



The University of the State of New York

The State Education Department

State Review Officer

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No. 09-091

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:

Hodgson Russ LLP, attorneys for respondent, Ryan L. Everhart, Esq., of counsel

DECISION

Petitioners (the parents) appeal from a decision of an impartial hearing officer which determined that the educational program respondent's (the district's) Committee on Special Education (CSE) had recommended for their son for the 2008-09 school year was appropriate. The district cross-appeals from that portion of the impartial hearing officer's decision which denied the district's motion to dismiss the parents' due process complaint notice on the basis of res judicata and ordered the district to commence a due process proceeding against the parents to override their refusal to consent to reevaluation. The appeal must be sustained in part. The cross-appeal must be sustained in part.

At the time of the impartial hearing, the student was attending the district's middle school and was receiving services consistent with a November 18, 2005 individualized education program (IEP) by virtue of pendency (Tr. pp. 185-86, 260-62; Dist. Ex. 7 at pp. 1, 7-12; IHO Ex. 5 at p. 8).¹ The student's educational programs have been the subject of three previous administrative appeals (Application of a Student with a Disability, Appeal No. 09-003; Application of a Student with a Disability, Appeal No. 08-077; Application of the Bd. of Educ.,

¹ See 20 U.S.C. § 1415(j) for statutory requirements pertaining to maintenance of a student's current educational placement during the pendency of due process proceedings (see also Educ. Law §§ 4404[4], 4410[7][c]; 34 C.F.R. § 300.518[a]; 8 NYCRR 200.5[m]).

Appeal No. 07-087);² therefore, the parties' familiarity with the student's prior educational history is presumed and will not be repeated here in detail. However, some discussion of the previous proceedings is instructive.

On June 20, 2008, an impartial hearing officer (Hearing Officer 1) issued a decision, annulling the student's November 2007 IEP, and directing that a CSE convene within 30 days (Parent Ex. F2). On July 17, 2008, a CSE convened to develop an IEP for the student in accordance with the order of Hearing Officer 1 (Tr. pp. 99-102, 125-26; Dist. Ex. 22). The July 17, 2008 CSE meeting was attended by the CSE chairperson, a school psychologist, an occupational therapist, a special education teacher, a regular education teacher, an additional parent member, and a "recording secretary" (Dist. Ex. 22 at p. 5). The parents were not present and did not participate in the July 17, 2008 CSE meeting (Tr. p. 179; Dist. Ex. 22 at p. 5). The CSE found the student to be eligible for special education services as a student with an other health impairment (OHI) and recommended that he be placed in a general education setting with the related service of individual occupational therapy (OT) once per week for 30 minutes in a "regular class" (Dist. Ex. 22 at p. 1). The July 17, 2008 IEP also recommended that the student receive "modifications/accommodations/supplementary aids and services" of preferential seating and use of a seat cushion, and that school personnel receive an "OT Consult-Indirect" one time per month for 30 minutes in the student's "regular class" (*id.* at pp. 1-2).

The parents subsequently appealed Hearing Officer 1's June 20, 2008 decision to a State Review Officer and then filed a due process complaint notice dated August 29, 2008, alleging procedural and substantive errors in the student's July 17, 2008 IEP (see Application of a Student with a Disability, Appeal No. 09-003; Application of a Student with a Disability, Appeal No. 08-077).

While the impartial hearing regarding the August 29, 2008 due process complaint notice was pending, a decision was rendered in the parents' appeal of Hearing Officer 1's decision (Application of a Student with a Disability, Appeal No. 08-077). By decision dated September 8, 2008, a State Review Officer sustained the parent's petition, in part, and ordered the CSE "to reconvene to address the issue of whether the student is eligible for special education services, and if so, to address the student's classification within 30 calendar days of this decision" and to consider whether an assistive technology evaluation is warranted (Application of a Student with a Disability, Appeal No. 08-077).

On October 16, 2008, the CSE convened to develop an IEP for the student in accordance with the decision in Application of a Student with a Disability, Appeal No. 08-077 (Tr. pp. 94-95; Dist. Ex. 1). The October 16, 2008 CSE meeting was attended by the CSE chairperson, a school counselor, a school psychologist, a regular education teacher, an occupational therapist, an additional parent member, and a "recording secretary" (*id.* at p. 5). The student's mother and her advocate participated by telephone (*id.*). The resultant October 16, 2008 IEP continued the student's eligibility for special education services as a student with an OHI, and continued the recommendation that the student attend a general education program and receive the related

² The New York State Education Department's Office of State Review maintains a website at www.sro.nysed.gov. The website explains in detail the appeals process and includes State Review Officer decisions since 1990.

service of OT individually one time per week for 30 minutes in his "regular class" (*id.* at p. 1). The recommendations for preferential seating, use of a seat cushion, and an "OT Consult-Indirect" remained the same as in the July 17, 2008 IEP (*id.* at pp. 1-2).

