



The University of the State of New York

The State Education Department State Review Officer

No. 08-100

Application of a STUDENT SUSPECTED OF HAVING 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:

Law Office of Anton Papakhin, P.C., attorneys for petitioners, Anton Papakhin, Esq., of counsel

Frazer & Feldman, LLP, attorneys for respondent, Laura A. Ferrugiari, Esq., of counsel

DECISION

Petitioners (the parents) appeal from the decision of an impartial hearing officer which denied their request to be reimbursed for their son's tuition costs at the Family Foundation School (Family Foundation) for the 2005-06, 2006-07 and 2007-08 school years. Respondent (the district) cross-appeals from the impartial hearing officer's determination insofar as it did not address equitable considerations of the parents' claim. The appeal must be dismissed. The cross-appeal must be dismissed.

The facts and procedural history in this case were set forth in specificity in the impartial hearing officer's decision (IHO Decision at pp. 1-66), and the parties' familiarity with them is presumed. Therefore, the student's educational history and the procedural aspects of the underlying impartial hearing will not be repeated here in detail. At the time the impartial hearing convened in August 2006, the student was attending Family Foundation (see Parent Ex. A at p. 2). Family Foundation has not been approved by the Commissioner of Education as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7). The student's eligibility for special education and related services as a student with an emotional disturbance and a learning disability are in dispute in this appeal (34 C.F.R. § 300.8[c][4], [10]; 8 NYCRR 200.1[zz][4], [6]).

According to a February 2001 individualized education program (IEP), the student was previously eligible for special education as a student with a speech or language impairment until the fourth grade, and he was declassified thereafter (Tr. p. 327; Dist. Ex. 5 at p. 4; Parent Exs. B at p. 1; Z at pp. 1, 4).

During the 2002-03 school year (sixth grade), the student's grades fell primarily in the "B" range (Tr. p. 2897; see Parent Ex. H at pp. 6-7). According to the student, he briefly experimented with marijuana in the fourth and sixth grades, and smoked it regularly beginning in October 2003 (seventh grade) (Tr. p. 2352; Parent Ex. H at p. 11).¹ During the seventh and eighth grades, the student also reported periodic alcohol, prescription and over the counter medication abuse, as well as two to three uses of marijuana with cocaine (Parent Ex. H at p. 11-12). Over the course of the 2003-04 and 2004-05 school years (seventh and eighth grades), the student had numerous unexcused absences from school (Parent Exs. I at p. 4; T at pp. 2-5). In seventh grade, the student began to receive failing grades in math, health, Spanish, social studies and "enrichment" (Dist. Ex. 5 at p. 1). During the first marking period of eighth grade, the student received failing grades in language arts, math, social studies and Spanish (Parent Ex. J at p. 5). On December 9, 2004 the student's parents requested a complete evaluation of the student (Parent Exs. H at p. 7; U at p. 10).

In response to the parents' request, the district conducted a psychological evaluation, social history and classroom observation of the student and solicited information from the student's teachers regarding his educational performance (Dist. Ex. 5; Parent Exs. K; M; R). The psychological evaluation included intelligence and achievement testing (Dist. Ex. 5). The results of standardized intelligence testing revealed that the student's overall cognitive functioning was within the average range; however, the student's processing speed skills were in the borderline range (id. at p. 3). The results of standardized achievement testing revealed that the student's decoding skills, math skills, spelling and listening comprehension skills were all in the average range (id. at pp. 2-3). The student's reading comprehension and oral language skills were in the high average range and his oral expression in the superior range (id.). The evaluator reported that the student's "resistance to expressing himself with pencil and paper served to contribute to a depressed score" on a subtest measuring writing skills (id. at p. 4). The evaluator opined motivational issues, rather than learning problems or perceptual issues, presented the primary challenges to the student's success in the classroom (id.). The student's teachers indicated that he would attend to lessons for a few minutes, then become sleepy and put his head down on his desk (id. at p. 1; see Parent Ex. J at pp. 5-8). Some of the student's teachers indicated that the student interacted with others, was social and appeared happy when with his friends (Parent Ex. M at pp. 1, 3, 4, 7). However, other teachers described the student as unable to relate to adults, seeming socially awkward, getting along with most students but often argumentative, lacking in self-esteem, and while having a group of friends, withdrawn and depressed (Parent Ex. M at pp. 2, 5, 6, 7). Several of the student's teachers commented that the student had a poor or "unkempt" appearance (Parent Ex. M at pp. 2, 3, 4).

¹ Although unclear, the parents indicated that they became aware that the student was using drugs either during seventh grade in January 2005 or during summer 2005, approximately time when the student began eighth grade (Parent Exs. A at p. 2; B at p. 2; H at p. 3).

The district conducted a classroom observation of the student during an eighth grade math class in December 2004 (Parent Ex. R). The observer described the student as initially sitting quietly while taking notes and looking at the board and then putting his head down on his desk for a brief period (Parent Ex. R). Later, the student sought help from a classmate but seemed confused with the assistance (id.). The observer reported that for the remainder of the class the student passed notes and joked with another student (id.). The teacher called on the student several times (id.). The first time the student was not aware which problem the class was working on and the last time he was able to answer correctly (id.). According to the observer, the student willingly accepted help from the teacher (id.). The student engaged in horseplay with another student during which both students ran out of the room (id.). The student returned to the room after approximately one minute (id.).

The CSE convened on March 1, 2005 to review the results of the district's evaluation (Parent Ex. X at p. 1). Although the March 2005 CSE determined that the student was not eligible for special education, the district recommended that the student receive testing accommodations in the form of extended time (id. at p. 2).²

In August 2005, the parents placed the student in a day treatment program (Tr. p. 1218). According to a discharge summary, the student's admission diagnoses included abuse of cannabis, alcohol, opiates, and amphetamines; attention deficit hyperactivity disorder (ADHD); and parent-child relational problem (Parent Ex. AA at p. 1). Treatment notes indicated that while participating in the day treatment program the student received weekly individual therapy, bi-weekly family therapy, and daily group and therapeutic activities (id. at p. 2). The student also received psychiatric services (id.). The student's progress throughout treatment was described as inconsistent (id.). According to progress notes the student often presented as hostile and angry and refused to consistently follow rules (id.). The district provided the regular education component of the student's day treatment program, which consisted of ten hours of instructional services weekly (Tr. pp. 335-36). During the time the student attended the day treatment program, he tested positive for smoking marijuana (Tr. pp. 2354-55; see Parent Ex. EE). The student's attendance was poor and he was often very somatic (Parent Ex. AA at p. 2). In February 2006, while the student was still attending the day treatment program, the parents informed him that they intended to seek a divorce (Tr. pp. 2406-07). Progress notes indicated that the "impact of excessive family conflict had a negative effect on the student's functioning" (Parent Ex. AA at p. 2).

In a letter to the district's assistant superintendent for special education and pupil services dated February 23, 2006, the coordinator of the day treatment program reported that the student was "smoking marijuana, disobeying house and program rules and taking off for hours at a time" (Dist. Ex. 8). The coordinator characterized the student's attendance as fair to poor and noted that the student required a higher level of care (id.). The coordinator indicated that immediate residential placement had been recommended for the student and that the student's mother had "sent paperwork" for a person in need of supervision (PINS) diversion but that it had "not taken

² It does not appear from the hearing record that the parents challenged the CSE's May 2005 determination (Tr. pp. 328-29; see Parent Ex. X at p. 2).

effect as of yet" (Dist. Exs. 7 at p. 2; 8; see Parent Ex. L at p. 1). The coordinator stated that the student was in need of longer-term treatment, that the day treatment program did not recommend the student return to the high school under any circumstances, and that child protective services (CPS) would be notified if the student did not reach a higher level of care (Tr. p. 338; Dist. Ex. 8). The student was expelled from the day treatment program at approximately the same time he notified the district superintendent of the recommendations (Tr. pp. 336, 559; 762; Dist. Ex. 8; Parent Exs. AA at p. 2; H at p. 3).

Following the student's expulsion from the day treatment program, the parents reported that he engaged in substance abuse on a daily basis, broke household rules and exhibited verbal and physical aggression (Parent Ex. H at p. 3). The student continued to abuse substances until March 17, 2006 when the parents placed him at Family Foundation (id.), a private residential college preparatory school that undertakes the education of students in a drug-free setting (Tr. p. 67, 69, 109). The hearing record indicates that Family Foundation relies upon the 12-step philosophy, a step-by-step process for resolving addiction issues (Tr. pp. 67, 87-90, 2092, 2094).

