



# The University of the State of New York

The State Education Department  
State Review Officer  
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No. 09-087

**Application of the BOARD OF EDUCATION [REDACTED]  
[REDACTED] for review of  
a determination of a hearing officer relating to the provision of  
educational services to a student with a disability**

**Appearances:**

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

Littman Krooks LLP, attorney for respondent, Dina B. Cohen, Esq., of counsel

## DECISION

Petitioner (the district) appeals from the decision of an impartial hearing officer which awarded respondents (the parents) payment of the student's tuition costs at the Family Foundation School (Family Foundation) from January 1, 2008 until the end of the 2007-08 school year. The parents cross-appeal from the impartial hearing officer's determination that they were only entitled to a portion of the tuition costs of the student's attendance at Family Foundation during the 2007-08 school year due to equitable considerations. The appeal must be sustained. The cross-appeal must be dismissed.

At the commencement of the impartial hearing on July 30, 2008, the student was attending Family Foundation, a private residential school (Tr. pp. 408, 449, 487, 823). 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). According to the student's private neurologist, the student had been offered diagnoses of an attention deficit hyperactivity disorder (ADHD), Asperger's syndrome, an impulse control disorder and an obsessive compulsive disorder (OCD), and was prescribed medications (Dist. Ex. II.C).<sup>1</sup> At the time of the impartial hearing, the student was not classified as eligible for

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<sup>1</sup> The hearing record contains multiple duplicative exhibits. For purposes of this decision, only District exhibits were cited in instances where both a District and a Parent exhibit were identical. It is the responsibility of the impartial hearing officer to exclude evidence that she determines to be irrelevant, immaterial, unreliable or unduly repetitious (8 NYCRR 200.5[j][3][xii][c]; see Application of a Student with a Disability, Appeal No. 09-038; Application of a Child with a Disability, Appeal No. 07-119; Application of the Bd. of Educ., Appeal No. 06-074).

special education services by the district and his classification remains a matter of dispute in this proceeding.

The hearing record reveals that the student received diagnoses of an ADHD and an oppositional defiant disorder (ODD) at the age of four (Dist. Ex. III.F at p. 13). The student began attending one of the district's elementary schools in second grade (Tr. pp. 719-20; Dist. Exs. III.B at p. 1; III.F at pp. 13-15). In August 2000, the student's private neurologist reported that the student was described as "a very bright child" who performed well on school tests, but exhibited "poor attention," disorganization, and defiant and oppositional behaviors (Dist. Ex. III.F at p. 13). Reportedly the student attended group behavioral therapy (*id.*). In her August 2000 neurological consultation report, the private neurologist's impression of the student was that he "[m]ost probably" had an ADHD and an ODD, and that while the results of her examination were "essentially within normal limits," cognitive test results indicated "extremely poor attention and extreme difficulties with writing" (*id.* at p. 15). Recommendations included the initiation of pharmacological management of the student's ADHD; school-based assessments of the student's behavior, cognitive, and academic skills; and psychological therapy with behavioral modification (*id.*).

During fourth and fifth grade, the student achieved honor and high honor roll designations (Dist. Ex. III.H at pp. 8, 11). His teachers reported that he was a "very bright and capable student," while noting that despite high grades, his class work needed improvement and he exhibited difficulty staying focused in class (*id.*). The student began attending the district's middle/high school in sixth grade, and during his sixth and seventh grade school years achieved final grades in the 90 range in English, social studies, science, and math (*id.* at pp. 13-14).<sup>2</sup> The hearing record indicates that during seventh and eighth grades, the private neurologist continued to provide the student with consultation services and management of his medications (Dist. Ex. III.F at pp. 4-7). During eighth grade, the student achieved final grades of 90 (English), 98 (social studies), 89 (living environments), 90 (Spanish), and 88 (math A) (Dist. Ex. III.H at p. 15). The hearing record reflects that during eighth grade, the student earned three high school credits (living environments, math A, and Spanish) and was considered to be in an "accelerated program" (Parent Ex. 48 at p. 31).

The student began ninth grade during the 2006-07 school year at the district's middle/high school (Dist. Ex. III.B at p. 1). In October or November 2006, the parents obtained twice weekly private counseling services for the student (Tr. pp. 775-76).

By letter dated November 13, 2006 addressed "To Whom It May Concern," the private neurologist advised that she was adjusting the student's medication, and due to "frequent dangerous situations" in the student's life and "unpredictable behaviors," she was recommending that he be kept home until his next appointment scheduled for December 12, 2006 (Dist. Ex. III.F at p. 11).

By letters to the principal and director of special programs dated November 13, 2006, the student's mother requested that the district conduct "a complete psychological and educational/academic evaluation" of the student (Dist. Exs. II.A; II.B).

On November 14, 2006, the student's mother sent to the district an October 30, 2006 letter from the student's private neuropsychologist addressed "To Whom It May Concern" (Dist.

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<sup>2</sup> The hearing record describes the district's middle/high school as serving students from grades six through twelve (Tr. p. 84; *see* Dist. Ex. III.H at pp. 13-16).

Ex. II.C). According to the private neurologist, the student had been offered diagnoses of an ADHD, Asperger's syndrome, an impulse control disorder, and an OCD (id.).<sup>3</sup> She further expressed that the student "ha[d] to be classified as other health impaired and appropriate behavior modification and educational support provided" (id.).

By letter dated November 15, 2006, and a second letter dated December 1, 2006, the director of special programs acknowledged the receipt of the parents' Committee on Special Education (CSE) referral and informed them about the "types of assessments or a review of current evaluative information" that would occur regarding the student, including a social history, a psychological evaluation, an educational assessment, a physical examination, a classroom observation of the student, and if needed, a speech-language evaluation (Dist. Exs. II.D; II.I).<sup>4</sup> Among the enclosures, the district sent to the parents an initial evaluation consent form, a parent guide to special education, a procedural safeguards notice, and a consent to communicate with an outside agency form (Dist. Exs. II.D at p. 2; II.I at p. 2).

