



The University of the State of New York

The State Education Department

State Review Officer

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No. 09-049

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:

Lance N. Salisbury, Esq., attorney for petitioners

DECISION

Petitioners (the parents)¹ appeal from the decision of an impartial hearing officer which determined that the educational program and services respondent's (the district's) Committee on Special Education (CSE) recommended for the student for the 2008-09 school year were appropriate. The appeal must be dismissed.

During the impartial hearing, the student attended sixth grade at a district middle school pursuant to the agreed upon pendency placement² for the instant proceedings (Tr. p. 24; see Dist. Ex. 35). In the pendency placement, the student participated in a general education setting for mathematics, reading, science, social studies, physical education, music, and practical arts classes (Dist. Ex. 35; see Tr. pp. 275-77). The student received English instruction in a 12:1+1 special education classroom, and he attended one period per day in the "Transition Program," which was described as a "resource room with aide support" (id.). During his school day, the student's aide or a special education teacher would accompany the student to all of his classes, with the exception of physical education, and the aide shadowed the student during transitions between classes (id.). During the pendency placement, the district middle school followed the student's behavior plan written in May 2008 and noted that a special education teacher would

¹ In this case, the student's grandparents are his legal guardians (Tr. pp. 580-81; Dist. Ex. D33 at p. 1). As defined by State and federal regulations, the term "parent" includes individuals acting as legal guardians of a student (see 34 C.F.R. § 300.30[a]; 8 NYCRR 200.1[ii]).

² See 20 U.S.C. § 1415(j); 34 C.F.R. § 300.518; Educ. Law § 4404(4)(a); 8 NYCRR 200.5(m).

update the plan in consultation with the parents (*id.*). The student's eligibility for special education programs and services as a student with an emotional disturbance is not in dispute in this appeal (see 34 C.F.R. § 300.8 [c][4]; 8 NYCRR 200.1[zz][4]).

Near the conclusion of the 2005-06 school year, the student's third grade teacher and an elementary school social worker referred the student to the CSE due to concerns regarding his behavior and difficulties with writing, receptive and expressive language, and reading (Dist. Ex. D1 at pp. 1-3). Behaviorally, the referral described the student as being "easily upset, frustrated," or having "tantrums;" "aggressive;" using "avoidance techniques;" seeking "constant attention;" making "frequent requests to have task boundaries explicitly defined; seeking "structure;" and exhibiting "complete defiance" (*id.* at p. 2). The referral also described the student's academic difficulties as the "[w]riting [p]rocess," "spelling in written work," and with oral and reading fluency (*id.* at p. 3). In the social history report, the social worker noted that during the 2005-06 school year, the student "acted inappropriately toward some of his peers (physical and verbal bullying behaviors)," and missed 43 school days due to suspensions related to his behavior (Dist. Ex. D3 at pp. 1-2).³ For the last three months of the 2005-06 school year, the student attended school half-days, worked with an "alternative instructor," and attended mathematics class in his classroom (*id.* at p. 2). After the completion of the initial evaluations—including a medical and social history, a psychological evaluation, and an academic achievement evaluation—the CSE convened on August 23, 2006, and determined that although the student was ineligible for special education services, the student's behavioral difficulties warranted the development and the implementation of a "behavior intervention plan" (Dist. Exs. D2-D5; D6 at pp. 3, 6, 8-9).

In accord with the determinations of the August 2006 CSE, the district conducted a "Functional Assessment" of the student in September 2006 and developed a "Positive Behavior Support Plan" (Dist. Ex. D7 at pp. 1-3). On November 21, 2006, a subcommittee of the CSE convened a requested review, and determined that although the student did not exhibit academic concerns, he demonstrated "significant behavior problems" that "interfer[ed] with his full participation in all the academic work in the classroom and with his ability to be part of a school community and have friends" (Dist. Ex. D8 at pp. 1-2, 7-10). In the meeting minutes, the CSE subcommittee noted the student's increasing "negative behaviors" due to changing family dynamics, that the student appeared to be in "crisis mode," and that he had fallen "behind academically" (*id.* at pp. 7, 10). At that time, the CSE subcommittee found the student eligible to receive special education programs and services as a student with an emotional disturbance, and developed an individualized education program (IEP) continuing the student's placement in a general education setting with additional support services including daily counseling, weekly case management, team meetings every two weeks, a yearly "CAST consultation," and an updated behavior plan (*id.* at pp. 1, 7, 11).⁴ The district updated the student's behavior support plan on December 13, 2006 (Dist. Ex. D7 at pp. 4-5).