The parents referred the student to the district's CSE in March 2006 and the CSE convened in April 2006 to consider whether the student was eligible for special education and related services (Dist. Exs. 1; 2; 4; Parent Ex. B). The CSE meeting attendees included the CSE chairperson, a school psychologist, a special education teacher, a regular education teacher, an additional parent member, the student's father, the parents' attorney and the district's attorney (Tr. pp. 332-34, 818, 1629; Parent Ex. B at p. 1). The CSE reached a consensus that additional information was needed to make an appropriate recommendation for the student (Tr. pp. 337-38, 340-41; Parent Ex. B at p. 2). The district made arrangements to have a psychoeducational evaluation of the student conducted at Family Foundation (Tr. pp. 343, 457, 467, 922-23, 1374; see Parent Ex. C at p. 2). Following the April 2006 CSE meeting, the parents obtained and submitted a psychoeducational and personality assessment report by a private psychologist, and the district thereafter reduced the scope of its own evaluation to avoid the "practice effect" associated with duplicative testing (Tr. p. 343-34, 1375, 2472; see Dist. Ex. 6; Parent Ex. H).

In a letter to the parents' attorney dated May 16, 2006, the coordinator of the day treatment program stated that the student "presented as a very anxious, depressed, guarded, immature boy who has a significant history of poly-substance abuse" as well as ADHD and school problems (Parent Ex. FF). The coordinator noted that although the student initially responded to the program, his progress was inconsistent (id.). The student was reportedly "very somatic" and had "excessive absences" (id.). Chronic family problems were reported to play a role in the student's overall progress and occasional substance use was noted (id.). The coordinator reported that in mid-February the student became more oppositional, "which coincided with learning that his parents might be divorcing" (id.). He noted that the student relapsed and refused to return to the program (id.). According to the coordinator, more salient than the student's drug history and relapse were the student's emotional immaturity, oppositional-defiant behavior and inability to cope with his feelings and his life (id.). The student was treated with medication to address his ADHD and depression (id.). The coordinator reported that, at the time the student was discharged, it was the recommendation of the day treatment program that the student attend a residential treatment facility for dually diagnosed adolescents that would allow the student to be in a structured setting away from home and that "would enable him to

emotionally mature; curb his drug use and behavioral acting-out; and function academically" (id.). The coordinator reported the following diagnoses at discharge: cannabis abuse, alcohol abuse, dysthymia, oppositional-defiant disorder, ADHD predominately inattentive type and generalized anxiety disorder (id.).

The following day, the day treatment program coordinator sent a similar letter, dated May 17, 2006, to the district's assistant superintendent (Parent Ex. I). In the May 17th letter, the student was described as anxious and guarded, but not depressed (id.). In addition, the student was diagnosed as having a parent-child relational problem but not as having a generalized anxiety disorder (id.). The May 17th letter indicated that, while the student was smoking marijuana at the time of discharge, the day treatment program felt that the student needed to be in an alternative educational/treatment setting that would address his significant emotional, behavioral and substance abuse problems (id.). The coordinator opined that the student was unable to sustain himself in day treatment at that time (Parent Ex. I).

Over the course of three days in May 2006, the student was assessed by the parents' private psychologist (Parent Ex. H). In an evaluation report dated May 30, 2006, the psychologist noted that information was collected through, among other things, interviews with the student and his parents, a review of the student's educational records, administration of a number of cognitive and achievement tests, and several behavior rating scales (id. at p. 4). In the evaluation report, the private psychologist concluded that the student should be classified as eligible to receive special education and related services as a student with an emotional disturbance (id. at p. 23). He recommended that the student be placed in a "highly structured and highly supervised residential placement" (id. at p. 24). The private psychologist also concluded that the student had a learning disability in reading, slow mathematical calculation speed, a learning disability in the area of written expression, and ADHD (id.).

A social history was conducted by the district on June 2, 2006 with the student's mother serving as reporter (Dist. Ex. 7). The student's mother indicated that she and her husband had not seen the student since he entered Family Foundation on March 17, 2006 (Dist. Ex. 7 at p. 2).³

On June 6, 2006, a school psychologist under contract with the district traveled to Family Foundation to conduct a classroom observation of the student, administer a rating scale called the Differential Test of Conduct and Emotional Problems (DT/CEP), and solicit feedback from the student's teachers (Dist. Ex. 6 at p. 1). In an evaluation report dated June 13, 2006, the contracted psychologist concluded that, overall, the student was doing well academically, socially and behaviorally at Family Foundation, and that the results of the DT/CEP did not suggest that an emotional disorder or behavioral problem was evident (id. at pp. 2, 3).

The CSE reconvened on June 16, 2006 to consider the updated information on the student (Parent Ex. C). The CSE meeting attendees included the CSE chairperson, a school psychologist, a special education teacher, a regular education teacher, an additional parent member, the parents, the parents' attorney and the district's attorney (id. at p. 1). According to

³ The parents and student were not permitted to communicate with one another for thirty days after he entered Family Foundation (Tr. pp 2384-85)

the parents, the student's emotional and subsequent substance abuse issues were the result of learning difficulties and possible behavioral/emotional difficulties, while the additional parent member and other committee members from the district determined that the student's drug abuse was difficult to separate from possible emotional issues (id. at p. 3). The CSE meeting minutes noted that during the classroom observation of the student, his level of functioning appeared commensurate with his cognitive abilities when he was abstinent from substance abuse (id.). The CSE also determined that there were no behavioral or emotional issues that were interfering with the student's academic performance and concluded that the student should not be classified as a student with a disability, and the parents indicated that they disagreed with this conclusion (id.).

In a due process complaint notice dated June 20, 2006, the parents alleged, among other things, that the student's emotional condition "significantly worsened" in the summer of 2005 and that the student began using drugs compulsively to self-medicate his emotional distress and anxiety (Parent Ex. A at p. 2). The parents also alleged that they unilaterally placed the student at Family Foundation because the district offered a regular education program (id.). According to the parents, after providing the June 2006 CSE with the private psychologist's evaluation report, the June 2006 CSE's decision not to classify the student with "emotional disability" was irrational and unsupported by the information presented at the CSE meeting (id.). The parents' requested that an impartial hearing officer find that the student met the criteria as a student with emotional disturbance, the district failed to offer the student a free appropriate public education (FAPE) for the 2005-06 and 2006-07 school years, Family Foundation was an appropriate placement for the student and the parents were entitled to tuition reimbursement from March 2006 through June 2007 (id. at p. 3).

In July 2006, at the request of the parents, the private psychologist conducted a follow-up assessment to his May 2006 psychoeducational and personality assessment of the student (Parent Ex. Q). The student was further assessed at Family Foundation by means of a diagnostic interview; a classroom observation; a review of educational records; an interview with Family Foundation staff; a review of the school literature; an observation of "table topics;" and an administration of the Behavior Assessment System for Children – Second Edition (BASC-2) to the student and his teachers (id.). In an evaluation report, the private psychologist again concluded that the student should be classified with an emotional disturbance and the opined that Family Foundation was an appropriate placement for the student that could address his substance abuse, emotional and learning needs (id. at pp. 7-12).

An impartial hearing convened in August 2006 and concluded in December 2007 after 20 days of testimony (Tr. pp. 1-3560). Prior to the conclusion of the impartial hearing, the parents filed a second due process complaint notice dated December 5, 2007 that raised the same alleged deficiencies identified in their June 2006 due process complaint notice and added a tuition reimbursement claim arising from the student's continued enrollment at Family Foundation for the 2007-08 school year (Parent Ex. LL). On the last day of the impartial hearing after the conclusion of the testimony, the parents moved to consolidate their tuition reimbursement claim for the 2007-08 school year into the pending hearing, which motion was granted by the impartial hearing officer over the district's objection (Tr. pp. 3540-47; see IHO Decision at p. 1).