On December 5, 2006, the district received a completed form entitled "Referral to District Committee on Special Education," which described the student's mother's concern that the student exhibited a "lack of focus," lack of executive functions skills, and difficulties with note-taking, completing class work and writing down homework assignments (Dist. Ex. II.F). The student's mother further reported that her son required "an enormous" amount of assistance from both parents in order to achieve his level of success (id.). The student's mother expressed her belief that her son had difficulty with memory/memorization and concerns that he exhibited a nonverbal learning disability (id.). Also on that day, the district received the student's mother's consent to evaluate the student, waiver of the presence of an additional parent member at the CSE meeting, and consent to communicate with the student's private neurologist (Dist. Exs. II.E; II.G; II.H). Subsequent to the receipt of the parents' consent to evaluate the student, the district conducted speech-language, psychological, and academic evaluations of the student, compiled a social history from the parents, and received a physical examination report from the student's pediatrician (Dist. Exs. III.A-III.E). During ninth grade, the student achieved first quarter grades of 91 (English), 96 (global history), 92 (earth science), 95 ("Regents math A/B"), 89 (Spanish 2), 77 (studio art), 75 ("mat proc 1") and 82 (physical education) (Dist. Ex. III.G at p. 3).

By letter dated December 8, 2006, the director of special programs informed the parents of their son's initial eligibility determination meeting scheduled for January 4, 2007 (Dist. Ex. II.J). On January 4, 2007 the CSE convened for the student's initial eligibility determination meeting (Dist. Ex. II.K). Attendees included the director of special programs, a school psychologist, a special education teacher, a regular education teacher, a speech-language therapist, a guidance counselor, and the parents (id. at p. 1). The CSE document resulting from that meeting was entitled "Committee on Special Education Ineligibility Document" and indicated that the student's mother referred her son to the CSE after reviewing a report from the

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<sup>3</sup> The hearing record contains a private neurological consultation report dated October 30, 2006, which the district's director of special programs testified was not submitted to the CSE (Tr. pp. 28-29, 80). According to the consultation report, the student's homework took "hours" to complete, was completed by his mother, and he was unable to study independently (Dist. Ex. III.F at p. 9). Additionally, although described as "alert, pleasant, and cooperative," the student also exhibited angry, "fidgety and hyperactive" behaviors, and used inappropriate language during the consultation appointment (id. at p. 10). The private neurologist's recommendations included medication adjustment, and "[p]sychosocial treatments" of "[s]ocial skills training, [f]amily intervention, [s]upportive therapy, [s]pecial educational services and [c]ommunity support services" (id.).

<sup>4</sup> The notice indicated that the physical examination report may be submitted by the student's family physician (Dist. Ex. II.D).

private neurologist and due to her concerns that she was completing much of the student's work (Tr. p. 40; Dist. Ex. II.K at p. 1). At the meeting, the CSE reviewed the student's physical examination, social history, speech-language, psychological, and educational evaluation reports (Tr. pp. 64-66; Dist. Ex. II.K at p. 1; see Dist. Exs. III.A-III.E). In addition, the CSE noted that the guidance counselor reviewed the student's "history," described in the hearing record as the student's school records including report cards and standardized testing (Tr. p. 95; see Tr. pp. 116-17).<sup>5</sup> Finally, the CSE reviewed the October 30, 2006 letter from the private neurologist (Tr. pp. 28-29, 48-49; Dist. Ex. II.C).<sup>6,7</sup> According to the director of special programs, following a review of the evaluative data, the CSE "open[ed] up" discussions about whether or not the student required special education services, at which time the student's mother expressed her concerns about the amount of assistance she provided to the student for him to be successful in school (Tr. pp. 39-40, 48-49). After considering classification as a student with a learning disability, an other health impairment, and an emotional disturbance, the CSE determined that based upon the information presented to it, the student was ineligible to receive special education services (Tr. pp. 66-68, 122-23; Dist. Ex. II.K at p. 1; see Dist. Exs. II.M; II.N).

By letter dated January 15, 2007, a private school provided the parents with information about its program and by letter dated February 7, 2007, the parents requested that the director of admissions of the private school consider accepting the student for admission at that time (Parent Exs. 35; 37). The hearing record indicates that the student stopped attending the district's school on February 5, 2007 and that the parents notified the district of the student's withdrawal on March 6, 2007 (Tr. pp. 216-17; Dist. Ex. I.B at p. 2). The student completed ninth grade at the private school (Parent Exs. 41; 42 at p. 2).

On August 16, 2007, the student was admitted to a private psychiatric hospital and a "psychodiagnostic evaluation" revealed difficulty with executive functions, and selective and divided attention (Tr. p. 1081; Parent Ex. 42). The evaluator reported that the student's test profile and self-reports were consistent with a diagnosis of a conduct disorder, "a number of substance dependence and substance abuse diagnoses," and a "severe personality disorder" (Parent Ex. 42 at pp. 7-8).

By letter dated August 20, 2007, the parents, through their counsel, advised the district that they disagreed with the January 2007 CSE's determination that the student was ineligible for

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<sup>5</sup> The hearing record is unclear whether the January 4, 2007 CSE reviewed Dist. Exs. III.G and/or III.H as the student's "guidance report" (see Dist. Ex. II.K at p. 1).

<sup>6</sup> The hearing record contains a neurological consultation report dated December 7, 2006, which the district's director of special programs testified was not submitted to the CSE (Tr. pp. 28-29, 80). The report indicated that the student was "not doing well in school" (Dist. Ex. III.F at p. 16). The student reported to the private neurologist that he was "constantly drawing, not responding and not paying attention to anything in school" (id.). According to the private neurologist, the student's behaviors were "inappropriate, extremely fidgety," he used inappropriate language and did not follow parental directions (id. at p. 17). The private neurologist provided the parent with recommendations for therapeutic behavioral modification programs, medication adjustments, and the psychosocial treatments that were recommended during the October 30, 2006 consultation appointment (compare Dist. Ex. III.F at p. 10, with Dist. Ex. III.F at pp. 17-18).