Subsequently, by decision dated November 24, 2008, an impartial hearing officer (Hearing Officer 2) dismissed the parents' due process complaint notice dated August 29, 2008 as moot (Application of a Student with a Disability, Appeal No. 09-003). The parents appealed Hearing Officer 2's decision to a State Review Officer, who rendered a decision dated February 4, 2009, upholding Hearing Officer 2's decision that the parents' claims in the August 29, 2008 due process complaint notice had been rendered moot by the superseding October 16, 2008 IEP (*id.*).

By due process complaint notice dated February 9, 2009, the parents alleged procedural and substantive errors in the student's October 16, 2008 IEP (IHO Ex. 5). As relief, the parents requested, among other things, that the CSE develop a new IEP for the student for the 2008-09 school year, the provision of appropriate OT services and assistive technology, an independent assistive technology evaluation, and a change in the student's classification (*id.* at pp. 7-8).

An impartial hearing began on May 15, 2009 and concluded on May 29, 2009, after two days of testimony (IHO Decision at pp. 2-3). By decision dated July 17, 2009, an impartial hearing officer (Hearing Officer 3) found that the district did not procedurally or substantively deny the student a free appropriate public education (FAPE) (*id.* at pp. 13-25, 28-29).³ However, Hearing Officer 3 found that there was a need for a comprehensive reevaluation of the student, and that after completing the evaluations, the district should reconsider the student's eligibility for special education services and classification (*id.* at pp. 25-26, 29). Hearing Officer 3 found that, although the district made sufficient efforts to comprehensively reevaluate the student, the district failed to initiate a due process hearing to obtain an order to reevaluate the student without parental consent (*id.* at pp. 20-21, 25-26, 29). Hearing Officer 3 ordered the district to initiate a due process proceeding to seek evaluations without parental consent if the parents continued to deny consent for the reevaluation (*id.* at p. 26). Hearing Officer 3 denied the parents' request for an assistive technology independent educational evaluation as premature, but found that the student's comprehensive reevaluation should include an assistive technology evaluation (*id.* at pp. 26-29). Hearing Officer 3 ordered the CSE to reconvene within 30 days to recommend specific evaluations and evaluative tools to conduct the student's reevaluation, to include an assistive technology component as part of its comprehensive reevaluation of the student, and then to reconvene the CSE after the reevaluation is complete to determine the student's classification, needs, and deficiencies (*id.* at pp. 29-30).

³ The parents assert that Hearing Officer 3 did not cite to the hearing record on pages 28-29 of his decision in violation of State regulations. Although the parents correctly note that pages 28-29 of Hearing Officer 3's decision do not cite to the hearing record, the findings and conclusions on those pages are a summary of his findings that were made with hearing record citations in the prior pages of his decision (compare IHO Decision at pp. 13-27, with IHO Decision at pp. 28-29). As a result, I find that Hearing Officer 3 complied with the relevant State regulations (see 8 NYCRR 200.5[j][5][v]). The parents also assert that Hearing Officer 3 did not reference the record close date in his decision. I remind Hearing Officer 3 of the requirement to include the record close date in his decision (see 8 NYCRR 200.5[j][5]).

The parents appeal, and assert that Hearing Officer 3 erred in determining that the district did not procedurally or substantively deny the student a FAPE. In support of this assertion, the parents contend that, among other things, Hearing Officer 3 erred in determining that: (1) the CSE was required to meet in July 2008 pursuant to Hearing Officer 2's order; (2) the CSE timely and thoroughly reviewed the student's evaluations; (3) the district provided the parents with proper notice of the October 2008 CSE meeting; (4) the parents meaningfully participated at the October 2008 CSE meeting; and (4) the October 2008 CSE was properly composed. The parents also assert, among other things, that the formulation and development of the October 2008 IEP was actually done at the July 2008 CSE meeting, when the parents were not in attendance. The parents request determinations that they were not allowed meaningful participation in the formulation and development of the student's IEP for the 2008-09 school year and that the student was denied a FAPE.