³ According to the social history report, the student had only missed nine days of school during the "past three school years" (Dist. Ex. D3 at p. 2).

⁴ In addition to the counseling provided by the district during the 2006-07 school year, the hearing record reflects that the student also received private counseling services from February 2007 until August 2007 (Dist. Ex. D30 at pp. 1-2).

On March 1, 2007, the CSE convened for a requested review of the student's program (Dist. Ex. D9 at pp. 1, 12-15). Noting the student's "escalating" behavior, his inability to participate in recess, his varied ability to function, and his threats to students during both structured and unstructured time, the CSE recommended an alternative schedule for the student to commence on March 14, 2007 (*id.* at pp. 1, 3-4, 6, 9, 12-15). The alternative schedule placed the student in a fourth grade general education setting with a program aide for two hours in the morning for academic instruction; the student then attended counseling; after counseling, the student received approximately one hour of individual teacher instruction in an alternate location; he then participated in lunch with additional adult supervision; after lunch, the student received two hours of individual teacher instruction in an alternate location; and after instruction, the student participated in an "Extended Day Program (Academic Plus)" for the remainder of his school day (*id.* at pp. 3-4). The CSE recommended updating the student's behavior plan, referring the student to the Board of Cooperative Educational Services (BOCES) Turning Point program, and scheduling an appointment for the parents to visit the Elementary Transition Program (ETP) located within another district elementary school due to their concerns about the student's increasing behavior needs (*id.* at pp. 4, 11, 14-15; *see* Dist. Ex. D15 at p. 1). The CSE also conducted program reviews of the student on March 27, 2007, and May 23, 2007 (Dist. Exs. D11-D12). At the May 2007 requested review, the CSE meeting minutes noted that the student continued to exhibit behavioral difficulties in the alternative programming, including defiance, avoidance of academic work (yelling, whining), leaving the classroom without permission, and refusing to work (Dist. Ex. D12 at p. 8).

On August 13, 2007, the CSE convened and recommended placing the student in the ETP program at another district elementary school from September 6, 2007 to December 13, 2007, and that the student receive daily resource room services, full-time 1:1 aide services, twice weekly counseling services (individual and group), and a behavior plan (Dist. Ex. D13 at pp. 1-2, 6). At that time, the parents expressed that they were "very much in favor" of the decision to place the student in the ETP program and for the student to continue to participate in his original elementary school's after-school program since the student did "not want to change schools" (*id.* at p. 6). According to the hearing record, the ETP program provided support to the student in his fifth grade general education classroom setting, including weekly counseling, consultant teacher services, and "daily access to Therapeutic Crisis Intervention trained staff" (Dist. Ex. 15). The ETP staff included a social worker, who provided counseling and crisis intervention, and a special education teacher, who ensured implementation of the students' IEPs and consulted with teachers (Tr. pp. 34-36). The ETP program also had a separate classroom, which functioned as a place for students to "de-escalate" (Tr. p. 36). In addition, the ETP program operated a room referred to as the "Quiet Zone," which was padded and allowed students to voluntarily release aggressive behaviors (Tr. pp. 36-37). Staff could also place a student in the Quiet Zone involuntarily in instances when the student threatened harm to himself or others (Tr. p. 37).

During the 2007-08 school year, the student attended the ETP program (Tr. p. 37; *see* Dist. Exs. D15-D16). The student experienced a "difficult adjustment" to his new elementary school and did not enter his general education classroom until mid-October 2007 (Tr. pp. 40-

44).⁵ The district updated the student's behavior plan in October 2007 (Dist. Ex. D14 at pp. 1-2; see Tr. pp. 38-42). For the student's upcoming annual review in November 2007, the ETP special education teacher and ETP social worker prepared reports, indicating that although the student initially exhibited difficulty adjusting to the new school, he—at that time—"successfully participat[ed] in all activities" with his fifth grade classroom (Dist. Exs. D15; D16 at p. 1). The student took direction from his teacher, acted in a socially appropriate manner, and functioned "at or above grade level in all academic areas" (Dist. Ex. D15; see Dist. Ex. D16 at p. 2). According to the reports, the student still exhibited inappropriate reactions, at times, but he appropriately used the ETP room to de-escalate and return to his classroom (Dist. Ex. D15). In the counseling report, the social worker reported that the student engaged in counseling sessions and seemed to "enjoy the anger management group" (Dist. Ex. D16 at p. 1). He also reported that earlier in the school year, consequences to the student's behaviors included "referrals," loss of recess and physical education classes, bus suspension, and "in-school and one out-of-school suspension" (*id.*). The social worker further reported that the student's aggressive behaviors had "dramatically decreased since mid-October" and that he continued to develop "positive relationships with staff and students" at school (*id.* at p. 2).

