student exhibited a nine-month delay in his communication skills, a three-month delay in his cognition skills when he was in a 1:1 setting, a nine-month delay in his cognition skills when he was in a small group, a nine-month delay in his social skills, a nine-month delay in his fine motor skills, a nine-month delay in his gross motor skills and a three-month delay in his self-help skills (Dist. Ex. 6 at pp. 1-

3). The student's preschool teacher further reported that the student transitioned between activities with ease, performed most prescribed activities, but often required verbal cues to be redirected to complete them (id. at p. 1). According to the teacher, if left to complete a task on his own the student would stare into space or gaze at his teachers or classmates (id.). The teacher noted that the student engaged in self-stimulatory behaviors such as exaggerated hand/arm movements and body rocking (id.). She further reported that the student engaged in frequent and intense tantrums at home, which were not exhibited in the school setting (id.).

In February 2002, the student was evaluated by a psychologist (Dist. Ex. 7 at p. 1). The psychologist reported that the student had weak fine motor coordination skills, delayed speech, language and articulation skills, and appeared to prefer parallel play rather than interactive play (id. at p. 5). Administration of the Wechsler Preschool and Primary Scale of Intelligence – Revised (WPPSI-R) resulted in a verbal IQ of 97, a performance IQ of 98 and a full scale IQ of 97, placing him in the average range of intellectual functioning (id. at p. 4). The psychologist opined that the student was in the average range of intellectual ability with high average potential indicated (id. at p. 6). The psychologist stated that the student could maintain eye contact but also reported observing the student engaging in some rocking and slight flapping (id. at p. 3). According to the psychologist, the student's social knowledge and judgment were within normal limits (id. at p. 5). In addition, the student interacted appropriately with adults and peers and spontaneously sought to share enjoyment with peers (id.).

During the 2002-03 school year, the student was classified by his then current school district as a student with a "speech impairment" (Dist. Exs. 1a at p. 1; 1b at p. 1; see 34 C.F.R. § 300.8[c][11]; 8 NYCRR 200.1[zz][11]). During the 2002-03 school year, the student attended one of the schools located in that district in a collaborative team teaching class and received speech-language therapy and OT (Dist. Exs. 1a at p. 1; 1b at p. 1). The student's individualized education programs (IEPs) for the 2002-03 school year indicated that the student interacted appropriately with both peers and adults (Dist. Ex. 1a at p. 4; 1b at p. 5).

For the 2003-04 school year, the student moved into the district that is a party to this appeal. The student attended a district school and continued to be classified as a student with a speech or language impairment (Tr. p. 226; Dist. Ex. 1c at p. 1). From the 2003-04 school year through the 2006-07 school year, the student received special class instruction in an 8:1+1 classroom environment as well as OT and speech-language therapy from the district (Dist. Exs. 1c at p. 1; 1d at p. 1; 1e at p. 1; 1f at p. 1). The student's IEPs continued to indicate that he interacted well with peers and adults and further noted that the student engaged in collaborative play and was aware of appropriate behaviors expected in different social situations (Dist. Exs. 1c at p. 2; 1d at p. 3; 1e at p. 4; 1f at p. 4). The student's IEPs further indicated that he was an enthusiastic participant in mainstream and inclusion activities (id.). Throughout this time period, the student was evaluated many times by his speech therapists, his occupational therapists, his teachers, a psychologist and a physical therapist (see Dist. Exs. 14; 17; 18; 19; 20; 21; 23; 24; 27).

On February 7, 2005, the student underwent a speech-language evaluation (Dist. Ex. 17). Based on the results of the Test of Language Development-Primary, Third Edition (TOLD-P:3), Expressive One Word Picture Vocabulary Test (EOWPVT), Peabody Picture Vocabulary Test-

Third Edition (PPVT-III) and Goldman Fristoe Test of Articulation-Second Edition (GFTA-2), the speech-language pathologist opined that the student's expressive and receptive language skills were in the very poor to below average range, and that he had a mild to moderate articulation disorder (id. at p. 3). In her report, the clinician commented that the student did not seem to have any difficulty using language appropriately to initiate conversation and make general comments (id. at p. 1). She noted that the student engaged in conversational speech with his teachers, classmates and school staff (id.).