In a 158 page decision dated July 28, 2008, the impartial hearing officer determined that the April 2006 and June 2006 CSE meetings were properly composed (IHO Decision at p. 75).⁴ The impartial hearing officer also found that the student did not have a learning disability (*id.* at p. 80). The impartial hearing officer rejected the conclusions of the parents' private psychologist and the coordinator of the day treatment program and he was persuaded by the opinions of the contracted psychologist and the district's school psychologist (*id.* at pp. 10, 81-82, 91, 94-101, 104, 114-17, 154-55).⁵ The impartial hearing officer concluded that the student did not have emotional issues or inappropriate behaviors at the time of the June 2006 CSE meeting and that the student excelled academically when was no longer abusing drugs and when he learned, after arriving at Family Foundation, that his parents were not going to divorce (*id.* at pp. 124-27). Consequently, the impartial hearing officer determined that the student should not be classified as a student with a disability (*id.* at pp. 127-28). The impartial hearing officer also determined that even if the student should have been classified, Family Foundation was not appropriate for him because the staff did not have appropriate credentials or provide appropriate therapeutic services for a student with an emotional disability (*id.* at pp. 128-29, 132, 134, 136, 138, 142, 155). The impartial hearing officer denied the parents' claims for tuition reimbursement for the 2005-06, 2006-07 and 2007-08 school years (*id.* at p. 155).

The parents appeal, contending that the impartial hearing officer erred in finding that the June 2006 CSE meeting was properly composed because the district failed to include a special education teacher or provider from Family Foundation or day treatment program at the CSE. The parents argue that the June 2006 CSE did not have sufficient evaluative data to make a determination regarding the student's eligibility for special education and related services. According to the parents, the impartial hearing officer erred because the hearing record does not support his conclusion that the student could not be classified as a student with a learning disability or emotional disturbance at the time of both the April 2006 and June 2006 CSE

⁴ The hearing record contains no explanation whatsoever regarding why the impartial hearing was conducted over 18 months or why the impartial hearing officer took over six additional months thereafter to render his decision, which brought the entire process to over two years (see Parent Ex. A; IHO Ex. 3; Tr. p. 3471; IHO Decision at p. 158). At various points during the impartial hearing, the impartial hearing officer commented on the adequacy of the hearing record and noted his practice of admitting all evidence and allowing parties to argue its admissibility in their post hearing briefs (see, e.g., Tr. pp. 308, 713). While impartial hearing officers are obliged to ensure completeness of the hearing record (8 NYCRR 200.5[j][3][vii]), State regulations also contain provisions requiring that impartial hearings be completed promptly and that hearing decisions be rendered in an expeditious fashion (8 NYCRR 200.5[j][3][iii][a]-[b], [xiii], [5]). I remind the impartial hearing officer that several provisions have been promulgated to assist impartial hearing officers in complying with State regulations, such as limiting the examination of witnesses and limiting the number of additional witnesses to avoid testimony that is irrelevant, immaterial or unduly repetitious (8 NYCRR 200.5[j][3][xii][d]-[e]), which, in this case, are tools that may have been useful during the 18-month development of testimonial evidence.

⁵ The impartial hearing officer found that the testimony of the private psychologist and the coordinator of the day treatment program was not credible (see, e.g., IHO Decision at pp. 91, 94, 104, 114-15). State Review Officers give due deference to the findings of witness credibility by an impartial hearing officer, unless non-testimonial, extrinsic evidence in the hearing record would justify a contrary conclusion or unless the hearing record, read in its entirety, would compel a contrary conclusion (*Carlisle Area School v. Scott P.*, 62 F. 3d 520, 524 [3d Cir. 1995]; Application of the Bd. of Educ., Appeal No. 08-074; Application of the Dep't of Educ., Appeal No. 08-037; Application of the Bd. of Educ., Appeal No. 04-091; Application of the Bd. of Educ., Appeal No. 03-062; Application of the Bd. of Educ., Appeal No. 03-038; Application of a Child with a Disability, Appeal No. 03-025; Application of a Child with a Disability, Appeal No. 01-019).

meetings. The parents allege that the impartial hearing officer's credibility findings regarding the private psychologist were erroneous and that the impartial hearing officer failed to render a decision in an impartial or timely manner. With regard to their tuition reimbursement claim, the parents assert that Family Foundation was an appropriate placement for the student and that equitable considerations support their claim.

In the answer, the district denies many of the substantive allegations raised by the parents and argues that the petition "fails to state a claim for which relief may be granted." The district asserts that the June 2006 CSE was validly composed and appropriately determined that the student was not eligible for special education services. Among other things, the district claims that the impartial hearing officer correctly rejected the private psychologist's opinions.⁶ According to the district, Family Foundation was not an appropriate placement for the student. The district also alleges that there is no valid reason to disturb the impartial hearing officer's credibility findings and that the parents' disagreement with his conclusions is not the result of actual or apparent bias by the impartial hearing officer. The district asserts that the delay in concluding the impartial hearing is, in many respects, attributable to the parents.

The district also cross appeals, arguing that the impartial hearing officer failed to address the parties' equitable arguments and asserting that equitable considerations do not support the parents' claims because the parents, among other things, failed to give the district "adequate notice of [the student's] alleged disabilities." In the answer to the cross appeal, the parents allege that they provided the district with information regarding the student's expulsion from the day treatment program and his need for a residential placement. The parents also assert that the student's need for a residential placement constituted an emergency situation, the district acknowledged the severity of the student's situation and the parents should have been excused from compliance with the notice requirements for unilaterally placing a student.

Two purposes of the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) are 1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and 2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). While school districts are required to comply with all IDEA procedures, not all procedural errors render an IEP legally inadequate under the IDEA (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

⁶ The district also requests that the private psychologist's September 2006 report be excluded from evidence on appeal.

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];⁷ E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an impartial hearing officer's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 130 [2d Cir. 1998]; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Mr. P. v. Newington Bd. of Educ., 2008 WL 4509089, at *7 [2d Cir. Oct. 9, 2008]; Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs (34 C.F.R. § 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals related to those needs (34 C.F.R. § 300.320[a][2]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (34 C.F.R. § 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

⁷ The Code of Federal Regulations (34 C.F.R. Parts 300 and 301) has been amended to implement changes made to the IDEA, as amended by the Individuals with Disabilities Education Improvement Act of 2004. The amended regulations became effective October 13, 2006. While some of the relevant events in the instant case took place prior to the effective date of the 2006 amendments, unless otherwise noted, citations in this decision refer to the federal regulations as amended because they were reorganized and renumbered.

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 C.F.R. § 300.148).

Under the IDEA, the burden of persuasion in an administrative hearing challenging an IEP is on the party seeking relief (see Schaffer v. Weast, 546 U.S. 49, 59-62 [2005] [finding it improper under the IDEA to assume that every IEP is invalid until the school district demonstrates that it is not]).⁸

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

At the outset, I will address the parent's claims of bias on the part of the impartial hearing officer. State regulations provide that an impartial hearing officer shall not have a personal or professional interest which would conflict with his or her objectivity in the impartial hearing (8 NYCRR 200.1[x][3]; Application of a Child with a Disability, Appeal No. 01-046). An impartial hearing officer should avoid giving the appearance of impropriety (Application of a Child with a Disability, Appeal No. 07-008; Application of the Bd. of Educ., Appeal No. 03-015; Application of a Child with a Disability, Appeal No. 02-027; Application of a Child with a Disability, Appeal No. 00-063; Application of a Child with a Disability, Appeal No. 99-061; Application of a Child with a Disability, Appeal No. 99-025; Application of a Child with a Disability, Appeal No. 98-73; Application of a Child with a Disability, Appeal No. 98-55;

⁸ The New York State Legislature amended the Education Law to place the burden of persuasion upon the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of persuasion 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 parents' due process complaint notice was dated June 20, 2006, well over a year before the burden of proof shifted to the district (Parent Ex. A at p. 1). Under the circumstances presented herein, the impartial hearing commenced prior to the effective date of the amended law. Accordingly, in the instant case, the burden of persuasion that the district failed to offer the student a FAPE rested with the parents. (Application of a Student Suspected of Having a Disability, Appeal No. 08-023; Application of the Dep't of Educ., Appeal No. 08-018).