<sup>7</sup> The hearing record contains a neurological consultation report dated January 2, 2007, which the district's director of special programs testified was not submitted to the CSE (Tr. pp. 28-29, 80). The private neurologist reported that the student's behavior had "improved a little," but that he continued to be "inappropriate and argumentative," indicating that his "major problem" was poor impulse control (Dist. Ex. III.F at p. 19). Recommendations included medication adjustments, and the psychosocial treatments that were recommended during the December 7, 2006 consultation appointment (compare Dist. Ex. III.F at p. 17, with Dist. Ex. III.F at p. 20).

special education services, and notified the district of their unilateral placement of their son at the private school for the 2007-08 school year (Parent Ex. 57).

The director of admissions at the private school stated that the student attended the private school at the end of August 2007 for "a very short period of time;" however, was removed due to the student "expressing that he might hurt somebody else" (Tr. p. 932).

On September 10, 2007, the parents completed an application for admission to Family Foundation, which indicated that the student was currently attending a private "intensive outpatient program for adolescents with alcohol and substance abuse problems" (Parent Ex. 48 at pp. 5-10).<sup>8</sup> On October 10, 2007, the student began attending Family Foundation (Dist. Ex. III.I at p. 2). The hearing record describes Family Foundation as a private, therapeutic, college preparatory boarding school that serves students primarily from the ages of 13 through 17, "who have difficulty managing their behavior or emotions in traditional educational settings" (Tr. pp. 408-09).

In a due process complaint notice dated May 27, 2008, the parents, through their attorney, alleged that the district denied the student a free appropriate public education (FAPE)<sup>9</sup> by: (1) failing to identify the student as a student with a disability; (2) not developing an appropriate IEP; (3) violating the Individuals with Disabilities Education Act (IDEA) in a manner that continues to deprive the student of educational benefits and opportunities; (4) depriving the parents of meaningful participation in the IEP process by ignoring requests by the parents to identify their son as a student with a disability; (5) failing to explore appropriate therapeutic day support programs; (6) failing to arrange for further evaluations to determine the student's educational needs; and (7) failing to make a timely placement (Dist. Ex. I.A at p. 4). As relief, the parents proposed that the district immediately reconvene its CSE and develop an appropriate IEP; that the district reimburse the parents for the cost of tuition at the first private school and at Family Foundation, and that the district provide compensatory educational services as a result of the district's failure to provide appropriate educational services for the past two years (Dist. Ex. I.A at p. 4).

The impartial hearing commenced on July 30, 2008 and concluded on May 8, 2009, after nine days of testimony (Tr. pp. 1, 159, 289, 400, 611, 805, 979, 1156, 1365). The impartial hearing officer rendered a decision dated June 21, 2009 (IHO Decision at p. 75). The impartial hearing officer found that the CSE meeting was not properly conducted; that the CSE did not give the parents a meaningful opportunity to participate; and that the CSE did not have sufficient evaluations and information to make a proper determination (id. at p. 69). The impartial hearing officer concluded that the above described findings "may have led to an improper failure to classify [the student]" and constituted a denial of a FAPE (id.). The impartial hearing officer further concluded that there should have been more inquiry regarding the student's medical diagnoses (id. at p. 64). As to meaningful participation by the parents, the impartial hearing

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<sup>8</sup> The hearing record indicates that the student had been "using drugs" during the two years prior to the September 2007 application for admission to Family Foundation (Parent Ex. 48 at p. 12).

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

officer indicated that the CSE did not take the parental concerns seriously, impacting the parents' ability to participate in a meaningful way (id. at pp. 64-65).

The impartial hearing officer further found that the student's physical, mental, or emotional condition had an adverse impact on the student's educational performance (IHO Decision at pp. 66-67). The impartial hearing officer did not find that an alleged drug problem was the source of the student's problem (id. at p. 66). The impartial hearing officer determined that disciplinary issues were not discussed at the CSE meeting; that no functional behavioral assessment (FBA) was conducted to determine why the student was engaging in such behavior; and that no one considered that the disciplinary issues may have been a manifestation of a disability (id. at pp. 65-66). The impartial hearing officer found that the student was having problems in the educational setting and that the student suffered socially, emotionally, behaviorally, organizationally, and physically (id. at p. 65).

In addition, the impartial hearing officer found that the first private school attended by the student was not appropriate, but that the second private school attended by the student during the 2007-08 school year (Family Foundation) was appropriate (IHO Decision at pp. 69-73). He determined that the parents placed the student at Family Foundation in October 2007 without proper notice to the district (id. at p. 74). The impartial hearing officer further found that the parents' "pattern" of failing to keep the district apprised of the student's status and location and the parents' "pattern" of failing to provide pertinent information to the schools, were cause for a reduction of tuition, and awarded tuition to the parents for Family Foundation from January 1, 2008 until the end of the 2007-08 school year (id. at pp. 74-75).

This appeal ensued. The district asserts that the impartial hearing officer's findings with respect to the appropriateness of the evaluations considered by the CSE are inconsistent and unsupported by the hearing record. In support of its assertion, the district cites testimony that, upon receiving the one-page private neurologist's report from the student's mother, she was contacted, consent was obtained to speak with the neurologist, and that district personnel spoke with the neurologist, which lead to the conclusion that information provided to the neurologist by the parents relating to the student's school functioning was inconsistent with information that was provided by the student's teachers to the CSE. In addition, the district asserts that the impartial hearing officer erroneously applied a "substantial" contact standard and it was unclear what the district should have done differently regarding the one-page report of the neurologist. The district further asserts that the impartial hearing officer's findings as to meaningful parental participation are not supported by the hearing record.

Next, the district asserts that the impartial hearing officer improperly failed to consider substantial evidence that the student's difficulties originated from substance abuse problems. In support of its assertion, the district maintains that the difficulties that the student began to experience as early as eighth grade were solely related the student's association with others who were substance abusers and the student's own serious substance abuse. The district further maintains that the hearing evidence supporting this conclusion was overwhelming and included information available to the CSE at the time that it made its eligibility determination. In addition, the district asserts that the student, as a matter of law, is not eligible for tuition reimbursement because the impartial hearing officer did not find that the hearing evidence supported a conclusion that the student was a student with an educational disability, but rather found that there "may" have been an improper failure to classify the student.

Other assertions by the district include that the impartial hearing officer's finding that Family Foundation was appropriate for the student is not supported by the hearing record; that

equitable considerations do not support an award of tuition reimbursement; and that the impartial hearing officer erred in admitting evidence relating to actions taken by another school district two years after the challenged CSE action in the instant case.