On February 18, 2005, the student underwent an OT evaluation (Dist. Ex. 18). As measured by the VMI and the Bruininks-Oseretsky Test of Motor Proficiency, the occupational therapist reported that the student had difficulty with motor control, directionality, spatial organization and the integration of parts into a cohesive whole (id. at pp. 2-3).<sup>3</sup> The evaluator opined that these deficits negatively impacted the student's ability to function in the classroom (id. at p. 3). With regard to behavior, the occupational therapist noted that the student transitioned easily to therapy and was appropriately conversational, although sometimes difficult to understand (id. at p. 1). She further noted that when the student was excited he would sometimes flap his arms with his mouth open (id.).

On March 1, 2005, the student was evaluated by a psychologist (Dist. Ex. 19). The psychologist administered the Wechsler Intelligence Scale for Children – Fourth Edition (WISC-IV), which resulted in standard (and percentile) scores of 95 (37th) for the verbal comprehension index, 77 (6th) for the perceptual reasoning index, 77 (6th) for working memory, 80 (9th) for processing speed, and 78 (7th) for a full scale IQ (id. at p. 1). The psychologist opined that the student displayed uneven cognitive skill development and weaknesses in processing, retaining, and manipulating information that would impact on his reading, math and written language (id. at p. 3). She reported that rapport with the student was easily established and maintained throughout the evaluation (id. at p. 2).

The hearing record reveals that in early 2006, the student underwent a PT evaluation and an OT evaluation (Dist. Exs. 22; 24).<sup>4</sup> The physical therapist's administration of the Bruininks-Oseretsky Test of Motor Proficiency yielded a score of 7 years, 4 months in the areas of running speed and agility, balance and strength and a score of 7 years, 5 months in upper limb

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<sup>3</sup> The student was previously evaluated in February 2004 by a different occupational therapist (Dist. Ex. 14). That therapist administered the Developmental Test of Visual Motor Integration (id.). That test yielded raw, standard, scaled and (percentile) scores of 12, 88, 8 (21st) for the visual motor integration portion of the test; 16, 100, 10 (50th) for the visual portion of the test; and 14, 93, 9 (32nd) for the motor portion of the test (id.). At that time, the therapist opined that although the testing placed the student in the average range for all the areas that were assessed, the student exhibited decreased control and accuracy for many eye hand coordination activities, including writing (id.).

<sup>4</sup> Additionally, a March 8, 2006 report from the student's teacher revealed that the student was administered the Woodcock-Johnson III Tests of Achievement (WJ-III ACH) (Dist. Ex. 23 at p. 1). This test indicated that the student's oral language skills were average, his academic skills were within the low average range, and his fluency with academic tasks and ability to apply academic skills were both within the average range (id.). The student's performance was average in reading, mathematics and written expression, and low average in math calculation skills and written language (id.).

coordination (Dist. Ex. 22. at p. 2).<sup>5</sup> The occupational therapist's administration of the VMI yielded standard, and (percentile) scores of 86 (18th) for the visual motor integration portion of the test, 91 (27th) for the visual portion of the test, and 80 (9th) for the motor portion of the test (Dist. Ex. 24). The occupational therapist reported that the student had difficulty in the areas of visual motor integration and eye hand coordination (id.).

In March 2007, the student underwent another OT evaluation and a speech-language evaluation (Dist. Exs. 25; 27). The occupational therapist's administration of the VMI yielded standard and (percentile) scores of 82 (12th) for the visual motor integration portion of the test, 99 (47th) for the visual portion of the test, and 80 (9th) for the motor portion of the test (Dist. Ex. 25 at p. 1). This therapist reported that the student had difficulty with fine motor activities, particularly in his ability to develop appropriate grasps and pinches to manipulate objects (id.). The student's speech-language pathologist opined that the student needed to work on improving his intelligibility, fluency and his expressive and receptive vocabulary (Dist. Ex. 27).