Application of a Child with a Disability, Appeal No. 94-32). An impartial hearing officer, like a judge, must be patient, dignified and courteous in dealings with participants in the impartial hearing process and must perform all duties without bias or prejudice in favor or against any person, and shall not, by words or conduct, manifest bias or prejudice, according each party the right to be heard (Application of a Child with a Disability, Appeal No. 07-090; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child Suspected of Having a Disability, Appeal No. 01-021; see 8 NYCRR 200.1[x][3], [4][v]). At all stages of the hearing, an impartial hearing officer may "assist an unrepresented party by providing information relating only to the hearing process" (8 NYCRR 200.5[j][3][vii]). An impartial hearing officer must render a decision that is based solely upon the hearing record (8 NYCRR 200.5[j][5][v]; see Application of a Child with a Disability, Appeal No. 00-063; Application of a Child Suspected of Having a Disability, Appeal No. 00-036; Application of a Child with a Disability, Appeal No. 98-55). State regulations do not impair or limit the authority of an impartial hearing officer to ask questions of counsel or witnesses for the purpose of clarification or completeness of the record (8 NYCRR 200.5[j][3][vii]).

After reviewing the entire hearing record, including the impartial hearing officer's interaction with the parties and the language of his decision, I find that the evidence does not weigh in favor of the parents' contention that the impartial hearing officer acted with bias or prejudice against petitioner. In addition to asking questions of the parents' witnesses, the impartial hearing officer asked numerous questions from the witness called by the district, and ruled in favor of both parties when objections were raised (see, e.g., Tr. pp. 191, 198-99, 205; 219, 336, 337, 342-343; 1285, 1291-93, 2318, 2374-75, 2596-97, 3541-44).⁹ Although the parents disagree with the conclusions reached by the impartial hearing officer, their disagreement does not provide a basis for finding that the impartial hearing officer acted with bias (Application of a Child with a Disability, Appeal No. 07-078; Application of a Child with a Disability, Appeal No. 06-102; Application of a Child with a Disability, Appeal No. 06-013; Application of a Child with a Disability, Appeal No. 96-3; Application of a Child with a Disability, Appeal No. 95-75).

Turning first to the parents' contention that the CSE meetings were improperly composed because the district failed to include "the student's current teachers and providers," the IDEA

⁹ By his own concession the impartial hearing officer stated that he raised "many many objections" as the parties presented their cases (Tr. p. 2578-79). Overall, his "objections" to testimony were numerous, at times interrupted the flow of testimony, and often did not facilitate the presentation of evidence or development of the record. In general, his "objections" and questions asked appeared at times to usurp the role of counsel in an attempt to apply formal rules of evidence at the impartial hearing (see, e.g., Tr. p.1230-32). Although I do not find that his objections, which were rendered against both parties, were the result of bias (see Pallotta v. West Bend Co., 166 A.D.2d 637, 639 [2d Dep't 1990]), I remind the impartial hearing officer that the formal rules of evidence that are applicable in civil proceedings are relaxed in impartial hearings (Cowan v. Mills, 34 A.D.3d 1166, 1167 [3d Dep't 2006]; see Application of a Child with a Disability, Appeal No. 07-027; see also Tonette E. v. New York State Office of Children and Family Servs., 25 A.D.3d 994, 995-96 [3d Dep't 2006][strict formal rules of evidence need not be observed at administrative hearings]). Here, both parties in this case were represented by counsel, and it is traditionally the role of a party's counsel, in the exercise of their professional judgment, to determine the whether or not to render an objection, especially since an impartial hearing officer does not function in an advocacy role (compare Carson v. New York City Health & Hosps. Corp., 178 A.D.2d 265 [1st Dep't 1991] with Schaffer v. Kurpis, 177 A.D.2d 379, 380 [1st Dep't 1991]; see also People v. Yut Wai Tom, 53 N.Y.2d 44; 55-58 [1981]; Habenicht v. R. K. O. Theatres Inc., 23 A.D.2d 378, 380-81 [1st Dep't 1965]).

requires a CSE to include, among others, not less than one regular education teacher if the student is or may be attending a general education environment and one special education teacher of the student, or where appropriate, not less than one special education provider of the student (20 U.S.C. § 1414[d][1][B][ii]-[iii]; see 34 C.F.R. § 300.321[a][2]-[3]; 8 NYCRR 200.3[a][1][ii]-[iii]). The Official Analysis of Comments to the revised IDEA regulations noted that:

A few commenters recommended that the regulations define "special education teacher" and "special education provider," as used in § 300.321(a)(3).

Discussion: Section 300.321(a)(3), consistent with section 614(d)(1)(B)(iii) of the Act, requires that the IEP Team include not less than one special education teacher, or where appropriate, not less than one special education provider of the child. This is not a new requirement. The same requirement is in current § 300.344(a)(3). As noted in Attachment I of the March 12, 1999 final regulations, the special education teacher or provider who is a member of the child's IEP Team should be the person who is, or will be, responsible for implementing the IEP.

(IEP Team, 71 Fed. Reg. 46670 [August 14, 2006] [emphasis added]).

In this case, the April 2006 and June 2006 CSE meetings both included the attendance of regular education and special education teachers from the district (Tr. pp. 332-34, 818, 1629; Parent Exs. B at p. 1; C at p. 1). Furthermore, the hearing record indicates that the district sent the parents notice of who had been invited that also indicated that the parents could be accompanied by anyone of their choosing with knowledge or expertise about the student (Dist. Ex. 4; but see Tr. pp. 1646-47). The CSE chairperson specifically testified that the parents informed the district that they were bringing counsel to the CSE meeting and she did not recall them requesting that anyone else be invited to the CSE meeting (Tr. p. 332).¹⁰ I find that the parents' procedural claim that the CSE was improperly composed is without merit, and that even if their claim had been supported by the hearing record, they have not established that the CSE composition in any way impeded the student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or deprived the student of educational benefits (see 20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]).

I will next address the parents' contention that the data before the CSE was inadequate to determine whether the student was eligible for special education and related services.¹¹ When a

¹⁰ The student's father testified that he requested the presence of the student's teachers from Family Foundation; however, it appears that he made this request after the June 2006 CSE meeting had convened (Tr. pp. 2478-79).

¹¹ Although the parents identify this issue in their petition for review as a challenge to the data available at the June 2006 CSE review, they do so by referencing their memorandum of law, in which the issue is recast as challenge to the impartial hearing officer's findings with regard to the diagnosis and opinions of the coordinator of the day treatment program. A memorandum of law is not a substitute for a pleading and State regulations provide that a party may not circumvent the page limitations for a petition for review through such incorporation by reference (8 NYCRR 279.8[5], Application of a Child with a Disability, Appeal No. 07-113;

student suspected of having a disability is referred to a CSE, the CSE must ensure that an individual evaluation of the referred student is performed (Application of the Dep't of Educ., Appeal No. 08-042; Application of the Bd. of Educ., Appeal No. 08-016; Application of the Dep't. of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-128). A "full and individual initial evaluation" must be conducted (20 U.S.C. § 1414[a][1][A]; see 34 C.F.R. § 300.301[a]) and must include at least a physical examination, an individual psychological evaluation (unless a school psychologist assesses the student and determines that such an evaluation is unnecessary), a social history, an observation of the student in the current educational placement, and other appropriate assessments or evaluations as necessary to ascertain the physical, mental, behavioral and emotional factors which contribute to the suspected disabilities (8 NYCRR 200.4[b][1][i-v]; Application of the Dep't of Educ., Appeal No. 08-042; Application of the Bd. of Educ., Appeal No. 08-016; Application of the Dep't. of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-128). The student must be assessed in all areas of suspected disability (20 U.S.C. § 1414[b][3][B]), including, "if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities" (34 C.F.R. § 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). The evaluation must be "sufficiently comprehensive to identify all of the child's special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified" (34 C.F.R. § 300.304[c][6]; see 8 NYCRR 200.4[b][6][ix]). Moreover, as part of an initial evaluation the IEP team must, as appropriate, "review existing evaluation data on the child" including "evaluations and information provided by the parents of the child" (20 U.S.C. § 1414[c][1][A][i]; 34 C.F.R. § 300.305[a][1][i]; see 8 NYCRR 200.4[b][5][i]).

In this case, I note that the parents did not allege in either of their due process complaint notices that the information before the CSE was inadequate to render an eligibility determination (Parent Exs. A; LL) and the impartial hearing officer did not decide this issue.¹² There is also no indication in the hearing record that the parents raised this issue at the June 2006 CSE meeting (Parent Ex. C at pp. 1-3; see Application of the Dep't of Educ., Appeal No. 08-105). Consequently, I find that this issue is not properly before me as it has been raised for the first time on appeal and is thus beyond the scope of a review (Application of the Bd. of Educ., Appeal No. 08-026; Application of a Student with a Disability, Appeal No. 08-020; Application of the Dep't of Educ., Appeal No. 08-009; Application of a Child with a Disability, Appeal No. 07-122; Application of a Child with a Disability, Appeal No. 07-072; Application of a Child with a Disability, Appeal No. 07-051; Application of a Child with a Disability, Appeal No. 06-139).