The parents filed an answer and cross-appeal. In their answer, the parents deny many of the district's allegations and assert that that district deprived the student's of a FAPE when it failed to classify him as a student with a disability. Specifically, the parents' assertions include: (1) that the district failed to adhere to legal standards in conducting evaluations on the student after receiving the parents' referral to the CSE; (2) that after receiving the referral, a psychological evaluation of the student was conducted with "spotty results;" (3) that despite a "voluminous" disciplinary record, an FBA was not conducted; (4) that contrary to 8 NYCRR 200.4(b)(v), the student's problematic behaviors were overlooked by the CSE; (5) that the district made no effort to recognize the underlying cause of the student's behaviors; (6) that the district's failure to make adequate contact with the student's neurologist and private school providers was in complete disregard of the district's duty to conduct a full investigation; and (7) that interviews with providers only focused on the student's academic achievement, not on the student's emotional or behavioral needs.

The parents' further assert that the district conducted an improper CSE meeting for the student; that the parents did not have an opportunity to participate; that the psychological evaluation was not done in time for the CSE meeting, several versions of the evaluation have different information; and that the parents relied on the report they were provided. In support of its claim that the district conducted an improper CSE meeting for the student, the parents cite the student's classification by another school district as emotionally disturbed.<sup>10</sup>

In their cross-appeal, the parents contend that they are entitled to reimbursement for the student's full tuition at Family Foundation for the 2007-08 school year.<sup>11</sup> The parents assert that the equities should not bar them from entitlement to full tuition reimbursement for Family Foundation during the time period from October 2007 through the end of the 2007-08 school year.<sup>12</sup> The parents attached additional evidence to their answer and cross-appeal.

In its answer to the cross-appeal, the district asserts in part that the impartial hearing officer properly found that the equities warranted a reduction in the tuition reimbursement, but

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<sup>10</sup> The hearing record reflects that the CSE of the district where Family Foundation is located evaluated the student approximately two years after the district's January 4, 2007 CSE meeting to determine eligibility for special education and "classified him as emotionally disturbed" (Tr. pp. 1389, 1413). The hearing record reflects that the CSE considered additional information as part of the eligibility determination including a then-current student interview, informal teacher reports from Family Foundation, the August 2007 psychodiagnostic evaluation report and a report of the administration of the Behavior Assessment System for Children (BASC) to staff at Family Foundation and the student, which were not available to the district's CSE in the instant case (Tr. pp. 1411-14, 1417, 1437-38).

<sup>11</sup> I note that the parents' cross appeal specifically asks that full tuition reimbursement be awarded for Family Foundation, but that the parents' memorandum of law in support of the parents' answer states that the parents should be reimbursed for the student's full tuition at the first private school and Family Foundation, in the body of the memorandum, but that in the conclusion paragraph, the parents ask for full tuition reimbursement for Family Foundation and "any other relief deemed "just, proper and appropriate" (Answer ¶ 44; Parents' Memorandum of Law at pp. 15, 20).

<sup>12</sup> The parents do not appeal the impartial hearing officer's decision denying tuition reimbursement at the student's first private school (IHO Decision at p. 70). Therefore, that portion of the decision is final and binding upon the parties and will not be further discussed in this decision (8 NYCRR 200.5[j][v]).

further asserts that the impartial hearing officer erred in finding that the equities supported any tuition reimbursement. The district requests that the cross-appeal be dismissed.

Initially, I note that the district attached as an exhibit to its petition, an affidavit from the director of special programs for the district concerning information received in a telephone call (after the last date of testimony in the impartial hearing) from Family Foundation concerning the student's enrollment, and that the parents assert in their answer that it should not be considered. Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an impartial hearing officer's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of the Dep't of Educ., Appeal No. 08-024; Application of a Student with a Disability, Appeal No. 08-003; Application of the Bd. of Educ., Appeal No. 06-044; Application of the Bd. of Educ., Appeal No. 06-040; Application of a Child with a Disability, Appeal No. 05-080; Application of a Child with a Disability, Appeal No. 05-068; Application of the Bd. of Educ., Appeal No. 04-068). I decline to consider the additional documentary evidence attached to the petition as such is not necessary in order to render a decision. Likewise, I decline to accept the additional evidence attached to the parents' answer and cross-appeal offered in response to the district's proffered evidence.

Turning to the merits of the case, two purposes of the 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 P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; 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 Newington, 546 F.3d at 114; 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, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 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 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 law 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).

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).

First, I will consider the district's assertion that the student, as a matter of law, is not eligible for tuition reimbursement because the impartial hearing officer did not find that the hearing evidence supported the conclusion that the student was a student with an educational disability, but rather found that there "may" have been an improper failure to classify the student (see IHO Decision at p. 69).

Tuition reimbursement is among the remedies available when a school district fails to offer a student a FAPE (see Burlington, 471 U.S. 359; Carter, 510 U.S. 7). However, FAPE extends only to students who meet the criteria for identification as children with disabilities under the IDEA (20 USC §1400 et seq.) and Article 89 of the New York Education Law (see Application of a Child Suspected of Having a Disability, Appeal No. 07-003; Application of a Child Suspected of Having a Disability, Appeal No.03-063; Application of a Child Suspected of Having a Disability, Appeal No.01-107; Application of the Bd. of Educ., Appeal No. 01-058). Unless the student is eligible for classification as a student with a disability, the parents cannot prevail in their claim for tuition reimbursement.

I find that the impartial hearing officer erred in awarding tuition reimbursement where, as here, the CSE found that the student was not eligible for special education services and the impartial hearing officer did not find that the evidence supported a conclusion that the student was a student with an educational disability under the IDEA. I note that the impartial hearing officer indicated in her decision that the CSE "did not conduct a proper meeting, did not give the parent a meaningful opportunity to participate and did not have sufficient evaluations and information to make a proper determination" (IHO Decision at p. 69). Where, as here, an impartial hearing officer found that the CSE did not have before it sufficient information to make a determination regarding a student's eligibility for special education programs and services, and the impartial hearing officer did not believe that there was sufficient information in the hearing record for her to make such a determination, the proper remedy would be to remand the matter to the CSE with instructions to obtain any additional evaluations and information required for a determination and to conduct another CSE meeting to make an eligibility determination, not to award tuition reimbursement. Accordingly, I will next consider whether the CSE had sufficient evaluations and information to make a proper determination.