On March 27, 2007, at a meeting of the Committee of Special Education (CSE), the student's mother requested that the student's classification be changed to autism (Dist. Ex. 1g at p. 6; see 34 C.F.R. § 300.8[c][1]; 8 NYCRR 200.1[zz][1]). By letters dated April 13, 2007 and April 26, 2007 to the district's CSE chairperson/director of special services (director of special services), the student's mother again requested that the student's classification be changed to autism (Dist. Exs. 29; 30).<sup>6</sup>

On May 1, 2007, the CSE reconvened and the student's mother reiterated her request that the student's classification be changed to autism (Dist. Ex. 1h at p. 5). The CSE recommended that the student continue to be classified as speech or language impaired, receive special class instruction in an 8:1+1 classroom environment, and receive OT and speech-language therapy (id.). Additionally, the CSE recommended an extended school year (ESY) program which included special class instruction in an 8:1+2 classroom environment, OT and speech-language therapy (id. at pp. 1-2). The CSE also recommended that a neuropsychological evaluation be performed at district expense (Dist. Exs. 1h at p. 5; 31; see also Dist. Ex. 32).

In June 2007, the student underwent a neuropsychological evaluation at district expense (Dist. Ex 34 at p. 1). The neuropsychologist obtained and reviewed information regarding the student's developmental, medical and educational histories from the district's CSE file and from

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<sup>5</sup> This evaluation occurred after the student's mother expressed concern that the student was unable to descend stairs reciprocally and that this would impact on the student's transition to the district's middle school (Dist. Ex. 22 at p. 1). The student's teacher had also expressed concern as to the student's lack of confidence in activities that involve motor planning (id.). The evaluation was also a follow-up to a May 17, 2005 evaluation by the same physical therapist which reported that the student had an inability to descend stairs reciprocally without verbal cues (Dist. Ex. 21 at p. 2).

<sup>6</sup> In the April 13, 2007 letter, the student's mother references three reports from the neurologist who performed the January 9, 2001 neurological evaluation in which the student was diagnosed as being "on the autism spectrum" (Dist. Exs. 2 at p. 4; 29). In addition to referencing the initial January 9, 2001 evaluation, the letter also references two follow-up reports dated August 31, 2005 and March 12, 2007, in which the same doctor again opined that the student had "[h]igh [f]unctioning [a]utism" (Dist. Exs. 16 at p. 2; 26 at p. 2). The August 31, 2005 report specifically recommended that the student's classification be "changed to autistic" (Dist. Ex. 16 at p. 2).

the parents (Tr. p. 52; Dist. Ex. 34 at p. 1). He also conducted a phone interview of the student's mother (Tr. p. 53). He further requested that the student's mother and the student's teacher complete behavior rating scales (BRIEF) and Social Responsiveness Scales (SRS) (Dist. Ex. 34 at pp. 4-5, 7, 12-13). The neuropsychologist noted that the student's mother reported that she was concerned about repetitive and obsessive behaviors and believed the correct diagnosis to be autism (Tr. pp. 53-54). Although the neuropsychologist requested current medical records from the student's mother to substantiate the diagnosis of autism, this documentation was not provided (Tr. p. 57). The neuropsychologist spoke to the student's teacher, performed a classroom observation of the student, and observed the student's interaction with his peers (Tr. p. 59).

The neuropsychologist performed multiple evaluative tests (Dist. Ex. 34 at pp. 10-13). Intellectual functioning was assessed by the administration of the Wechsler Abbreviated Scale of Intelligence (WASI), which yielded a verbal IQ score of 85 (16th percentile, low average range), and a performance IQ score of 84 (14th percentile, low average range) for a full scale score of 83 (13th percentile, low average range) (*id.* at p. 10). Administration of the computerized test of sustained attention (CPT-II) was unsuccessful because the student failed to complete the test and put his head down on the testing table (*id.* at p. 3). Several subtests of the NEPSY, a development neuropsychological assessment, were administered (Tr. p. 76; Dist. Ex. 34 at pp. 4, 10). On the NEPSY-Tower subtest, a subtest which assesses planning and organizational skills, the student performed within the low average/average range (25th percentile) (Dist. Ex. 34 at pp. 4, 10). On the NEPSY-Knock-Tap subtest, a subtest that assesses self-regulatory and inhibition, the student performed in the borderline range (*id.*). On the NEPSY-Visual Attention subtest, the student performed in the low average range (16th percentile) (*id.*). The student's general memory abilities as assessed by the Wide Range Assessment of Memory and Learning, Second Edition (WRAML-2) were within the borderline range (3rd percentile) (*id.* at pp. 6, 11). The neuropsychologist noted that there was a significant discrepancy between the student's average verbal recall abilities (27th percentile) and his extremely low/ borderline visual recall abilities (2nd percentile) (*id.*). Significant deficits were also seen in the student's working memory capacities across multiple domains (*id.*). The student's overall language skills were assessed via the Test of Language Competence – Level 1 (TLC-1) and also with selected subtests from the NEPSY (*id.* at p. 5). The student's scores ranged from low/ borderline to low average (*id.* at pp. 5-6). The neuropsychologist noted that the student had difficulty following lengthier, syntactically complex instructions; weaknesses in his higher-level receptive language skills and marked articulation difficulties and expressive language deficits (*id.*). The student's visuospatial/visuoperceptual processing skills were assessed with the Motor-Free Visual Perception Test – 3rd Edition (MFVPT) (*id.* at pp. 7, 12). The student was found to be in the low average range (*id.*). The student's fine motor, motor praxis and visuomotor integrations skills were assessed using the Finger Tapping and Visuomotor Precision subtests of the NEPSY (*id.*). The student was noted to be extremely low functioning for these skills (*id.*).