Even if I were to reach this issue, I note that when the CSE met in April 2006, it had evaluation reports of the student from 2004 and 2005, but the parties specifically agreed to reconvene to provide time to obtain additional evaluative information (Parent Ex. B at p. 2). The June 2006 CSE considered evaluative information from approximately 20 sources, including the evaluation report of the parents' private psychologist, before determining that the student was not

Application of a Child with a Disability, Appeal No. 07-112). Accordingly, I will not consider the issue as presented in the parent's memorandum of law.

¹² The parent also did not raise this issue in their post-hearing brief to the impartial hearing officer, which they have submitted without an exhibit label. For convenience, I will refer to it in this decision as Pet. at Ex. OO.

eligible for special education, and I find that this information satisfied the criteria for an initial evaluation (Tr. p. 343; Parent Ex. C at pp. 3-5). Furthermore, I find the parents' argument that the CSE lacked adequate data to determine whether the student was eligible for special education is undermined by their assertions that the private psychologist's report was "comprehensive" and should have led the CSE to conclude, based on the "substantive evidence it presented at the review" that the student should have been classified with an emotional disturbance (see, e.g., Parent Ex. A at p. 2; Pet. ¶¶ 57-62).

Turning next to the parents' assertion, that CSE should have determined that the student was eligible for special education as a student with a learning disability, I note their contentions on appeal are based largely on the testimony and May 2006 evaluation report of the private psychologist, who opined that the student had a learning disability (Tr. pp. 1401, 1404, 1438-39; Parent Ex. H). However, the issues raised in both of their due process complaint notices were limited to whether the student should have been classified as student with an emotional disturbance, and the private psychologist testified that this was primary, the parent's conceded in their memorandum of law that the due process complaint notices were limited to the issue of emotional disturbance (Parent Exs. A at pp. 2-3; LL at pp. 2-3; Pet'r Mem. of Law at p. 7; see Tr. pp. 1878-79).¹³ Accordingly, this issue has not been properly raised.

Nevertheless, were I to reach this issue, I would agree with the conclusion of the impartial hearing officer that the evidence does not show that the student meets the criteria for a learning disability. The IDEA defines a "child with a disability" as a child with a specific physical, mental or emotional condition, "who, by reason thereof, needs special education and related services" (20 U.S.C. § 1401[3][A]; see 34 C.F.R. § 300.308[a][1]; 8 NYCRR 200.1[zz]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007] [explaining that a child must meet a two-prong test to be considered a child with a disability]). State regulations, at the time of the CSE meetings and the commencement of the impartial hearing in this case, defined a learning disability as

a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which manifests itself in an imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations, as determined in accordance with section 200.4[j] of this Part. The term includes such conditions as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia and developmental aphasia. The term does not include learning problems that are primarily the result of visual, hearing or motor disabilities, of mental retardation, of emotional disturbance, or of environmental, cultural or economic disadvantage

¹³ The parents did not assert that the student should have been classified as a student with a learning disability in their posthearing brief (Pet. at Ex. OO), and therefore, it is unclear why the impartial hearing officer made a determination of whether the student was eligible for special education as a student with learning disability (IHO Decision at p. 80).

(8 NYCRR 200.1[zz][6];¹⁴ see 20 U.S.C. § 1401[30]). Here, the evidence in the hearing record shows that the student did not have a learning disability as defined in State regulation. The CSE considered the private psychologist's evaluation report, which concluded that the student demonstrated learning disabilities in reading and written expression (Parent Ex. H at pp. 15-18). The private psychologist administered the WISC-IV to the student, which yielded scores that were consistent with the scores attained during district testing in December 2004 and January 2005 (see Parent Exs. D; H at pp. 12-14, 27).

The private psychologist assessed the student's academic achievement (Parent Ex. H). Using an ability-achievement discrepancy model the private psychologist found that the student demonstrated an impairment in reading speed which he suggested was caused by the student's below average processing speed, as well as poor visual naming facility and poor visual scanning (id. at p. 12). The private psychologist opined that the student's impairment in reading speed was likely caused in significant part by cognitive dysfunction (id. at p. 16). With respect to spelling, the examiner reported that the student's ability fell towards the bottom end of the average range and was significantly below his intellectual potential (id.). The examiner opined that the student's spelling mistakes could reflect a lack of exposure to and practice with spelling and could be accounted for by the student's drop in effort and frequent absences during the previous two years (id.). With regard to a learning disability in written expression, the private psychologist found that the student's development in written expression was significantly below his intellectual potential and appeared to be rooted in the student's difficulty integrating information and slow processing speed (id. at p. 18).

However, the June 2006 meeting minutes indicated that the CSE also reviewed information from the psychologist contracted by the school district (Parent Ex. C at p. 2). The contracted psychologist conducted a classroom observation of the student in his earth science class at Family Foundation and solicited feedback from five of the student's teachers (id.). Based on his classroom observation, the contracted psychologist noted, among other things, that the student followed teacher directions, that he asked the teacher questions, that he listened attentively and took notes, and that the student frequently raised his hand to respond to teacher questions and answered correctly (Dist. Ex. 6 at p. 1). According to the psychologist the student's earth science teacher reported that the student was doing well in class, receiving good grades and demonstrating good effort (id. at p. 2). In addition, various other teachers reported that the student was doing well and described him as smart, working hard and having the highest grade in math class (id.). The psychologist concluded that the student was doing well academically at Family Foundation (id. at p. 3).

¹⁴ A number of provisions in State regulations addressing the learning disability classification were amended after the date of CSE meetings and the commencement of the impartial hearing; however, the former provisions, to the extent applicable the facts of this case, have not been substantively revised (see 8 NYCRR 200.1[zz][6], 200.4[j][4]; see also 8 NYCRR 200.4[c][6] [effective Dec. 9, 2005]). Unless otherwise noted, citations in this decision refer to the State regulations as amended because they have been renumbered. The Office of Vocational and Educational Services for Individuals with Disabilities issued a guidance document outlining some of the amendments (see Implementation of Response to Intervention Programs located at <http://www.vesid.nysed.gov/specialed/publications/policy/RTIfinal.pdf>).

While testing results obtained by the private psychologist led him to conclude that the student had learning disabilities in reading fluency and written expression, there is no indication in the hearing record that these learning disabilities were demonstrated by the student in the classroom at the time of the June 2006 CSE meeting. The student's Family Foundation teachers reportedly indicated that the student was doing well academically (Dist. Ex. 6 at p. 2). Taking into account that the student was recently placed in a residential setting at the time the June 2006 classroom observation took place, the hearing record indicates that the student performed well in a Regents class and there is no indication that the student was being provided any specially designed instruction, accommodations or modifications at the time (Tr. p. 85).

The private psychologist's September 2006 follow-up evaluation report contained little detail with respect to the student's learning disabilities in reading and written expression. (Parent Ex. Q). In the student's "global" class, the private psychologist observed that the student took a long time to copy a small to medium amount of information from the board (*id.* at p. 7). The psychologist concluded that the student's learning disability in reading and his attending difficulties could be addressed through accommodations that could be implemented at any school, including Family Foundation (*id.* at p. 12). According to the private psychologist, the student's academic performance had improved dramatically since entering Family Foundation in March 2006, a fact he attributed primarily to the school's strict behavioral interventions (*id.* at pp. 9-10). With regard to the 2006-07 school year, the acting director of admissions at Family Foundation testified on October 20, 2006 that no academic testing of the student was conducted when he entered Family Foundation and, to the director's knowledge, no academic testing of the student had been conducted to date (Tr. pp. 293-94). For the fall 2006 semester, the student received final grades in the 80s and 90s in Regents level classes at Family Foundation, and his spring 2007 grades for core academics were likewise in the 80s and 90s (Parent Ex. CC at pp. 1, 2). I find that there is no indication in the hearing record that the student required or was provided with any of the accommodations or other assistance outlined in the private psychologist's follow-up assessment.