In addition, the parents assert that Hearing Officer 3 erred in determining that the parents did not respond to the district's requests for consent to reevaluate the student, ordering reevaluation, and allowing the district's cross-claim for reevaluation to be heard after not allowing it at the beginning of the impartial hearing. The parents assert that they are aggrieved by Hearing Officer 3's order directing the CSE to comprehensively reevaluate the student and reconvene the CSE to determine the student's eligibility for special education services and classification. The parents further allege that Hearing Officer 3 erred in not considering the exhibits attached to the parents' closing brief, which showed that the CSE reconvened in June 2009 without requesting or completing the student's reevaluations in May 2009. The parents also contend that the district continued to "carry over" the student's classification for the 2009-10 school year and recommend a reduction of his OT services without any attempt to reevaluate the student.

Further, the parents allege that Hearing Officer 3 erred by, among other things, not considering the parents' request to classify the student as a student with a learning disability and by determining that the recommendations on the October 2008 IEP were appropriate. As relief, the parents request that the October 2008 IEP and the entire decision of Hearing Officer 3 be annulled. The parents also request: (1) that the additional evidence attached to their closing brief be accepted and considered; (2) the provision of an independent assistive technology evaluation of the student; and (3) a determination that the student is eligible for special education and services as a student with a learning disability.

In its answer and cross-appeal, the district asserts that Hearing Officer 3 erred by not dismissing the due process complaint notice on the basis of res judicata and requests dismissal of the petition on that ground. The district also alleges that Hearing Officer 3 erred by finding that the district should have commenced a due process hearing against the parents after they failed to provide consent for reevaluation. The district asserts that Hearing Officer 3 erred by ordering the district to file a due process complaint notice against the parents if the parents continue to refuse to consent to the student's reevaluation. As relief, the district requests that Hearing Officer 3's order to complete a reevaluation of the student be affirmed with the stipulation that the district may complete the reevaluation without the parents' consent.

Initially, two procedural matters must be addressed. First, the district asserts that the petition should be dismissed because the parents' claims are barred by res judicata. The doctrine of res judicata "precludes parties from litigating issues 'that were or could have been raised' in a prior proceeding" (Perez v. Danbury Hosp., 347 F.3d 419, 426 [2d Cir. 2003]; Murphy v. Gallagher, 761 F.2d 878, 879 [2d Cir. 1985]; Grenon v. Taconic Hills Cent. Sch. Dist., 2006 WL 3751450, at *6 [N.D.N.Y. Dec. 19, 2006]; Application of a Student with a Disability, Appeal No. 09-025; Application of a Student with a Disability, Appeal No. 08-093; Application of a Student with a Disability, Appeal No. 08-076; Application of a Child with a Disability, Appeal No. 07-093; Application of a Child with a Disability, Appeal No. 06-100; Application of a Child with a Disability, Appeal No. 05-072; Application of a Child with a Disability, Appeal No. 04-099). The rule applies not only to claims actually litigated, but also to claims that could have been raised in the prior litigation. The rationale underlying this principle is that a party who has been given a full and fair opportunity to litigate a claim should not be allowed to do so again (In re Hunter, 4 N.Y.3d 260, 269 [2005]). "[P]rinciples of res judicata require that 'once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy'" (Chen v. Fischer, 6 N.Y.3d 94, 100 [2005], quoting O'Brien v. City of Syracuse, 54 N.Y.2d 353, 357 [1981]; In re Hunter, 4 N.Y.3d at 269). Res judicata applies when: (1) the prior proceeding involved an adjudication on the merits; (2) the prior proceeding involved the same plaintiff or someone in privity with the plaintiff; and (3) the claims alleged in the subsequent action were, or could have been, raised in the prior proceeding (Grenon, 2006 WL 3751450, at *6).

Here, the doctrine of res judicata does not apply because the prior proceeding was not decided on the merits. In addition, as noted in a prior State Review Officer decision involving this student, Application of a Student with a Disability, Appeal No. 09-003, the parents' claims regarding the July 2008 IEP were rendered moot by the superseding October 2008 IEP; therefore, the parents were not precluded from filing a due process complaint notice to address their concerns regarding the October 2008 IEP. The due process complaint notice at issue in this case dated February 9, 2009, raised allegations concerning the October 2008 IEP. Therefore, the parents' claims raised in that due process complaint notice are not barred by res judicata.

Second, the parents attached exhibits to their closing brief, which Hearing Officer 3 refused to accept or consider on the basis of relevancy and availability at the time of the impartial hearing (IHO Decision at pp. 26, 29). On appeal, the parents request the acceptance and consideration of this additional documentary evidence. 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). Here, I find that the exhibits are not necessary for my review; therefore, I decline to accept them.