The neuropsychologist opined that the student had significant global language delays, difficulties in the simultaneous processing of more than one stimulus, markedly underdeveloped motor praxis/ fine-motor abilities, variable attention and moderate impulsivity (Dist. Ex. 34 at p. 8). The student also had self-confidence issues and when confronted with a difficult task, the student frequently became anxious, shut down or answered quickly and impulsively (*id.*). The neuropsychologist opined that the student met the criteria for a Mixed Receptive-Expressive

Language Disorder and for Attention-Deficit/ Hyperactivity Disorder – Combined Type (*id.* at p. 8). He also opined that the student did not meet the diagnostic criteria for Pervasive Developmental Disorder (PDD) (*id.*). While the student exhibited the substantial social difficulties and "behavioral sequelae" often seen in children with PDD at home, these behaviors were not reported as problematic at school nor were they outwardly evident during the evaluation (Tr. pp. 56-57; Dist. Ex. 34 at pp. 4-5, 8).<sup>7</sup>

On September 4, 2007, the CSE reconvened (Dist. Ex. 1i). At the meeting, the neuropsychologist who performed the June 2007 evaluation reported his findings to the CSE (*id.* at p. 6). The neuropsychologist informed the CSE that the student did not meet the criteria for a classification of autism (Tr. pp. 102-04, 210, 212; Dist. Exs. 1i at p. 6; 34 at p. 8). The CSE again recommended that the student be classified as speech or language impaired (Dist. Ex. 1i at pp. 1, 6). The CSE also recommended that the student receive daily special class instruction in a 15:1 classroom environment, two 30-minute OT sessions per week, two 30-minute speech-language therapy sessions per week, and the assistance of a shared teacher assistant for specials and unified arts (*id.* at pp. 1-2).

By letter dated September 4, 2007 to the district's director of special services, the student's mother informed the district of her disagreement with the neuropsychologist's opinion and requested that the district pay for an IEE by a neuropsychologist of her choice (Dist. Ex. 37).

The district declined to pay for an IEE and on September 25, 2007, the board of education authorized the appointment of an impartial hearing officer to conduct a hearing so that the district could defend the appropriateness of the neuropsychological evaluation (Dist. Ex. 40 at p. 2)

Although the impartial hearing was initially scheduled for November 2, 2007, it was adjourned at the request of the parents' attorney (IHO Decision at p. 4; IHO Exs. I at p. 8; II at pp. 2-3). On December 19, 2007, the parents moved to dismiss the hearing alleging that the district failed to provide them with a due process complaint notice (IHO Decision at p. 4; IHO Ex. IV at p. 1). On January 7, 2008, the impartial hearing officer issued a letter decision on the parents' motion to dismiss finding that the motion was a challenge to the sufficiency of the due process complaint notice and that such a challenge was untimely (IHO Ex. IV at p. 1). The impartial hearing officer also treated the parents' motion as a "general 'motion to dismiss'" (*id.*). In viewing the motion in that fashion, the impartial hearing officer found that the parents' motion assumed facts not yet proven and did not constitute grounds for dismissal of the hearing (*id.*). The parents' motion was denied (*id.* at p. 2). On January 9, 2008, an impartial hearing was held (Tr. p. 1).