At the impartial hearing, the principal of the BOCES Turning Point program testified that on November 16, 2007, the parents participated in a portion of an intake appointment for the BOCES Turning Point program and BOCES conducted a review of the student's records (Tr. pp. 108-09, 113-15). According to her testimony, Turning Point required the completion of an intake process prior to admitting students into the program (Tr. pp. 112-13). The intake process consisted of a records review and an appointment at the facility to "tour" the program, to discuss the use of "time out in a crisis intervention program, and introduction to the Turning Point Program, the classroom, and the counseling components"—which she recalled the parents "did listen to" (Tr. p. 114). However, the parents did not complete the remaining components of the intake process, which included the following: "[i]ntroductions to the student's prospective teacher and counselor," completion of a family history, signing "consents," the completion of a student "mental status evaluation by [the program's] clinical psychologist, and an assessment of the student's and family's willingness to participate in the program" (*id.*). The principal testified at the impartial hearing that although the parents attended the intake appointment, the parents did not complete the process because "the family indicated they didn't want to continue" (Tr. pp. 113-14). Given that the parents did not complete the intake process, the principal could not "say . . . for sure" whether the Turning Point program was appropriate for the student, but she indicated that based upon the records review, "it looked to us as though he was appropriate to continue the intake process" (*id.*).

The principal described Turning Point as a "K through 12 program for students with emotional disabilities" with 8:1+1 classes (Tr. pp. 109-10). Turning Point was located within the BOCES directly across the street from the district middle school (Tr. p. 110). At that time, the program contained approximately 30 middle school students (Tr. pp. 110-11). Turning Point staff included certified special education teachers, classroom aides, and 1:1 aides (Tr. pp. 111-13). The Turning Point program "partner[ed]" with a local mental health services provider that

⁵ On the first day of school, the student refused to enter the elementary school building, but thereafter, he entered the building and remained in the ETP classroom all day until mid-October, when he eventually transitioned in to his general education classroom setting (Tr. pp. 40-42).

employed "counselors, MSWs, . . . speech therapists, occupational therapists, [and] physical therapists" (Tr. p. 111). The partnership with the mental health services provider composed Turning Point's "mental health therapeutic component" of the program (Tr. pp. 111-12). According to her testimony, the mental health services provider offered a range of services, including "day treatment" programming, "school counseling," group and individual counseling, "psychiatric care, medication therapy, [and] sometimes family therapy" (Tr. p. 112).

On November 19, 2007, the CSE convened to conduct the student's annual review (Dist. Ex. D17 at p. 1). The CSE reviewed the reports prepared by the student's ETP special education teacher and ETP social worker, as well as the student's discipline records (id. at pp. 4, 7). The parents reported that the student had started to "talk about school and feeling better about himself" (id. at p. 8). The CSE discussed the student's progress in the ETP program and agreed that the student should continue in the program at that time (id. at pp. 1, 4, 8-9). The CSE added consultant teacher direct services and continued the student's 1:1 aide and counseling services (id. at pp. 1, 9).

At a requested review on January 14, 2008, the parents reported that the student liked school, his regular education teacher reported that the student followed "classroom routines and expectations," the ETP special education teacher reported "good progress," and the ETP social worker indicated that the student was "well-liked by classmates and staff alike" (Dist. Ex. D18 at pp. 4, 6-7, 10). Behaviorally, the January 2008 CSE reported that the student, at times, engaged in bullying behavior, inappropriate behavior directed toward his 1:1 aide, and that behavioral referrals tended to occur out of the classroom and in the afternoon (id. at pp. 7-8). The CSE recommended that the student continue in the ETP program with his then-current special education programs and services (id. at pp. 1-2, 8).