When a 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 (see Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-128; Application of a Child Suspected of Having a Disability, Appeal No. 05-047; Application of a Child Suspected of Having a Disability, Appeal No. 04-063; Application of a Child Suspected of Having a Disability, Appeal No. 04-059). 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. 07-018; Application of a Child with a Disability, Appeal No. 06-128; Application of a Child Suspected of Having a Disability, Appeal No. 05-047; Application of a Child Suspected of Having a Disability, Appeal No. 04-063). 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]; 8 NYCRR 200.4[b][6][ix]). Moreover, as part of an initial evaluation, the CSE 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]; 8 NYCRR 200.4[b][5][i]).

The hearing record reflects that the January 4, 2007 CSE reviewed the student's physical examination, social history, speech-language, psychological, and educational evaluation reports (Tr. pp. 64-66; Dist. Ex. II.K at p. 1; see Dist. Exs. III.A- III.E). In addition, the CSE noted that the district's guidance counselor reviewed the student's "history," described in the hearing record as the student's school records including report cards and standardized testing (Tr. p. 95; Dist. Ex. II.K at p. 1; see Tr. pp. 116-17). Additionally, the hearing record reveals that the CSE considered the private neurologist's October 30, 2006 letter (Tr. pp. 28-29, 48-49; Dist. Ex. III.C).

The physical examination report dated August 26, 2006, indicated that the student was in "good health," and in an undated health and social intake completed during the student's ninth grade year prior to the January 2007 CSE meeting, the parents provided information regarding the student's behavior, relationships, medical history, and attitude toward school (Dist. Exs. III.A at p. 1; III.B at p. 1). The parents reported that the student appeared to "like school," enjoyed "seeing friends" while at school, and denied that the student had concerns about school (Dist. Ex. III.B at pp. 1-2). The parents further reported that the student had "difficulty with authority" (id. at p. 1).

The January 2007 CSE reviewed the December 11, 2006 speech-language evaluation report conducted by the district's speech-language therapist, which included formal testing with the Clinical Evaluation of Language Fundamentals – Fourth Edition (CELF-4) (Dist. Ex. III.C at p. 1). Administration of the CELF-4 yielded a core language score of 126 (percentile rank of 96), a receptive language index of 121 (percentile rank of 92), an expressive language index of 118 (percentile rank of 88), a language content index of 127 (percentile rank of 96) and a language memory index of 117 (percentile rank of 87) (id.). Results of the CELF-4 indicated that the student's language abilities were in the above average range and therefore, the speech-language therapist concluded that he did not require speech-language services (id. at pp. 1-7).

The hearing record reflects that the January 2007 CSE reviewed the December 13, 2006 district psychological evaluation report of the student, which included formal testing with the Wechsler Intelligence Scale for Children – Fourth Edition (WISC-IV) and the Behavior Assessment System for Children (BASC) Rating System (Dist. Ex. III.D at p. 1). The school psychologist reported she observed that the student was cooperative, attentive, and put forth his "best effort on all tasks" (id. at p. 2). Administration of the WISC-IV yielded a full scale IQ of 112 (percentile rank of 79), a verbal comprehension index of 124 (percentile rank of 95), a perceptual reasoning index of 110 (percentile rank of 75), a working memory index of 104 (percentile rank of 61), and a processing speed index of 91 (percentile rank of 27) (id. at p. 1). According to the school psychologist, the results of the WISC-IV indicated that the student's cognitive abilities were in the average to superior range, with verbal comprehension a relative strength and processing speed a relative weakness (id. at pp. 1, 4). The school psychologist reported that results from the BASC Parent Rating Scales indicated "significant concerns" regarding hyperactivity, and conduct and attention difficulties (id. at p. 4). Results from the BASC Parent Rating Scales also yielded T-scores in the "at-risk range" for "atypicality" and

social skills (*id.*).<sup>13</sup> The parents' BASC responses also yielded T-scores in the average range for aggression, anxiety, depression, somatization, leadership skills, and withdrawal (*id.*). Results of the BASC Self Report Rating Scales completed by the student indicated "no significant areas of concern;" however, scores measuring relations with his parents were in the "significant range," indicating concerns in that area (*id.* at pp. 3-4). Additionally, results of the BASC Self Report Rating Scales completed by the student yielded T-scores in the at-risk range for self-reliance skills, "locus of control" and atypicality, and T-scores in the average range for attitude toward school and his teachers, sensation seeking behavior, somatization, "social stress anxiety," depression, and sense of inadequacy (*id.*).<sup>14</sup>

The district special education teacher's December 18, 2006 educational evaluation report indicated that she administered the Woodcock-Johnson Tests of Achievement – Third Edition (WJ-III ACH) to the student, which yielded standard (and percentile) scores of 119 (89) in broad reading, 113 (80) in broad math, and 110 (75) in broad written language (Dist. Ex. III.E. at p. 3). According to the special education teacher, "[w]hen compared to others at his age level, [the student's] academic skills, his ability to apply those skills, and his fluency with academic tasks are all within the high average range," and he performed in the high average range in broad reading, reading comprehension, and math reasoning (*id.* at p. 2). The special education teacher reported that the student's basic reading skills, math calculation, basic writing, and written expression skills were in the average range (*id.*).

As indicated earlier, the private neurologist's October 30, 2006 letter addressed "To Whom It May Concern," advised that the student had been offered diagnoses of an ADHD, Asperger's syndrome, an impulse control disorder and an OCD, and that he was currently administered medications (Dist. Ex. II.C at p. 1). The private neurologist recommended that the student "be classified as other health impaired and appropriate behavior modification and educational support provided" (*id.*).