The impartial hearing officer issued a decision dated March 15, 2008 (IHO Decision at p. 12). In his decision, the impartial hearing officer reiterated the contents of his January 7, 2008 letter decision on the parents' procedural motion to dismiss (IHO Decision at p. 9; *see* IHO Ex. IV). The impartial hearing officer cited to additional evidence adduced at the hearing to further support his January 7, 2008 decision denying the parents' motion and credited the testimony of

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<sup>7</sup> At the time of the impartial hearing, the neuropsychologist also testified that the student had inquired about the neuropsychologist's own daughter, a question that would be atypical for a student with PDD (Tr. p. 64).

the district's clerk that she had served the impartial hearing officer's appointment letter and accompanying documents on the student's mother on September 28, 2007 (id.). As he had previously decided in his January 7, 2008 letter decision, the impartial hearing officer again found that the parents and their attorney had actual and constructive notice of the hearing and that they did not make a timely sufficiency challenge to the due process complaint notice (id.). Regarding the merits of the hearing, the impartial hearing officer credited the testimony, report and findings of the neuropsychologist who generated the June 2007 report; held that the district's evaluation was appropriate, and concluded that the parents were not entitled to an IEE at the district's expense (id. at p. 11).

This appeal ensued. The parents commenced this appeal, contending that the impartial hearing officer erred by denying their motion to dismiss and finding that the district's neuropsychological evaluation of the student was appropriate. Among other relief, the parents request an order directing the district to reimburse them for the cost they incurred in obtaining an IEE.

Preliminarily, I must address a procedural issue. In its answer, the district contends that the parents' petition must be dismissed as untimely. On April 15, 2008, the parents' process server personally served the district's clerk with the notice of intention to seek review (see Parent Aff. of Service dated April 15, 2008; see 8 NYCRR 279.2). On April 25, 2008, the Office of State Review received the notice of intention to seek review and an affidavit of service pertaining to this notice of intention to seek review (8 NYCRR 279.9). Thereafter, the district produced a complete hearing record in this matter.

On May 1, 2008, the Office of State Review received a verified petition with notice, another copy of the notice of intention to seek review, and another copy of the affidavit of service for the notice of intention to seek review from the parents. There was no affidavit of service for the verified petition to reflect how or when the parents had served the verified petition (see 8 NYCRR 279.4[a]). To date, the Office of State Review has not received an affidavit of service to indicate how or when service of the verified petition was effectuated.

On May 7, 2008, the district's process server served a verified answer by mail on the parents (see Dist. Aff. of Service dated May 7, 2008). In their answer, the district alleged three affirmative defenses: that the parents' April 15, 2008 service of the notice of intention to seek review was untimely; that the parents' April 28, 2008 service of the petition upon the district was untimely and that the parents' petition was improperly served by the student's mother (see 8 NYCRR 275.8[a], 279.2[b]).<sup>8</sup>

On May 19, 2008, the Office of State Review received an undated and unverified reply from the parents. The reply sought to have the district's answer dismissed and specifically denied the district's affirmative defenses insofar as they alleged that the parents' service of the notice of intention to seek review and service of the petition were untimely. The reply further alleged that the impartial hearing officer's decision was postmarked on March 19, 2008 and that "the appeal was filed in a timely fashion" (Reply at ¶ 1). The reply did not refute the district's

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<sup>8</sup> The district's assertion that the petition was served on April 28, 2008 by the student's mother is the only indication as to when and how the petition was served (Answer ¶¶ 28-29).

assertion that the petition was improperly served by the student's mother, nor did it offer a statement of good cause as to why the petition was served late (see 8 NYCRR 275.8[a]).

On May 26, 2008, the Office of State Review received a faxed copy of an affidavit of service from the parents indicating that on May 23, 2008, the student's mother served a copy of the reply on the district by mail (Parent Aff. of Service dated May 23, 2008; see 8 NYCRR 279.6). On May 27, 2008, the Office of State Review received a mailed copy of this same affidavit of service. Thereafter on May 30, 2008, the Office of State Review received a different affidavit of service from a process server indicating that on May 28, 2008, the district was served with an additional copy of the parents' reply by mail (see Parent Aff. of Service dated May 28, 2008).