At the impartial hearing, the ETP social worker testified that between November 2007 and March 2008, the student experienced what he characterized as a "golden period"—noting that the student participated in basketball, felt better about himself and was "more part of the community," and had "relationships with other students" (Tr. pp. 44-45). In March 2008, the student's behavior suffered a "big regression, . . . going back to some of the behaviors that [the district] hadn't seen since late September, early October," which renewed the need to, at times, physically restrain the student (Tr. p. 46; see Dist. Ex. D26 at pp. 29-46). In his updated counseling report prepared in "late spring" for a program review, the ETP social worker indicated that the student had become "withdrawn, demanding and provocative after recess" (Dist. Ex. D21 at p. 1; see Tr. pp. 46-48). The report indicated that the student refused to complete work and exhibited aggression toward staff when they did not meet his "demands," including calling home, going home, and talking to his parents (Dist. Ex. D21 at p. 1; see Dist. Exs. D24-D25; D26 at pp. 29-46). The student received two out-of-school suspensions for aggression toward staff, running away from staff, and for leaving the building (Dist. Ex. D21 at pp. 1-2). In addition, the student received a two-week bus suspension for striking a bus aide and another student on the bus (Dist. Exs. D21 at p. 2; D22 at pp. 1-2).

On May 13, 2008, the CSE convened for a manifestation determination to review an episode of aggression directed toward the student's 1:1 aide (Dist. Exs. D19 at pp. 1, 4, 6; D27 at pp. 1-2; see Dist. Ex. D23 at pp. 1-2). The CSE determined that the student's behavior was a manifestation of his disability and subsequently updated the student's behavior plan on May 15,

2008 (Dist. Exs. D19 at p. 9; D20 at pp. 1-2; D27 at pp. 3-4). At the manifestation determination, the student's regular education teacher and ETP social worker reported that after lunch/recess, the student was "much less responsive to engaging in academic work or to adult direction" (Dist. Ex. D19 at p. 7). The parents reported that the student did not take any medications at that time, but they would speak to his pediatrician and take the student for an intake at the Turning Point program (id. at p. 8). The CSE expressed a "general agreement" at the meeting that the student required a more restrictive program as a result of his behavioral needs (id. at pp. 8-9).

By letter dated May 23, 2008, BOCES informed the parents that Turning Point had "space at [the student's] age level for fall 2008" and requested that the parents contact the admissions coordinator to schedule an appointment for a "visit and a screening meeting" (Dist. Ex. D28).

At the impartial hearing, the parents submitted the student's fifth grade "Discipline Report" for the 2007-08 school year when he attended the ETP program, which documented 61 incidents reported by 8 different staff members between September 11, 2007 through May 23, 2008 (see Parent Ex. P11 at pp. 1-12). The reported incidents included insubordination; creating dangerous conditions; leaving campus without permission; failing to follow school rules, attend class or attend detention; threatening staff and/or students; property destruction; disorderly conduct; conditions endangering the welfare of others; academic misconduct; disrupting school activities; assault (5 incidents); inciting violence; and throwing objects (id.).

On June 6, 2008, the CSE convened for a second manifestation determination meeting related to the student's use of vulgar language, failure to comply with directions, and violent behavior (Dist. Ex. D29 at pp. 1, 7; see Dist. Exs. D24 at pp. 1-3; D25 at pp. 1-2; D27 at pp. 5-10). The CSE determined that the student's behavior was a manifestation of his disability, and after a lengthy discussion about the student's behaviors and options available to the district, the CSE agreed to conduct updated psychological and academic evaluations of the student (Dist. Exs. D29 at pp. 7-14; D27 at pp. 11-12; see Dist. Exs. D30-D31). In addition, the CSE altered the student's daily routine by recommending that the student spend the morning in the general education classroom and the "afternoon in the ETP classroom with an individually designed low-stress program" (Dist. Ex. D29 at p. 11; see Tr. pp. 209-10). According to the June 2008 CSE meeting notes, the parents indicated that the entire family would begin counseling "next week," and further, that they "[did] not want [the student] to go to Turning Point" (Dist. Ex. D29 at pp. 11-12). The parents executed a consent form to allow the district to perform the updated psychological and academic evaluations, as well as an "FBA" (id. at p. 6).

On June 24, 2008, the ETP special education teacher conducted the student's updated academic achievement evaluation (Dist. Ex. D31 at pp. 1-4). The evaluator's report indicated that although the student cooperated during the administration of the word reading, spelling, and mathematics subtests of the Wechsler Individual Achievement Test—Second Edition (WIAT-II), he refused to complete an assessment of his written language (id. at p. 1). The student achieved standard scores in the average range in the areas of reading, mathematics, spelling, and oral language (id. at pp. 2-4). The evaluator reported that the student's "[w]riting ha[d] been a daily struggle . . . throughout this school year," and he often did not complete writing assignments in the classroom despite 1:1 intervention (id. at p. 3). The evaluation report provided general

recommendations for school and home, including 1:1 aide services, updating the student's behavior plan as needed, and to encourage the use of a keyboard for writing activities (id. at p. 4).