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 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

_____, 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).

The parents assert that Hearing Officer 3 erred in determining that the CSE was required to meet in July 2008 in response to Hearing Officer 1's order and in further determining that the CSE thoroughly reviewed the student's evaluations. As part of any evaluation or reevaluation of a student with a disability, the CSE must review existing evaluation data on the student, including evaluations and information provided by the parents, current classroom-based assessments, State assessments, classroom observations, and observations by teachers and related services providers (34 C.F.R. § 300.305[a][1][i]; 8 NYCRR 200.4[b][5][i]). The hearing record reveals that the July 2008 CSE reviewed the student's evaluation reports that resulted from evaluations conducted in 2005 and 2006, including two OT evaluation reports, a behavioral optometrist evaluation report, and a central auditory processing evaluation report (Tr. pp. 100-102; Dist. Ex. 22 at p. 5; see Dist. Exs. 23-26). The hearing record also reflects that the July 2008 CSE considered the student's updated information, including a report card and teacher report (Dist. Ex. 22 at p. 5). I concur with Hearing Officer 3's conclusion that the CSE met in July 2008 pursuant to Hearing Officer 1's order, and thoroughly reviewed the student's evaluations (Parent Ex. F2 at pp. 16-17; IHO Decision at pp. 18-20).

Turning to the parents' allegations that the district failed to properly notify the parents of the October 2008 CSE meeting, I agree with Hearing Officer 3 that the district provided the parents with proper notice (IHO Decision at pp. 14-16). The hearing record reflects that: the first meeting notice was timely sent to the parents; the subsequent meeting notice merely advised the parents of a change in the additional parent member; the October 2008 CSE meeting was a full committee meeting, not a subcommittee meeting; and the meeting notices' references to a subcommittee meeting were typographical errors (Tr. pp. 93-94; Dist. Exs. 15; 16; see Dist. Exs.

3; 6; 11). I also find that the typographical errors and substitution of an additional parent member did not impede the student's right to a FAPE, significantly impede the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or cause 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]).

The parents also assert that the October 2008 CSE was not properly composed because a special education teacher did not attend the meeting. Although a special education teacher was not in attendance at the October 2008 CSE meeting, the student's OT provider attended and participated in the meeting in compliance with State regulations, which provide that "not less than one special education teacher of the student, or, if appropriate, not less than one special education provider of the student" attend a students' CSE meeting (8 NYCRR 200.3[a][1][iii]; Tr. pp. 47-50, 80; Dist. Exs. 1 at p. 5; 27; 39). Therefore, I find that the lack of special education teacher at the October 2008 CSE meeting was not a procedural violation of the IDEA (20 U.S.C. § 1414[d][1][B][iii]; 34 C.F.R. § 300.321[a][3]; 8 NYCRR 200.3[a][1][iii]), and I agree with Hearing Officer 3 that the October 2008 CSE was properly composed (IHO Decision at pp. 17-18).

Turning next to the parents' allegation that they were denied the opportunity to meaningfully participate at the July and October 2008 CSE meetings, I agree with Hearing Officer 3 that the parents were given the opportunity to meaningfully participate in the formulation of the October 2008 IEP (IHO Decision at pp. 19-20). I find that the hearing record reflects that the district afforded the parents an opportunity to participate in the formation of the student's October 2008 IEP, and thus did not significantly impede the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student (see 20 U.S.C. § 1415[f][3][E][ii][II]; T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]; Z.D. v. Niskayuna Cent. Sch. Dist., 2009 WL 1748794, at *3 [N.D.N.Y. June 19, 2009]; E.G., 606 F. Supp. 2d at 388-89; M.C. v. Rye Neck Union Free Sch. Dist., 2008 WL 4449338, at *12-*13 [S.D.N.Y. Sept. 29, 2008]; Perricelli, 2007 WL 465211, at *14-*15; Sch. for Language and Communication Dev. v. New York State Dep't of Educ., 2006 WL 2792754, at *7; 34 C.F.R. § 300.513[a][2][ii]; 8 NYCRR 200.5[j][4][ii]). The hearing record reflects that the district notified the parents of the July 2008 CSE meeting and then convened the July 2008 CSE meeting, which the parents did not attend, in order to comply with Hearing Officer 2's order to convene a CSE meeting within 30 days of his decision (Tr. p. 127; Dist. Ex. 22 at p. 5; Parent Exs. C1; C2; C3; C4; C5; F2 at pp. 16-17). Although the parents did not participate in the July 2008 CSE meeting, they were offered an opportunity to request that the CSE reconvene to "ask questions and/or address concerns regarding the CSE recommendation," which the parents declined (Tr. pp. 327-28; Parent Ex. C5). Moreover, the student's mother and her advocate participated in the October 2008 CSE meeting and were given the opportunity to address any additional concerns they had at that time (Dist. Exs. 1 at p. 5; 7 at pp. 1-6; 27).