State regulations provide that a petition for review by a State Review Officer must comply with the timelines specified in section 279.2 of the Regulations (8 NYCRR 279.13). To initiate an appeal, a notice of petition,<sup>9</sup> petition, memorandum of law and any additional documentary evidence must be served upon the respondent within 35 days from the date of the decision sought to be reviewed (8 NYCRR 279.2[b]).<sup>10</sup> Additionally, if it is the parent or person in parental relationship of the student with a disability who intends to seek review by a State Review Officer, then they shall serve upon the school district a notice of intention to seek review (8 NYCRR 279.2[a]). The notice of intention to seek review must be served upon the school district not less than 10 days before service of a copy of the petition for review upon such school district, and within 25 days from the date of the decision sought to be reviewed (8 NYCRR 279.2[b]). If the decision has been served by mail upon petitioner, the date of mailing and the four days subsequent thereto shall be excluded in computing the 25- or 35-day period (id.). A State Review Officer, in his or her sole discretion, may excuse a failure to timely seek review within the time specified for good cause shown (8 NYCRR 279.13). The reasons for the failure to timely seek review must be set forth in the petition (id.). Moreover, parents seeking review shall file with the Office of State Review proof of their service of the petition for review, the memorandum of law, any additional documentary evidence, and the notice of intention to seek review upon the other party to the hearing (8 NYCRR 279.4[a]).

If a school district is named as a party respondent, service upon such school district shall be made personally by delivering a copy of the petition to the district clerk, to any trustee or any member or the board of education of such school district to the superintendent of schools, or to a person in the office of the superintendent who has been designated by the board of education to

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<sup>9</sup> State regulations require that each petition contain a notice that, among other things, informs a respondent that an answer must be served within 10 days after the service of the petition for review and that a copy of such answer must be filed with the Office of State Review within two days after service of the answer (8 NYCRR 279.3).

<sup>10</sup> Part 279 of the State regulations governs the practice of how a State Review Officer may review an impartial due process hearing. Section 279.1(a) provides that the provision of Parts 275 and 276 shall govern the practice on such reviews, except as provided in Part 279 (8 NYCRR 279.1). Section 279.1(a) also states that "references to the term commissioner in Parts 275 and 276 shall be deemed to mean a State Review Officer of the State Education Department, unless the context otherwise requires" (id.). Additionally, the impartial hearing officer's decision provided notice to the parties of their right to appeal to a State Review Officer and the timelines for initiating an appeal (IHO Decision at p. 12). The decision also advised the parties that directions and sample forms were available at the Office of State Review website (id.).

accept service (8 NYCRR 275.8[a]). If the last day for service of a notice of intention to seek review or any pleading or paper falls on a Saturday or Sunday, service may be made on the following Monday; and if the last day for such service falls on a legal holiday, service may be made on the following business day (8 NYCRR 275.8[b], 279.11).

A respondent shall, within 10 days after the date of service of a copy of the petition, answer the same (8 NYCRR 279.5). Such answer, together with proof of service of a copy of such document upon the petitioner, shall be filed with the Office of State Review, within two days after such service (*id.*). A reply by the petitioner to any procedural defenses interposed by respondent or to any additional documentary evidence served with the answer shall be served and filed within three days after service of the answer (8 NYCRR 279.6). For petitions, answers and replies, no filing by facsimile transmission shall be permitted (8 NYCRR 279.4[a], 279.5, 279.6). Pleadings may be served by any person not a party to the appeal over the age of 18 years (8 NYCRR 275.8[a]). All pleadings must be verified (8 NYCRR 275.5, 275.6). Service of all pleadings subsequent to a petition shall be made by mail or by personal service (8 NYCRR 275.8[a]).

In this case, the parents have not properly initiated their appeal.

The impartial hearing officer's decision is dated March 15, 2008 (IHO Decision at p. 12). By excluding the date of mailing and four days subsequent, the 25th day within which to serve the notice of intention to seek review falls on April 14, 2008 (8 NYCRR 279.2[b]). Therefore, the parents' April 15, 2008 service of the notice of intention to seek review was untimely.<sup>11</sup>