In July and August 2008, the district's school psychologist conducted the student's updated psychological evaluation (Dist. Ex. D30 at pp. 1-11).⁶ An administration of the Kaufman Brief Intelligence Test, Second Edition (KBIT-2) yielded average verbal and nonverbal reasoning scores and indicated that the student's overall cognitive abilities fell within the average range (id. at p. 2). The psychologist reported that the student continued to exhibit "significant difficulty in the school setting," and by June 2008, the student attended his general education class "infrequently" due to "absences by choice, absences due to suspension, and extensive time in the ETP room" (id. at p. 1). A review of the student's disciplinary records and an interview with the parents revealed "specific behavior concerns" including:

difficulty concentrating, tiredness, irritability, threats that [the student] will kill himself, gagging himself and hitting himself in the face, statements that he hates school, throwing objects and spitting; sometimes at other people, physical aggression toward staff and peers, verbal hostility toward staff and peers, leaving areas without permission including the school building, [and] refusing to follow instructions and participate in classroom activities

(id.).

To assess the student's social/emotional functioning, the psychologist administered the Behavior Assessment Scale for Children: Second Edition-Teacher Rating Scales (BASC-TRS-C) to the student's fifth grade regular education teacher, the ETP social worker, and the ETP special education teacher (Dist. Ex. D30 at pp. 2-3). The information reported by district staff suggested that the student experienced "emotional difficulties" at a "Clinically Significant" level in the areas of "[a]nxiety, [h]yperactivity, [a]ggression, [c]onduct [p]roblems, [d]epression, [a]daptability, [and] [s]tudy [s]kills," and further described the student as "withdrawn, pessimistic, and sad" (id. at p. 3). The psychologist reported that the student's range of scores "usually warrant assessment of vegetative symptoms and suicidal tendencies need to be explored" (id.). She also reported that information from school staff reflected that the student "frequently display[ed] behaviors stemming from worry, nervousness and fear," and that the student was often "restless and overactive" (id.). The student also exhibited difficulty "maintaining his behavior and mood (e.g. [was] easily annoyed by others, annoy[ed] others on purpose, [was] easily upset, frustrated and angered)," and "frequently engage[d] in rule-breaking behavior and display[ed] a high number of aggressive behaviors reported as being argumentative, defiant and threatening to others" (id.). Additionally, the student engaged in a "high number of behaviors that adversely affect" other students in the classroom, such as difficulty "staying seated, teas[ing] others, bother[ing] other children while they are working," which indicated that the student experienced difficulty "maintaining his self-control" (id.). The

⁶ The school psychologist who conducted the student's updated 2008 psychological evaluation also conducted the student's 2006 psychological evaluation for the district (compare Dist. Ex. D30 at p. 1, with Dist. Ex. D4 at p. 1).

student's scores also indicated that he experienced difficulty "adapting to changing situations" and took "much longer to recover from stress and adversity" compared to his peers (id.).

An administration of the Behavior Assessment Scale for Children: Second Edition-Parent Rating Scale (BASC-PRS-C) to the parents did not result in any scores in the "Clinically Significant" range; however, scores in the areas of "[a]ggression, [s]omatization, [a]ttention [p]roblems, [and] [a]daptability" fell within the "At Risk" range (Dist. Ex. D30 at p. 3). The parents indicated that the student sometimes displayed "aggressive behaviors, such as being argumentative, defiant, and threatening," he complained of health related concerns, and overall, he exhibited difficulty "maintaining his behavior and mood" (id.).

The psychologist also administered the Behavior Assessment Scale for Children: Second Edition-Self Report Scale (BASC-SRP-C) to the student, which indicated that he considered his "teachers to be unfair, uncaring, and overly demanding" (Dist. Ex. D30 at p. 4). He also reported having difficulty "maintaining necessary levels of attention" (id.). The psychologist described the student's affect during the clinical interview as "irritable and angry" and that his "mood was dysthymic" (id.).