The student's eighth grade report card indicated that his final average grades in his "core" academic subjects were in the 88 to 98 range (English, social studies, living environment, math, Spanish) (Dist. Ex. III.H at p. 15; *see* Dist. Ex. III.D at p. 4).<sup>15</sup> During ninth grade, the student achieved first quarter grades in his core academic subjects of 91 (English), 96 (global history), 92 (earth science), 95 (math A/B), 89 (Spanish 2) (Dist. Ex. III.G at p. 3).<sup>16</sup>

The parents alleged in their due process complaint notice that the district failed to arrange for further evaluations to determine their son's educational needs (Dist. Ex. I.A at p. 4). The director of special programs testified that the service providers conducting the evaluations

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<sup>13</sup> The school psychologist reported that "atypicality" referred to "behaviors that are considered immature or odd and are often associated with psychiatric issues" (Dist. Ex. III.D at p. 3).

<sup>14</sup> The school psychologist reported that "locus of control" referred to the student's "perception of his ability to control his surrounding world" (Dist. Ex. III.D at p. 3).

<sup>15</sup> As to the student's "special subject area classes," he received grades of 80 in art, 58 in careers, 72 in music, 78 in technology, 78 in computer, 88 in physical education, and 90 in health education (Dist. Ex. III.H at p. 15; *see* Tr. p. 128). The school psychologist testified that the "special area teachers" reported that the student was "more focused on his core classes, he felt they were more important. He needed to put more effort there and he didn't -- he said he honestly didn't care as much about his special subject area classes" (Tr. p. 128). The student's mother testified that the student did not pass careers because it was the only class in which she did not provide help to the student (Tr. pp. 1116-7).

<sup>16</sup> As to the student's special subject area classes, he received grades of 77 in art, 75 in "mat proc 1", and 82 in physical education (Dist. Ex. III.G at p. 3).

determined the appropriate evaluations used to assess the student, which included both standard and supplemental batteries (Tr. pp. 54-55). Prior to her evaluation, the school psychologist discussed the upcoming psychological evaluation with the student's mother and advised her as to what tests she planned on administering (Tr. pp. 280-81). The school psychologist testified that the parents did not request that any other type of testing be administered, or advise the psychologist of any specific areas that the parents wanted her to assess (*id.*). The school psychologist testified at length about her rationale for using the WISC-IV, BASC, student interview, and report card/standardized test result review with the student, and the results of her assessments (Tr. pp. 105-17). Additionally, the school psychologist spoke to all of the student's "core" teachers, who reported to her that the student was "doing very well, he was doing his work, he was on task and did well on tests" (Tr. pp. 117-18). The director of special programs stated that results of the student's evaluations in the areas of achievement, cognition, social/emotional, and speech-language skills did not indicate that further assessment was needed (Tr. pp. 56). Additionally, the hearing record reflects that each evaluator reviewed their respective reports at the January 2007 CSE meeting, after which the parents had the opportunity to discuss the information presented (Tr. pp. 39-40). The hearing record further reflects that although the student's mother did express her concerns regarding the amount of assistance she provided her son at home and his note-taking skills, she did not request additional testing be completed during the January 4, 2007 CSE meeting (Tr. pp. 30, 40, 60, 339).

After a review of the hearing record, I find that the CSE had sufficient information and evaluations in order to make a determination as to whether or not the student was eligible for special education programs and services. In consideration of the assessments and teacher report results described above, I agree with the district's assertion that the CSE's evaluations of the student did not indicate that further assessments were required.

I will next conduct an independent review of the hearing record to determine whether the CSE's January 2007 determination that the student was not eligible for special education programs and services under the IDEA is supported by the evidence.

The parents alleged in their due process complaint notice that the district improperly failed to identify their son as a student with a disability (Dist. Ex. I.A at p. 4). The hearing record reflects that the January 4, 2007 CSE discussed three possible disability classifications for the student with the parents: learning disability, emotional disturbance, and other health impairment (Tr. pp. 66-67, 122-23; *see* 8 NYCRR 200.1[zz][4], [6], 10]). I note that the January 2007 CSE did not dispute that the student had been diagnosed with an ADHD, Asperger's Syndrome, an impulsive control disorder and an OCD, but that the CSE concluded that the diagnosed conditions did not have an adverse effect on the student's educational performance (Tr. pp. 49-50, 95-96; *see* Dist. Ex. III.H). After an independent review of the hearing record, I find that the impartial hearing officer's finding that the student's diagnosed conditions had an adverse effect on the student's educational performance is not supported by the hearing record (*see* IHO Decision at pp. 67-68).

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 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]; C.B. v. Dep't of Educ., 2009 WL 928093 [2d Cir. April 7, 2009]; New Paltz Cent. Sch. Dist. v. St. Pierre, 307 F. Supp. 2d 394, 399 [N.D.N.Y. 2004]). 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 a disability (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 [OSEP 2007]).

I will first address whether the CSE properly determined that the student was eligible for special education services as a student with a learning disability. A learning disability is defined 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 (34 C.F.R. § 300.8[c][10]; 8 NYCRR 200.1[zz][6]). The term includes such conditions as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia and developmental aphasia (id.). 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 (id.).

Regarding the classification of learning disability, the CSE determined that the student was not eligible for special education services because there was no discrepancy between his cognitive abilities and educational achievement (Tr. pp. 67, 122-23).<sup>17</sup> The school psychologist testified that results from both the educational and cognitive testing indicated average to above average performance (Tr. pp. 106, 125). In addition to the evaluative information reflecting the student's average to superior cognitive skills, and average to high average academic skills (Dist. Exs. III.D at p. 4; III.E at p. 2), the student's teachers reported to the director of special programs and the school psychologist that they did not have concerns about the student's educational progress, and that he did not need special education services (Tr. pp. 21, 23-26, 93-94, 101-02, 117-18). Specifically, the student's seventh grade science teacher reported that the student had been "high functioning" and "cooperative" in her classroom (Tr. p. 26). The director of special programs testified that the student consistently demonstrated "high performance" with regard to his "accelerated" level courses (Tr. p. 24). The hearing record reflects that the guidance counselor stated that the student met the requirements of the honors program, and the guidance

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<sup>17</sup> The director of special programs testified that at the time of the January 2007 CSE, the district operated under the "discrepancy model" when determining eligibility as a student with a learning disability (Tr. pp. 19, 67).

counselor stated to the director of special programs that the student was "very bright" and articulate (Tr. pp. 26-27). The student's mother testified that the student was able to maintain his grades because she would "reteach" the school lessons every night (Tr. pp. 750, 1066). However, the director of special programs testified that the student's ninth grade teachers reported that the student was "cooperative" and functioned independently within the classroom (Tr. pp. 25, 93-94). Based upon the testimony of the school psychologist and director of special programs, along with the academic achievement and cognitive evaluative data, teacher reports regarding the student's functioning in the classroom, and report card grades, the hearing record reveals that the January 2007 CSE correctly determined that the student was ineligible for special education services as a student with a learning disability.