Additionally, the district has indicated in its answer that the petition was served on the district on April 28, 2008 (Answer ¶ 28). By excluding the date of mailing of the impartial hearing officer's decision and the four days subsequent, the petition was required to be served by April 24, 2008. The parents have failed to submit an affidavit of service to establish when the petition was served, nor did they refute the district's assertion in its answer that the petition was served on April 28, 2008. By using the date of service of the petition provided by the district in its answer (April 28, 2008), and in the absence of an affidavit of service from the parents to indicate otherwise, I find that the parents' service of the petition was untimely (*see Grenon v. Taconic Hills Cent. Sch. Dist.*, 2006 WL 3751450, at \*5 [N.D.N.Y. Dec. 15, 2006]; *Application of a Student with a Disability*, Appeal No. 08-031; *Application of the Dep't of Educ.*, Appeal No. 08-006). Furthermore, I find that the service of the petition was improper because the student's mother, a party in this case, served the petition (8 NYCRR 275.8, 279.2). Also, I find that no good cause for a failure to timely serve the petition was alleged (8 NYCRR 279.13).

The parents have claimed in their reply that the impartial hearing officer's decision was postmarked on March 19, 2008. I find that the reply was improper because it is not verified (*see Reply*; *see also* 8 NYCRR 275.5, 275.6). Moreover, the two affidavits of service for this reply

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<sup>11</sup> Even if the notice of intention to seek review had been timely, it is the service of the petition, not the notice of intention to seek review, that determines whether an appeal is properly commenced (*see Application of a Student with a Disability*, Appeal No. 08-031 *aff'd Keramaty v. Arlington Cent. Sch. Dist.*, 05 Civ. 0006 [S.D.N.Y. Jan. 24, 2006]).

clearly indicate that it was untimely (see Parent Aff. of Service dated May 23, 2008; Parent Aff. of Service dated May 28, 2008; see also 8 NYCRR 279.6, 279.11).<sup>12</sup> The unverified and untimely reply will not be considered.

Based upon all of the above, I find that the parents have not properly initiated the appeal because they failed to serve the petition with notice in a timely manner. Additionally, they failed to file proof of service. The parents have failed to comply with the State regulations, and have failed to allege any good cause to excuse the untimeliness of the petition. In the exercise of my discretion, the petition must be dismissed (8 NYCRR 279.13; see Jonathan H. v. Souderton Area Sch. Dist., 2008 WL 746823, at \*4 [E.D. Pa. March 20, 2008][upholding dismissal of late appeal from impartial hearing officer decision]; see also Matter of Madeleine S. v. Mills, 12 Misc. 3d 1181[A] [Alb. Co. 2006] [holding that a determination by the Commissioner of Education to dismiss an appeal as untimely was neither arbitrary nor capricious and had a rational basis]).

Despite dismissing the petition as untimely, I will review the merits of the parents' appeal.

The parents' contend in their petition that they did not receive a due process complaint notice and therefore, the impartial hearing should have been dismissed. I agree with the parents that the district did not file a due process complaint notice that met the level of sufficiency required by federal and State regulations (34 C.F.R. § 300.508[b]; 8 NYCRR 200.5[i][1]; see Tr. pp. 237-38, 244-45; Dist. Ex. 40). At the hearing, the district's clerk testified that she served the student's mother two internal memoranda, the letter appointing the impartial hearing officer and the district's rules and procedures regarding impartial hearing officers (Tr. pp. 242-46; Dist. Ex. 40). These documents do not comport with federal and State regulations relating to the content of a due process complaint notice (34 C.F.R. § 300.508[b]; 8 NYCRR 200.5[i][1]). I remind the district that they are required to file a due process complaint notice when initiating a due process hearing (34 C.F.R. § 300.508[c]; 8 NYCRR 200.5[i][2]; 8 NYCRR 200.5[j][1]). Despite these inadequacies in the due process complaint notice, I find that this procedural irregularity did not rise to the level of a denial of a free appropriate public education (FAPE) (20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; 8 NYCRR 200.5[i][3]; 8 NYCRR 200.5[j][4][ii]). I agree with the impartial hearing officer that the parents had actual and constructive notice of the hearing and the issues and failed to make the sufficiency challenge in a timely manner (IHO Ex. IV at p. 1; see 8 NYCRR 200.5[i][3])

Next, I will address the parent's contention that they are entitled to be reimbursed for their IEE. Federal and State regulations provide that a parent has the right to an IEE at public expense if the parent disagrees with an evaluation obtained by the school district (34 C.F.R. § 300.502[b][1]; 8 NYCRR 200.5[g][1]). If a parent requests an IEE at public expense, the school district must, without unnecessary delay, ensure that either an IEE is provided at public expense