Based upon the information gathered, the results suggested that the student experienced "emotional difficulties at a level that is Clinically Significant characterized by depression (dysthymia with possible intermittent episodes of major depression) with substantial tension (anxiety)" (Dist. Ex. D30 at p. 4). She further reported that the student "experience[ed] clear, pervasive distress that [was] broad based in its impact on [the student's] thoughts and feelings, ha[d] few coping skills for his difficulties and display[ed] oppositional behavior," which warranted "[t]houghtful intervention" (id.). Among other recommendations, the psychologist indicated that "[i]t ma[de] sense for the Committee to consider a placement with increased level of services to address [the student's] emotional functioning" at that time (id.).

On August 26, 2008, the CSE convened for a requested review to discuss the student's placement for the 2008-09 school year and to review the updated evaluations of the student (Dist. Ex. D32 at pp. 4, 6). Attendees at the meeting included the following: a CSE chairperson, a school psychologist, a regular education teacher, a special education teacher,⁷ an additional parent member, the ETP social worker, a principal, the director of special education, the principal of the BOCES Turning Point program, the parents, the parents' attorney, and the district's attorney (id. at pp. 4, 6, 12).

The August 2008 CSE meeting minutes indicated that the regular education teacher discussed the student's performance during the 2007-08 school year, commenting that by January 2008 the student attended the "fifth grade class virtually full-time," and exhibited inconsistent academic performance (Dist. Ex. D32 at pp. 7, 9). The regular education teacher also noted that the student received the services of a 1:1 aide and accommodations, such as "breaks" and modifying the "type and amount" of work (id. at p. 8). The regular education teacher also indicated that as spring 2008 progressed, the student's "willingness to engage and comply with

⁷ The special education teacher in attendance at the August 2008 CSE meeting also acted as a CSE chairperson for the district's middle school that was discussed at the August 2008 CSE meeting (compare Dist. Ex. D32 at pp. 4, 6, 11, with Tr. pp. 443-44).

academic and behavioral demands decreased and he became avoidant of the classroom," exhibiting "refusal/defiance" (*id.* at p. 7). According to the meeting minutes, the principal described the end of the 2007-08 school year as "very difficult," and the regular education teacher recounted numerous instances of the student's physical "aggression" toward staff, including his 1:1 aide, the ETP social worker, the ETP special education teacher, and a bus driver (*id.* at pp. 7-8). The principal further indicated that by the end of the school year, the student attended the ETP room "full-time" (*id.* at p. 7). At the meeting, the parents raised their concerns regarding the training of the student's 1:1 aide, whether homework modifications were used, the district's response to the student's behaviors during the 2007-08 school year, and the family difficulties experienced by the student (*id.* at pp. 8-9, 11).

The CSE meeting minutes also indicated that the CSE chairperson reviewed the student's updated academic evaluation, and the school psychologist reviewed the updated psychological evaluation at the meeting (Dist. Ex. D32 at pp. 8-9). Turning to the issue of the student's placement for the 2008-09 school year, the CSE discussed the features of two placement options: a district middle school "transition program," which included a 12:1+1 special class for academics, behavioral consultation, behavior plan, and 1:1 aide services;⁸ and the BOCES Turning Point program, which offered a therapeutic program and small classrooms (*id.* at pp. 10-11). The special education teacher indicated that if the student attended the district's middle school program, he would be required to change classes every 39 minutes, which could be problematic if the student used refusal as a strategy (*id.* at p. 10). She further stated that in the middle school program, the student would be in the transition classroom for only one period per day and that the transition program aides were not trained to provide therapy during periods of stress (*id.*). The meeting minutes indicated that the principal expressed her concerns that the district middle school would be "too stimulating" for the student and that in her opinion, the student needed the therapeutic approach and resources offered in the BOCES Turning Point program (*id.*). The additional parent member, the CSE chairperson, and the school psychologist stated their opinions that the BOCES Turning Point program was appropriate for the student, and the CSE chairperson indicated that the majority of the CSE supported a recommendation to place the student at the BOCES Turning Point program (*id.* at pp. 10-11). According to the meeting minutes, the parents stated their belief that the district's middle school program was the least restrictive placement for the student, and that they would remove the student from the district rather than have him attend the BOCES Turning Point program (*id.*).

After concluding their discussions, the CSE recommended placing the student at the BOCES Turning Point program in an 8:1+1 special class with a full-time 1:1 aide, daily group consultant teacher direct services, and three group and one individual counseling sessions per week (Dist. Ex. D32 at p. 1; *see* Tr. pp. 572-76). The CSE also recommended the development of a behavior plan for the student (Dist. Ex. D32 at pp. 1-2, 4). The CSE also developed annual goals and short-term objectives to address the student's needs in the areas of writing and social/emotional/behavior (*id.* at pp. 4-5).