The CSE also considered and rejected the classification of an other health impairment, determining that, based on the information before the CSE, the student did not meet the definition of a student with such a disability (Tr. pp. 67-68, 122-23). State regulations define an other health impairment as:

having limited strength, vitality or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that is due to chronic or acute health problems, including but not limited to a heart condition, tuberculosis, rheumatic fever, nephritis, asthma, sickle cell anemia, hemophilia, epilepsy, lead poisoning, leukemia, diabetes, attention deficit disorder or attention deficit hyperactivity disorder or tourette syndrome, which adversely affects a student's educational performance.

(8 NYCRR 200.1[zz][10] [emphasis added]; see 34 C.F.R. § 300.8[c][9]).

The director of special programs testified that she contacted the student's private neurologist prior to the January 4, 2007 CSE meeting regarding the neurologist's recommendation that the student be classified with an other health impairment; however, she was unable to gain additional information from the neurologist about the neurologist's opinion that the student needed special education services (Tr. pp. 28, 79). The director of special programs further testified that the parents did not provide the district with any of the private neurologist's records except for her October 2006 letter (Tr. p. 80). While the hearing record demonstrates that the CSE was aware of the student's diagnoses pursuant to the private neurologist's October 2006 letter, the January 4, 2007 CSE determined that the student's "medical diagnoses" did not adversely affect the student's educational performance (Tr. pp. 95-96; see Dist. Ex. III.H). The director of special programs testified that the CSE based its determination on "all the school records, on all the evaluations and tests that we had, on the interviews with teachers and people who work with [the student] every day in a school setting" (Tr. p. 68).

As stated above, the student received grades in the 88-98 range in academic subjects of English, Spanish, math, social studies and science during eighth and ninth grades while attending the district's school (Dist. Exs. III. G at p. 3; III.H at p. 13). Regarding the student's diagnosis of an ADHD, the district school psychologist stated that the student's English teacher reported that the student engaged in no more off-task behavior than any of the other ninth grade students, and all of his "core" teachers reported that he was actively engaged in his learning (Tr. pp. 121, 258). The school psychologist testified that specific subtests of the WISC-IV and the BASC adequately assessed the student's executive functions levels, resulting in "average to above average scores in all areas," and "no significant areas of concern" (Tr. pp. 105-11). Additionally, with the exception of the psychological report that indicated the student demonstrated some off-

task behavior during a classroom observation, none of the evaluation reports indicated that the student exhibited difficulty with attention, and the parents' social history did not indicate that they had concerns regarding their son's ability to attend (see Dist. Exs. III.A-III.E). Based upon my review of the hearing record, the information before the January 2007 CSE did not indicate that the student was eligible for special education services as a student with an other health impairment.

The CSE also considered the student's eligibility as a student with an emotional disturbance; however, determined that the student did not meet the definition of a student with an emotional disturbance based on the information before it (Tr. pp. 122-23). A student with an emotional disturbance must meet one or more of the following five characteristics:

- (i) an inability to learn that cannot be explained by intellectual, sensory, or health factors.
- (ii) an inability to build or maintain satisfactory interpersonal relationships with peers and teachers.
- (iii) inappropriate types of behavior or feelings under normal circumstances.
- (iv) a generally pervasive mood of unhappiness or depression;  
or
- (v) a tendency to develop physical symptoms or fears associated with personal or school problems.

(8 NYCRR 200.1[zz][4]; see also 34 C.F.R. § 300.8[c][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 (8 NYCRR 200.1[zz][4]; see also 34 C.F.R. § 300.8[c][4]). 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, 307 F. Supp. 2d at 398). The student, therefore, must not only manifest one of the numbered characteristics, but the emotional disturbance must adversely affect the student's educational performance to the extent that he or she requires special education (see Educ. Law § 4401[1]).

Information considered by the CSE indicated that as late as ninth grade, the parents reported that the student's relationships with his peers were "fine" and his relationship with his brother was "ok" (Dist. Ex. III.B at p. 1). Additionally, when asked what the student enjoyed or liked the most about school, the parents responded "seeing friends," and they denied that the student had concerns about school (id. at p. 2). The school psychologist testified that in order to assess the student's social/emotional functioning, she interviewed the student's mother and the student, and administered the BASC (Tr. pp. 107-08, 143). According to the school psychologist, at that time the student's mother reported her concern about the student exhibiting "some behavioral difficulties" and her concern regarding who the student "was choosing as friends" (id.).<sup>18</sup> The hearing record reveals that the student's teachers reported that the student's behavior did not interfere with his learning, nor did he engage in behaviors in the classroom that interfered with his learning or the learning of others (Tr. pp. 94, 130, 259). The hearing record shows that the disciplinary actions taken by the district during the student's eighth and ninth

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<sup>18</sup> The hearing record reflects that the student's mother was concerned that some of the student's friends were "getting into trouble" by exhibiting insubordinate behaviors and engaging in possible drug and alcohol use (Tr. pp. 253-54). The school psychologist testified that prior to the psychological evaluation of the student, the parents did not indicate to her that the student was involved in the use of alcohol or substances (Tr. pp. 281-83).

grade years resulted from the student's behaviors which included, among other things, making threats, writing on the desk and walls of the classroom, using profanity and purchasing drug paraphernalia on school property (Tr. pp. 728-30, 733-34, 756; Parent Exs. 47; 50 at pp. 1-2). Despite the student's mother's concerns regarding her son's disciplinary actions and choice of friends, the school psychologist who attended the CSE meeting testified that these behaviors did not affect the student in the classroom setting (Tr. pp. 226, 257; Dist. Ex. II.K).