With regard to the parent's tuition reimbursement claim for the 2007-08 school year, I note that the private psychologist met with the student on May 30, 2007 at the psychologist's office. The private psychologist's notes from this meeting provided little information regarding the student's academic functioning except that the student reported that his classes were going very well, his grades were improving, he wanted to double up on classes and graduate in June 2008, and he wanted to learn and do well in school, cared about his grades and completed his homework because he wanted to avoid "blackout sanctions"¹⁵ (Parent Ex. II at pp. 2-3, 5, 6-7).

In addition, at the impartial hearing the parents' private psychologist acknowledged that he did not recommend a special education program to address the learning disabilities that had been identified by him (Tr. p. 3503). Instead, he conceded that the student's deficits were "circumscribed," did not "exert[] an extensively negative impact on his learning," "could be attended to via accommodations that any school could administer," and that the student's writing disability "could be handled with additional instruction in a regular education environment" (Tr. pp. 3503-04; *see* Tr. pp. 3165-66, 3173-80). I find the private psychologist's concessions

¹⁵ Blackout sanctions appear to be a restriction in a student's telephone privileges (Parent Ex. II at p. 2).

persuasively indicate that the student did not require special education as a result of the student's alleged learning deficits (8 NYCRR 200.1[zz]).¹⁶ In view of the forgoing, I find that the hearing record supports the impartial hearing officer's determination that the student should not have been classified as a student with a learning disability at either the April 28, 2006 or June 26, 2006 CSE meeting.

I will next address the parents' contention that the student should have been eligible for special education as a student with an emotional disturbance. A student with an emotional disturbance must meet one or more of the following five characteristics

- (A) An inability to learn that cannot be explained by intellectual, sensory, or health factors.
- (B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers.
- (C) Inappropriate types of behavior or feelings under normal circumstances.
- (D) A general pervasive mood of unhappiness or depression.
- (E) A tendency to develop physical symptoms or fears associated with personal or school problems.

(34 C.F.R. § 300.8[c][4]; see 8 NYCRR 200.1[zz][4]). Additionally, the student must exhibit one or more of the five characteristics over a long period of time and to a marked degree that adversely affects the student's educational performance (id.). While emotional disturbance includes schizophrenia, the term does not apply to students who are socially maladjusted, unless it is determined that they otherwise meet the criteria above (id.; New Paltz Cent. Sch. Dist. v. St. Pierre, 307 F. Supp. 2d 394, 398 [N.D.N.Y. 2004]).

Whether a student's condition adversely affects his or her educational performance such that the student needs special education, within the meaning of the IDEA, is an issue that has been left for each state to resolve (J.D. v. Pawlett Sch. Dist., 224 F.3d 60, 66 [2d Cir. 2000]). Although some states elect to establish further, more explicit definitions for these terms, often through regulation or special education policy (see, e.g., Mr. I. v. Maine Sch. Admin. Dist. No. 55, 480 F.3d 1, 11 [1st Cir. 2007]; J.D., 224 F.3d at 66-67; Johnson v. Metro Davidson County Sch. Sys., 108 F. Supp. 2d 906, 918 [M.D.Tenn. 2000]), others do not and instead resolve the issue on a "case-by-case" basis (R.B. v. Napa Valley Unified Sch. Dist., 2007 WL 2028132, at *9 [9th Cir. July 16, 2007]; see, e.g., Yankton Sch. Dist. v. Schramm, 93 F.3d 1369, 1375-76 [8th Cir. 1996]; Greenland Sch. Dist. v. Amy N., 2003 WL 1343023, at *8 [D.N.H. Mar. 19, 2003]). Cases addressing this issue in New York appear to have followed the latter approach (Corchado v. Bd. of Educ. Rochester City Sch. Dist., 86 F. Supp. 2d 168, 176 [W.D.N.Y. 2000] [holding that each child is different and the effect of each child's particular impairment on his or her educational performance is different]; Application of the Dep't of Educ., Appeal No. 08-042; Application of a Student Suspected of Having a Disability, Appeal No. 08-023; Application of a

¹⁶ I also note both parties assertions in the record that the student was eligible for accommodations under the Section 504 of the Rehabilitation Act of 1973 (504) (29 U.S.C. §§ 701-796[l]) and testimony that he had a 504 plan (Tr. pp. 656-57, 674, 704).

Child Suspected of Having a Disability, Appeal No. 07-086; see Muller v. E. Islip Union Free Sch. Dist., 145 F.3d 95, 103-04 [2d Cir. 1998]; N.C. v. Bedford Cent. Sch. Dist., 473 F. Supp. 2d 532, 543 [S.D.N.Y. 2007], aff'd 2008 WL 4874535 [2d Cir. Nov. 12, 2008]; New Paltz, 307 F. Supp. 2d at 399). While consideration of a student's eligibility for special education and related services should not be limited to a student's academic achievement (34 C.F.R. § 300.101[c]; 8 NYCRR 200.4[c][5]; see Corchado, 86 F. Supp. 2d at 176), evidence of psychological difficulties, considered in isolation, will not itself establish a student's eligibility for classification as a student with an emotional disturbance (N.C., 473 F. Supp. 2d at 546). Moreover, as noted by the U.S. Department of Education's Office of Special Education Programs, "the term 'educational performance' as used in the IDEA and its implementing regulations is not limited to academic performance" and whether an impairment adversely affects educational performance "must be determined on a case-by-case basis, depending on the unique needs of a particular child and not based only on discrepancies in age or grade performance in academic subject areas" (Letter to Clarke, 48 IDELR 77).

In this case, I note that the parents identify numerous diagnoses, but they do not specifically identify in their petition for review which of the five characteristics are attributable to the student.¹⁷ With regard to the first characteristic, "an inability to learn that cannot be explained by intellectual, sensory, or health factors" (8 NYCRR 200.1[zz][4][i]; see 34 C.F.R. § 300.8[c][4][i][A]), parent reported that student "did okay" in sixth grade, which was prior to the time that he developed a substance abuse problem (Tr. pp. 1564, 1570; Parent Ex. H at pp. 6, 7, 11). Likewise, the observation and assessment of the student conducted in June 2006, when he was no longer engaging in substance abuse, indicated that the student was performing well academically, socially and behaviorally (Dist. Ex. 6 at pp. 2-3). Furthermore, the student reported that his classes were going very well at Family Foundation, his grades had improved, he was doubling up on classes, graduated in June 2008, and entered an honors program in a community college (Parent Ex. II at pp. 2-3, 5, 6-7; Pet. at Exs. MM; NN). I find that the parents have not established that the student had an inability to learn that could not be explained by intellectual, sensory or health factors at the time of the June 2006 CSE meeting or thereafter.

Turning next to the second characteristic, "an inability to build or maintain satisfactory interpersonal relationships with peers and teachers" (8 NYCRR 200.1[zz][4][ii]; see 34 C.F.R. § 300.8[c][4][i][B]), I note that the parents' private psychologist opined that the student demonstrated an inability to build and maintain satisfactory interpersonal relationships with peers and teachers based on diagnostic interviews, a review of the student's educational records, projective testing, and the administration of rating scales (Parent Ex. H at p. 23). Specifically, the private psychologist cited the student's poor interpersonal skills, impaired reality testing and judgment in interpersonal interactions, the finding that the student's "friends" were those with whom he used drugs and the student's then recent history of verbal and physical aggression toward adults (*id.*). According to the student's mother, the student had difficulty transitioning to middle school because most of his friends were on different teams and the student never seemed to feel connected at the middle school (Dist. Ex. 7 at p. 2; Parent Exs. H at p. 20; K at p. 2).

¹⁷ A petition for review must "clearly indicate the reasons for challenging the impartial hearing officer's decision, identifying the findings, conclusions and orders to which exceptions are taken" (8 NYCRR 279.4[a]), and I note that the impartial hearing officer's decision in this case addressed several of the characteristics (see, e.g., IHO Decision at pp. 96-97, 106, 111-12, 116, 119, 124, 127).