By due process complaint notice dated September 12, 2008, the parents asserted that the district failed to offer the student a free appropriate public education (FAPE) for the 2007-08

⁸ The district middle school "transition program" discussed at the CSE meeting became the student's agreed upon pendency placement in the instant proceedings (*compare* Dist. Ex. D32 at p. 10, *with* Dist. Ex. D35).

school year based upon the following: the student's 1:1 aide was not properly trained to provide positive behavioral support and instead, used punitive measures with the student; the district failed to conduct a functional behavioral assessment (FBA) or develop a behavioral intervention plan (BIP) during 2007-08 school year; the district's denial of a FAPE resulted in numerous inappropriate suspensions during the 2007-08 school year; and, the district failed to develop appropriate goals and objectives for the student (Dist. Ex. D33 at pp. 1-2). Regarding the 2008-09 school year, the parents asserted the following as a basis for a denial of a FAPE: the proposed placement at the BOCES Turning Point program was retaliatory, punitive, and not the student's least restrictive environment (LRE); the district's proposed placement would create new issues and reinforce existing behavioral problems for the student; the district overly relied upon information presented by the student's special education teacher from the 2007-08 school year; and the district failed to develop any plans based upon the student's identified needs during specific times, such as transitions outside the classroom and during the afternoon hours (*id.* at p. 2). As relief, the parents requested: a determination finding that the student's pendency placement, future educational placements, and placement in the LRE should be the district's middle school; the provision of a 1:1 paraprofessional with specific training to provide positive behavioral support to the student; the provision of appropriate modifications to the student's school day to "maximize his educational potential and minimize the identified negative behavioral impacts;" the development, support, and monitoring of an appropriate behavior management plan for the student's entire school day with positive behavioral supports; the development of appropriate and measurable goals and benchmarks for the student; the provision of appropriate educational modifications for homework and school work; the provision of appropriate testing modifications; and reimbursement to the parents for the costs of attorney's fees (*id.* at pp. 2-3).

The parties proceeded to an impartial hearing on December 4, 2008, which concluded after three days on January 9, 2009 (Tr. pp. 1, 523). Both parties presented testimonial and documentary evidence at the impartial hearing (Tr. pp. 1-707; Dist. Exs. D1-D38; Parent Exs. P1-P22; IHO Exs. I-XXXI; Joint Ex. 1; Dist. Post-Hr'g Br. at pp. 1-18; Parent Post-Hr'g Br. at pp. 1-45). In his decision dated February 27, 2009, the impartial hearing officer recounted in detail the history of the instant matter, which documented the numerous CSE meetings, revisions of the student's behavior plans, consistent and frequent communications between the district and the parents, the student's varied behavioral and social/emotional challenges, various progress reports and evaluative data, as well as specific examples of the student's reported disciplinary incidents (IHO Decision at pp. 1-13). The impartial hearing officer then considered the parties' arguments set forth in their post-hearing briefs and determined that the district "made a compelling case that the BOCES program [was] the appropriate placement for the student at this time, subject to the BOCES program finding the student appropriate for the program after the student and his family complete the full intake which [was] required for acceptance into the program" (*id.* at pp. 13-23; *see* Dist. Post-Hr'g Br. at pp. 1-18; Parent Post-Hr'g Br. at pp. 1-45). In his decision, the impartial hearing officer ordered that "the CSE's placement recommendation at the BOCES program [was] upheld, subject to the BOCES program finding the student appropriate for the program after the student and his family complete the full intake which is required for acceptance into the program" (IHO Decision at p. 23). He ordered the district to "immediately arrange" for the parents' and the student's participation in a complete intake appointment with the BOCES program (*id.*). The impartial hearing officer then ordered that if the BOCES program did not find the student appropriate for its program, the matter would be

remanded to the district's CSE to convene a meeting to determine an appropriate recommended placement (*id.*). If, however, the BOCES program found the student appropriate for its program, then the matter would be remanded to the district's CSE to convene a meeting to consider what, if any, opportunities existed that would allow the student to interact with his peers at the district's middle school (*id.*). Furthermore, the impartial hearing officer ordered that at the CSE meeting convened in accord with his decision, the CSE should review and update the student's BIP as necessary, if the CSE had not already done so following the June 6, 2008 manifestation determination meeting (*id.* at p. 24). Finally, the impartial hearing officer ordered that at the CSE meeting convened in accord with his decision, the CSE should consider adding annual goals for the student's counseling services, as well as any other further relief not inconsistent with his decision (*id.*).