The school psychologist stated that the CSE discussion regarding the classifications of emotional disturbance and other health impairment focused on whether the student's diagnoses adversely affected his educational performance (Tr. p. 123). She testified that the CSE determined that the student was ineligible for special education because the student's medical diagnoses did not adversely affect his educational performance (Tr. pp. 67-68). By letter dated December 2006, the parents acknowledged that their son was doing very well in math class, despite the need for putting in hours at home stating: "[h]e has gotten to the point where he is pretty good about writing down homework assignments each night, and when he forgets he calls someone in the class and gets it" (Parent Ex. 25). The school psychologist testified that "[m]y opinion is he did not qualify in terms of the education law in terms of whether it adversely affected his educational performance" (Tr. p. 124).

In order to be classified as a student with a disability under Federal regulation (34 CFR 300.8[a][1]) or its State counterpart (8 NYCRR 200.1[zz]), a student must not only have a specific physical, mental or emotional condition, but such condition must adversely impact upon the student's performance to the extent that he or she requires special education and/or related services. The CSE appropriately declined to classify the student as a student with a disability because the hearing record as a whole does not demonstrate that the student's educational performance was adversely affected by his medical diagnoses of an ADHD, an OCD, an impulse control disorder, or Asperger's syndrome or that he needs special education services.

The parents further contend that the district conducted an improper CSE meeting for the student and allege that the parents were not afforded an opportunity to participate at the CSE meeting. The IDEA sets forth procedural safeguards that include providing parents with an opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child" (20 U.S.C. § 1415[b][1]). Federal and State regulations governing parental participation require that school districts take steps to ensure that parents are present at their child's IEP meetings or are afforded the opportunity to participate (34 C.F.R. § 300.322; 8 NYCRR 200.5[d]). In deciding whether parents were afforded an opportunity to participate in the development of their child's IEP, courts have considered the extent of the participation (see Cerra, 427 F.3d at 193; Perricelli, 2007 WL 465211, at \*14-15; Viola v. Arlington Cent. Sch. Dist., 414 F. Supp. 2d 366, 378-79 [S.D.N.Y. 2006]; Z.D. v. Niskayuna Cent. Sch. Dist., 2009 WL 1748794 at \*3 (N.D.N.Y., June 19, 2009); see also Paolella v. District of Columbia, 2006 WL 3697318, at \*1 [D.C. Cir. Dec. 6, 2006]; A.E. v. Westport Bd. of Educ., 463 F. Supp. 2d 208 [D. Conn. 2006]).

In the instant case, the impartial hearing officer found that the student's mother "convincingly expressed her frustration that no one at the meeting would listen to her and didn't take her issues seriously" and she concluded that the parents did not have an opportunity to participate in a meaningful way (IHO Decision at pp. 64-65). The State Review Officer gives due deference to the findings of credibility of the impartial hearing officer, unless the hearing record, read in its entirety, would compel a contrary conclusion (see Carlisle Area School v. Scott P., 62 F. 3d 520, 524 [3d Cir. 1995]; 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; Application of a Child with a Disability, Appeal No. 97-73). Here, however, I find that the hearing record does not support such a finding. The hearing record factually shows that the parents meaningfully participated in the January 2007 CSE meeting. The parents attended the January 4, 2007 CSE meeting, which according to the student's mother, lasted approximately 39 minutes in length (Tr. pp. 38, 788-89). The student's mother testified that the evaluators reviewed the social history and educational, speech-language, and psychological evaluation reports, and that she was provided with copies of the reports (Tr. pp. 789-791, 795). The student's mother further testified that the district's guidance counselor discussed the student's behavior and its affect on the student's admittance to college (Tr. pp. 794-95). The director of special programs stated that after the review of the evaluation reports, the meeting was "open[ed] up" for discussion regarding the student's eligibility, at which time the student's mother expressed her concern that she "does a lot of the work" (Tr. pp. 39-40). The student's mother testified that she "made them aware at the CSE meeting" that she provided her son with much "support" at home (Tr. p. 751). The director of special programs testified that "mom's concern, that's what she shared with the committee saying that she did the homework and so forth, and we explained to her that we didn't see him as being a person who was eligible for special education" (Tr. p. 40). The student's mother also testified that the CSE only discussed the student's academics; however, the hearing record reveals that re-teaching of academics at home, the length of time the student's mother spent with the student completing class work, and his note-taking skills were the concerns raised by the student's mother during the initial evaluation process and at the CSE meeting (Tr. pp. 30, 40, 49, 59, 60, 788; Dist. Ex. II.F). The director of special programs testified that at the January 2007 meeting, the parents did not disagree with the determination of the CSE that the student was not eligible for special education services (Tr. pp. 40, 41, 126). A careful review of the hearing record reveals that the parents were afforded the opportunity to meaningfully participate at the January 2007 CSE meeting and that the student's mother did express her concerns to the CSE. The CSE's disagreement with the parents' assertion that their son required special education services does not equate to a finding that they were precluded from participating at the meeting.

In sum, I find upon reading the whole record, that the weight of the evidence in the hearing record supports a finding that, at the time of the January 2007 CSE meeting, the student was not eligible for special education programs and services. Because I have found that the student is not a student eligible to receive special education programs and services as a student with a disability under the IDEA, the parents are not entitled to tuition reimbursement and I need not reach the issue of whether Family Foundation was an appropriate placement. The necessary inquiry is at an end (M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142F. 3d at 134; Application of a Child with a Disability, Appeal No. 03-058; Application of a Child Suspected of Having a Disability, Appeal No. 03-058).

In light of my determination, I need not consider the parties' remaining contentions, including the parents' cross-appeal.

**THE APPEAL IS SUSTAINED.**

**THE CROSS-APPEAL IS DISMISSED.**

**IT IS ORDERED** that the impartial hearing officer's June 21, 2009 decision is annulled to the extent that it ordered the district to reimburse the parents for reduced tuition costs at Family Foundation for the 2007-08 school year.

**Dated:** Albany, New York  
September 2, 2009

A handwritten signature in black ink, appearing to read "Paul Kelly", written in a cursive style.

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**PAUL F. KELLY**  
**STATE REVIEW OFFICER**