However, the student's seventh grade report cards contained comments on the student's academic abilities, but little information regarding the student's social-emotional functioning (Parent Ex. J at pp. 1-4).¹⁸ The March 2005 CSE meeting minutes indicated that the student related well to his peers and was "quite popular" (Parent Ex. X at p. 2). Reports from the student's eighth grade teachers were mixed with respect to the student's social-emotional functioning (Parent Ex. M). Although some of the student's eighth grade teachers described the student as socially awkward, unable to relate to adults, argumentative and withdrawn (Parent Ex. M at pp. 2, 5, 6, 7), others reported that he interacted with others, appeared to have positive social skills and appeared happy when he was with his friends (Parent Ex. M at pp. 1, 3, 4, 7). The coordinator of the day treatment program testified that the student's ability to interact with peers at the day treatment program varied but was generally adequate (Tr. p. 1544). The student's mother testified that "when he was at [the day treatment program] during the day he seemed to get along fine with the kids from what I was told, and I never heard otherwise. . ." (Tr. p. 1616). While the day treatment program coordinator described the student as "abusive," "non-compliant" and "explosive" during his stay at the day treatment program, which could suggest that the student had difficulty maintaining satisfactory relationships with adults during this time period (Tr. pp. 1898, 1943), I note that the program is licensed as a drug rehabilitation facility and the student continued to abuse drugs during his attendance there (Tr. p. 2061; Parent Exs. I; EE; FF). In May 2006, the private psychologist noted that the student's parents stated that the student had been able to make friends and that he got along well with adults unless accused of something (Parent Ex. H at p. 2). The district's contracted psychologist reported that during his June 2006 observation, the student interacted appropriately with his peers and teacher (Tr. p. 1289; Dist. Ex. 6 at pp. 1-2). Based on the forgoing, I find that the evidence does not persuasively show that the student had an (1) inability to build or maintain satisfactory interpersonal relationships with peers and teachers for a long period of time or to a marked degree, or (2) that he required special education to address any needs with regard to his interpersonal relationships (34 C.F.R. § 300.8[a][1]; 8 NYCRR 200.1[zz]; Letter to Clarke, 48 IDELR 77).

With respect to the third characteristic, "inappropriate types of behavior or feelings under normal circumstances" (8 NYCRR 200.1[zz][4][iii]; see 34 C.F.R. § 300.8[c][4][i][C]), the parents' private psychologist opined that the student exhibited inappropriate types of behavior and feelings under normal circumstances, which was evidenced by his pre and post substance abuse anxiety symptoms, and his "present and past significantly elevated anger and aggressive attitudes and behavior" (Parent Ex. H at p. 23). The private psychologist cited examples of the student's anger and aggression toward his parents and the staff at the day treatment program, both of which are substantiated in the hearing record (Tr. pp. 497, 1898, 1943, 2347-49; Parent Exs. H at 22; I). In his evaluation report, the private psychologist stated that the student's marked anger and aggressive attitude occurred after approximately seven weeks of complete abstinence from substances (Parent Ex. H at p. 22). However, I find that the private psychologist's statement is inconsistent with the other evidence in the hearing record. The incidences cited by the psychologist in his evaluation report all occurred at a time prior to the

¹⁸ One teacher reported that the student demonstrated disrespectful behaviors (Parent Ex. J at p. 3), but this does not establish that he was unable to build interpersonal relationships.

student's abstinence from substance abuse and were merely recorded by the psychologist seven weeks later (Parent Ex. H at p. 22). The psychologist acknowledged that the student's parents completed the BASC-2 based on the behavior demonstrated by the student prior to the time he entered Family Foundation on March 17, 2006 (Tr. p. 3116). In addition, with the exception of the student's father, all other BASC-2 respondents rated the student's aggression as falling in the average range (Parent Ex. H at pp. 29-31). I also note that the incidents cited by the psychologist coincided with family difficulties which had a significant impact on the student (Parent Exs. FF; H at p. 3; I; Q at p. 2). I find that the student's anger and aggression, while occurring over a long period of time, were closely related with his drug abuse and were later compounded when his family's difficulties erupted in February 2006. Accordingly, I find that the student's anger and aggression did not constitute inappropriate types of behavior or feelings under normal circumstances.

With regard to anxiety that predated and post dated the student's substance abuse, the private psychologist cited the report of the student's mother that the student had emotional difficulty transitioning to seventh grade (Parent Ex. H at p. 20). According to the private psychologist's evaluation report, the student was frequently absent at the beginning of seventh grade due to somatic complaints and that the student expressed anxiety over walking in the halls alone at the beginning of seventh grade (Tr. p. 2567; Parent Ex. H at p. 20). According to the student's mother, the student was anxious over the prospect that he would be called upon to read something and that he wouldn't be able to read it as well as the other students (Tr. p. 1583). While the student was in seventh grade in November 2003, the student mother wrote a letter to the district's social worker, indicating that a guidance counselor and psychologist from the district had suggested that she take the student for outside counseling and possibly medication in an effort to help the student overcome and eliminate some anxiety that the student might have concerning school (Parent Ex. W at p. 1). According to the private psychologist, the student began experiencing school-related anxiety approximately one month prior to the time that he began engaging in substance abuse (Parent Ex. H at p. 20). I also note that, at that point in time, the hearing record indicates that the student was having difficulty transitioning to middle school and had multiple absences due to illness (Parent Ex. H at pp. 7, 20). After a careful review of the hearing record, I find that the student's anxiety, which the hearing record indicates very shortly predated his drug abuse, was not an inappropriate type of behavior or feeling under normal circumstances that occurred for a long period of time to a marked degree.

After the student ceased using drugs in spring 2006, the private psychologist indicated the student was anxious during the May 2006 assessment of the student as evidenced by the student picking his cuticles and shaking his leg (Parent Ex. H at p. 10). On the BASC-2, the student yielded T scores of 67 on the anxiety scale and 64 on the social stress scale. However, at the time of the observation by the district's contracted psychologist, the student appeared at ease in his class, participated, and interacted well with peers (Dist. Ex. 6 at p. 1). The contracted psychologist also testified that it was unlikely that the student could have suppressed characteristics of anxiety from the staff at Family Foundation for more than brief, intermittent periods of time (Tr. pp. 1370-71, 1374). I also concur with the conclusion of the impartial hearing officer that the student's feelings of anxiety were normal under these circumstances, in which the student was suddenly placed in a residential facility and out of contact with his family (IHO Decision at pp. 111-13; Tr. pp. 76-77, 144, 157, 267, 258-61, 2385, 2525-26). In view of

the evidence above, I find that the parents have not established that, at the time of the June CSE meeting, the student experienced inappropriate types of behavior or feelings under normal circumstances to a marked degree over a long period of time.

Turning to the fourth characteristic, "a generally pervasive mood of unhappiness or depression" for a long period of time and to a marked degree (8 NYCRR 200.1[zz][4][iv]; see 34 C.F.R. § 300.8[c][4][i][D]), the hearing record indicates that the student attended private counseling during the 2003-04 school year; however, this private counselor did not testify at the impartial hearing and no documentation from the counselor was entered into evidence.¹⁹ In December 2004, the student's eighth grade teachers reported that the student was lethargic, that his head was always down on his desk, that he was withdrawn and seemed depressed, and that he did not seem to have very good self-esteem (Parent Ex. M). In May 2005, the student was seen by a private psychiatrist who reportedly diagnosed the student as having an attention deficit disorder (Tr. p. 442, 452, 453-54, 495, 751-52, 756-59, 1189, 1352, 1607, 2350-51, 2787-88, 2942). Like the private counselor, the psychiatrist did not testify, no documentation from the psychiatrist was entered into the hearing record, and there is no evidence that this psychiatrist diagnosed the student as having depression.²⁰ At the time the student entered the day treatment program in August 2005, the student's mood was characterized as dysthymic, and physician notes from the day treatment program indicated that the student reported feeling anxious and depressed and that he was prescribed medication to treat these conditions (Parent Ex. AA at p. 1; Parent Ex. BB at p. 2). Discharge diagnoses included the need to rule out a mood disorder (Parent Ex. AA at p. 2).²¹ While the private psychologist's May 2006 assessment indicated that BASC-2 responses of the student's English teacher at Family Foundation noted marked amounts of depression related behavior (Parent Ex. H at pp. 19-20), the other three BASC-2 responses characterized the student's depressive behavior as being in the average range (Tr. pp. 3123-26; Parent Ex. H at pp. 29-31). In his May 2006 evaluation report, the private psychologist concluded that the student met the criteria for emotional disturbance under the second, third and fifth characteristics of the definition (Parent Ex. H at p. 23). Although he indicated that his findings were consistent with the day treatment program's diagnoses, including dysthymia, the psychologist did not conclude that the student met the criteria for the fourth characteristic of emotional disturbance (*id.* at pp. 22, 23). Administration of the DT/CEP by the district's contracted psychologist in June 2006 yielded a score in the normal range on the emotional

¹⁹ According to the parents' private psychologist, the student's counselor told him in a phone conversation that he thought the student was depressed and that the depression existed prior to the beginning of seventh grade (Aug. 29, 2007 Tr. p. 1316).