On appeal, the parents assert that they "disagree" with the impartial hearing officer's conclusion that the student should be placed in the BOCES Turning Point program, but "agree" with the impartial hearing officer's conclusion that the student's placement at the BOCES Turning Point program must be conditioned upon a determination by the BOCES Turning Point program that the student is appropriate for the program. In addition, the parents assert that they "agree" with the impartial hearing officer's conclusion that if the student's placement at the BOCES Turning Point program is upheld, then the district must convene a CSE meeting to consider opportunities for the student to interact with his peers at the district's middle school. Finally, the parents "disagree" with the impartial hearing officer's conclusion that the hearing record contained no evidence that the district focused its placement recommendations for the student on the BOCES Turning Point program "for a number of years."

The district did not serve an answer in response to the parents' petition as required by State regulation 8 NYCRR 279.4(b). Despite the district's failure to answer, I am required to examine the entire hearing record and make an independent decision based on the entire hearing record (Arlington Cent. Sch. Dist. v. State Review Officer, 293 A.D.2d 671 [2d Dep't 2002]; see 20 U.S.C. § 1415[g]; 34 C.F.R. § 300.514).

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 (A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if a procedural violation is alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's

right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; 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 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 P. v. Newington Bd. of Educ., 546 F.3d 111, 114 [2d Cir. 2008]; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; E.G. v. City Sch. Dist. of New Rochelle, 2009 WL 773960, at *4 [S.D.N.Y. Mar. 16, 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

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). Subsequent to its development, an IEP must be properly implemented (8 NYCRR 200.4[e][7]; Application of a Child with a Disability, Appeal No. 08-087).

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 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; therefore, it applies to the instant case (see Application of the Bd. of Educ., Appeal No. 08-016).

Upon review and due consideration of the hearing record in this matter, I find that the impartial hearing officer, in a thorough, well-reasoned, and well-supported 30-page decision, correctly upheld the district's recommended placement at the BOCES Turning Point program for the student for the 2008-09 school year upon the condition that the parents and student attend, participate in, and fully complete an intake appointment at the BOCES Turning Point program, and upon further condition that the BOCES Turning Point program finds that the student is an appropriate student for the program after the intake appointment (IHO Decision at pp. 21-24; see Tr. pp. 1-707; Dist. Exs. D1-D38; Parent Exs. P1-P22; IHO Exs. I-XXXI; Joint Ex. 1; Dist. Post-Hr'g Br. at pp. 1-18; Parent Post-Hr'g Br. at pp. 1-45). The hearing record indicates that at the time the CSE recommended the BOCES Turning Point program in August 2008, the student required a higher level of mental health support than was available in a general education middle school and that the recommended placement—an 8:1+1 classroom with a significant level of mental health services in place—offered the student a setting within which to effectively deal with the student's behavioral challenges and emotional needs (Tr. pp. 57-58, 96-98, 113-14, 141-42, 195-96, 220-23, 249-50, 385-404, 448, 513-15, 563-65; see Dist. Exs. D21-D27; Parent Exs. P11-P12; compare Dist. Ex. D4, with Dist. Ex. D30). The decision shows that the impartial hearing officer carefully considered the testimonial and documentary evidence presented by both parties, and further, that he carefully marshaled and weighed the evidence in support of his conclusions and properly supported this conclusions with citations to the hearing record (IHO Decision at pp. 1-23). The hearing record amply supports the impartial hearing officers determinations. I adopt the findings of fact and conclusions of law of the impartial hearing officer and accordingly, the parties shall implement the impartial hearing officer's decision, dated February 27, 2009 (IHO Decision at pp. 23-24; see Application of a Child with a Disability, Appeal No. 06-136; Application of the Bd. of Educ., Appeal No. 03-085; Application of a Child with a Disability, Appeal No. 02-096). In conclusion, based upon an independent review of the entire hearing record, I find that the hearing was conducted in a manner consistent with the requirements of due process and that there is no need to modify the determination of the hearing officer (34 C.F.R. § 300.514[b][2]; Educ. Law § 4404[2]).

THE APPEAL IS DISMISSED.

Dated: Albany, New York
May 15, 2009



PAUL F. KELLY
STATE REVIEW OFFICER