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<sup>12</sup> The answer was served by mail on May 7, 2008 (see Dist. Aff. of Service dated May 7, 2008). Excluding the date of service and the two days subsequent thereto, the last day for service of the parents' reply falls on May 12, 2008 (see 8 NYCRR 279.11). The student's mother, a party to the appeal, improperly served the unverified and untimely reply on May 23, 2008 (Parent Aff. of Service dated May 23, 2008; see 8 NYCRR 275.8[a]). Thereafter, a process server re-served the unverified and untimely reply on the district by mail on May 28, 2008 (Parent Aff. of Service dated May 28, 2008).

or initiate an impartial hearing to show that its evaluation is appropriate or that the evaluation obtained by the parent does not meet the school district criteria (34 C.F.R. § 300.502[b][2]; 8 NYCRR 200.5[g][1][iv]). If the impartial hearing officer finds that a school district's evaluation is appropriate, a parent may not obtain an IEE at public expense (34 C.F.R. § 300.502; 8 NYCRR 200.5[g]; Application of a Child with a Disability, Appeal No. 07-126; Application of a Child with a Disability, Appeal No. 06-067; Application of the Bd. of Educ., Appeal No. 05-009; Application of a Child with a Disability, Appeal No. 04-082).

I agree with the impartial hearing officer's finding that the district has shown that the neuropsychologist's June 2007 evaluation was appropriate. The record indicates that the neurologist who conducted the evaluation held a Ph.D. in clinical neuropsychology, was licensed as a psychologist by the State of New York, and had experience working with students with autism spectrum disorders (Tr. pp. 29-30, 40-41, 46-47; Dist. Ex. 39 at pp. 1, 4). The neuropsychologist received information from the district's CSE and from the parent regarding the student's developmental, medical and educational history (Tr. p. 50; Dist. Ex. 33). He reviewed the information provided by the student's mother, and spoke to her by telephone (Tr. pp. 52-53). He noted that the student's mother was concerned about the student's behaviors and believed that the student should be diagnosed as autistic (Tr. pp. 53-54). The neuropsychologist further noted the behavioral and social inconsistencies between the school records and what the student's mother reported (Tr. pp. 56-57). Although the neuropsychologist requested medical documentation from the student's mother which reflected a diagnosis of autism, the mother failed to provide those records (Tr. p. 57; Dist. Exs. 2; 16; 26; 34 at p. 7).<sup>13</sup> He spoke with the student's teachers, performed a classroom observation, observed the student's interaction with his peers, and observed the student transitioning from one activity to another (Tr. pp. 59-60). The hearing record shows that neuropsychologist interviewed the student and assessed the student's behavior style, his ability to express himself verbally, his verbal articulation and his confidence level (Dist. Ex. 34 at p. 2). The evaluator administered multiple tests to assess the student's intelligence, language, learning, memory, his visuospatial and visuoperceptual processing, his fine motor/ motor praxis and his emotional behavioral functioning (*id.* at pp. 3-7). In addition, he noted that at least some of the measures and subtests that he chose to assess the student were "sensitive" to students with possible autism spectrum disorders (Tr. pp. 65-67, 82, 84-85, 185-86). The neuropsychologist provided a summary and conclusions consistent with his observations, offered a diagnosis, and recommended a course of action for the student's education, his medical follow-up, his speech therapy and his occupational therapy (*id.* at pp. 8-9). He also acknowledged the differences between his findings and those of the neurologist that had previously diagnosed autism (*id.* at p. 8). He reported that at the time he conducted his assessment, the student did not exhibit the diagnostic criteria for a PDD (*id.*). While his observations and findings were not consistent with the prior neurologist's diagnosis of autism, they provided the CSE with a thorough description and analysis of the student's functioning at the time the evaluation was conducted.

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<sup>13</sup> At the impartial hearing, after reviewing the three reports of the neurologist who had diagnosed the student with autism, the neuropsychologist testified that the reports did not change his conclusion or his recommendations (Tr. p. 212).

Therefore, I agree with the impartial hearing officer that the neuropsychological evaluation conducted in June 2007 was appropriate and that the parents are not entitled to an IEE at the district's expense.

**THE APPEAL IS DISMISSED.**

**Dated: Albany, New York  
June 18, 2008**

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**PAUL F. KELLY  
STATE REVIEW OFFICER**