²⁰ The school psychologist mistakenly testified that a social history completed by the district indicated that the student received diagnoses of anxiety and depression from a psychiatrist (Tr. p. 954, 1089, 1097). The exhibit actually indicates that these diagnoses were made by the day treatment program (Dist. Ex. 7 at p. 2). The report generated by the parents' private psychologist also indicates that the student was diagnosed in May 2005 by psychiatrist as having ADHD and in August 2005 the student was diagnosed with anxiety and depression (Parent Ex. H at p. 3).

²¹ The discharge diagnoses were determined by the student's treating therapist and reviewed by the student's treating psychiatrist (Tr. pp. 2010-11). Letters written in May 2006 by the coordinator of the day treatment program suggested additional diagnoses at the time of discharge including dysthymia, oppositional defiant disorder and generalized anxiety disorder (Parent Exs. I; FF).

disturbance scale, indicating that the student was "not perceived at potential risk of emotional disturbance" (Dist. Ex. 6 at p. 2). Although a teacher from Family Foundation commented that the student came from an "angry background and at times gives other kids in the room attitude," the student's Earth Science teacher opined that the student "always appears to be in a good mood" (*id.*). The evidence in the hearing record indicates that the student may have experienced a generally pervasive mood of unhappiness or depression in seventh and eighth grade, which coincides with the time that he engaged in substance abuse; however, I find that there is little evidence to suggest that this mood persisted at the time of the June 2006 CSE meeting, and consequently, the student did not meet the fourth characteristic.

The fifth characteristic within the definition of emotional disturbance is that the student must have "a tendency to develop physical symptoms or fears associated with personal or school problems" (8 NYCRR 200.1[zz][4][v]). The private psychologist for the parents opined that the student demonstrated a tendency to develop physical symptoms and fears associated with personal or school problems, as evidenced by his "present and past somatization, present and past anxiety symptoms, and lack of alternative, healthy coping strategies" (Parent Ex. H at p. 23). The hearing record indicates that the student missed 34 days of school during his seventh grade school year (Parent Ex. K at p. 2). The parents' private psychologist opined that the student's somatic complaints, including stomach aches and hives were "medically cleared" and were consistent with anxiety (Parent Ex. H at p. 20). He further opined that the student's symptoms appeared in September 2003 (seventh grade), prior to the student engaging in substance abuse (*id.*). The hearing record also indicates that the student's attendance was a point of contention between the student's parents and the school district, as evidenced by the mother's November 2003 letter to the school district (Parent Ex. W at p. 1). The student's mother provided the district with details regarding 17 absences or instances of tardiness/early dismissal accrued by the student between September 5, 2003 and October 22, 2003 (*id.* at p. 3). The reasons provided by the parent included strep throat and a viral infection, headache and stomachache, and hives (*id.*). Somatic complaints were also recorded by the day treatment program staff during the student's attendance in that program (Tr. pp. 1896-97; Parent Exs. AA at p. 2; FF), and this is consistent with the results of the BASC-2 in May 2006, in which the student's father reported a marked amount of somatic complaints, which yielded a score associated with adolescents who are overly-sensitive and anxious or depressed (Parent Ex. H at p. 20). However, I also note that somatization scores for all other BASC-2 responses fell within the average range, particularly those who reported after the student stopped engaging in substance abuse (*id.* at pp. 29-31). The contracted psychologist who evaluated the student in June 2006 did not note any reports or observations of somatic complaints (Dist. Ex. 6). In view of the forgoing, I am not persuaded that the student somatic complaints were a tendency to develop physical symptoms or fears that were associated with personal or school problems.

In addition to the five characteristics discussed above, I note that the student performed well academically in sixth grade prior to the time he began engaging in substance abuse on a regular basis (Tr. p. 2897; *see* Parent Ex. H at pp. 6-7). The private psychologist's recommendation for residential placement appears to have been based primarily on the student's substance abuse and need for strict supervision (Parent Ex. H at pp. 23-24). The private psychologist noted that while enrolled at the day treatment program and living at home, the student left the house every night to abuse substances, despite parental prohibitions (*id.* at p. 22).

The psychologist opined that without strict supervision the student was at risk for school non-compliance and that, given the opportunity, the student would abuse substances and avoid school (*id.* at p. 24). The psychologist described the student as having "substance dependence in early full remission in a controlled setting" and stated that the student was in need of intensive drug treatment (*id.* at p. 25). Although the psychologist attributed the student's substance dependence to an emotional disturbance, he did not recommend psychotherapy or counseling for the student (*id.* at pp. 23-26). At the time of the May 2006 evaluation of the student by the private psychologist and the June 2006 evaluation by the district's contracted psychologist the student was attending Family Foundation (Dist. Ex. 6; Parent Ex. H). The hearing record reveals that the student stopped engaging in substance abuse when he entered Family Foundation, and that shortly thereafter in May 2006, the student received the following grades in his core academic courses: earth science 83, English (9) 87, global studies (I) 88, and math (A2) 95 (Parent Exs. P; II at p. 4; Q at p. 3). Upon reviewing the evidence in the hearing record in its totality, I am not persuaded that the decline in the student's educational performance was attributable to the alleged emotional disturbance as opposed to his substance abuse, such that he required special education (see Mr. & Mrs. N.C. v. Bedford Cent. Sch. Dist., 2008 WL 4874535 at *2). Accordingly, I find that the impartial hearing officer correctly concluded that the student should not be classified as a student with an emotional disturbance.

The remedy of tuition reimbursement under the IDEA is available only to a student who meets the eligibility criteria of a student with a disability (Application of a Child Suspected of Having a Disability, Appeal No. 05-122). However, I note that even if I had found that the student was eligible for special education programs and services, I concur with the impartial hearing officer's conclusion that the program offered by Family Foundation was not appropriate for the student (IHO Decision at pp. 128-29, 134). The academic vice president from Family Foundation conceded that the "table topics," in which the students address issues together at mealtimes in groups of approximately 30, is a form of mentoring and is not counseling (Tr. pp. 73-74). Although Family Foundation provides counseling services to a small number of students through a licensed social worker or an unlicensed school psychologist holding a bachelor's degree in psychology (Tr. pp. 128, 134-35, 159, 184, 186-87), I find that the hearing record does not indicate that the student was actually provided with any regularly occurring counseling services from an individual with appropriate credentials (Tr. pp. 189, 220, 234, 241, 264, 3231-32, 3279-80, 3284-85, 3288).²² Assuming, for the sake of argument, that the student should have been classified and his primary difficulty was emotional in nature, I find that the impartial hearing officer correctly determined that Family Foundation did not provide the student with appropriate special education services to address his needs (Application of a Child Suspected of Having a Disability, Appeal No. 06-087).

As the student does not meet the criteria for classification as a student with a disability, he is not entitled to the remedies available under IDEA. Accordingly, the necessary inquiry is at an end and the parents are not entitled to reimbursement from the district for the tuition costs

²² The student was required to meet weekly with an individual, but this meeting appears to have been for sponsoring or mentoring in the 12-step recovery process rather than counseling to address issues related to emotional disturbance (Tr. p. 221).

associated with their son's placement at Family Foundation for the 2005-06, 2006-07 or 2007-08 school years (Application of the Dep't of Educ., Appeal No. 06-120).

I have considered the parties remaining contentions, including the district's cross appeal, and find it is not necessary to address them in light of my decision herein.²³

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS DISMISSED.

Dated: Albany, New York
November 24, 2008

PAUL F. KELLY
STATE REVIEW OFFICER

²³ I note that the district was not aggrieved by the decision of the impartial hearing officer, which did not reach the issue of equitable considerations (see 34 C.F.R. § 300.514[b]). In this case, the district's "cross appeal" asserting that equitable considerations do not support the parents claim would be more appropriately characterized as a defense to the parents' claims.