Next, I agree with the parents' assertion that the district did not prepare a written report regarding its determination of whether the student has a learning disability, as required by State regulations (8 NYCRR 200.4[j][5]). The hearing record supports the determination of the CSE and Hearing Officer 3 that, because the student's evaluations were last conducted in 2005 and 2006, a comprehensive reevaluation would be necessary for the district to reconsider the

student's eligibility and classification (Dist. Exs. 1 at pp. 3-5; 22 at pp. 3-5; 23; 24; 25; 26). However, after the October 2008 CSE meeting, the district should have provided the parents with a written report of its determination that the student was not a student with a learning disability in accordance with State regulations. However, the district's omission did not, under the circumstances of this case, impede the student's right to a FAPE, significantly impede the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or cause 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]).

Turning to the parents' request for the provision of an independent assistive technology evaluation of the student, federal and State regulations provide that, subject to certain limitations, a parent has the right to an independent educational evaluation (IEE) at public expense if the parent disagrees with an evaluation obtained by the school district (34 C.F.R. § 300.502[a], [b]; 8 NYCRR 200.5[g][1]). I agree with Hearing Officer 3's conclusion that this request is premature because the district has not yet conducted an assistive technology evaluation (IHO Decision at pp. 26-27, 29). Hearing Officer 3 ordered the district to include an assistive technology evaluation as part of its comprehensive reevaluation of the student (IHO Decision at pp. 29-30). The district did not cross-appeal from that part of Hearing Officer 3's order, thus, it is final and binding on the parties (34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[j][5][v]; Application of a Student with a Disability, Appeal No. 09-013; Application of a Student with a Disability, Appeal No. 08-073; Application of a Student with a Disability, Appeal No. 08-046; Application of the Dep't of Educ., Appeal No. 08-025; Application of a Student with a Disability, Appeal No. 08-013; Application of a Child with a Disability, Appeal No. 07-050; Application of a Child with a Disability, Appeal No. 07-026; Application of a Child Suspected of Having a Disability, Appeal No. 06-092; Application of a Child with a Disability, Appeal No. 06-085; Application of a Child with a Disability, Appeal No. 04-024; Application of a Child with a Disability, Appeal No. 03-108; Application of a Child with a Disability, Appeal No. 02-100).⁴ In the event that the parents disagree with the district's assistive technology evaluation, they may then request an IEE (34 C.F.R. § 300.502[a], [b]; 8 NYCRR 200.5[g][1]; see Application of a Student with a Disability, Appeal No. 09-057; Application of a Student with a Disability, Appeal No. 09-002).

Turning to the parents' contention that Hearing Officer 3 erred in determining that the recommendations on the October 2008 IEP were appropriate, I disagree. Hearing Officer 3 correctly determined that the district was not required to maximize the student's physical and mental functioning (IHO Decision at pp. 24-25; see Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Further, the hearing record reveals that the student mastered all of his OT goals on his 2005-06 IEP during the 2005-06 school year, his handwriting did not interfere with his academics, the only sensory equipment that he used was a seat cushion, he did not demonstrate difficulty hearing in class, he never used 1.5 time for tests, he participated in the classroom, and he was an "average" student in terms of his academic performance (Tr. pp. 15, 21-23, 26, 39-40, 53-54, 57-60, 62-65, 206-07, 259; Dist. Exs. 1 at p. 3; 7 at pp. 7-12). The student's occupational therapist testified that the student had no ongoing OT issues with posture, graphomotor skills, tactile awareness, or copying, and that the student no longer used tape guides for writing in class (Tr. pp. 52-53, 56-59). She also testified that the recommendations in the

⁴ I remind the district that, if it has not already done so, it should include an assistive technology evaluation as part of its request for consent to reevaluate the student.

student's OT evaluations from 2005 and 2006 no longer reflected the student's OT needs (Tr. p. 56). The hearing record reflects that the student needed OT services to address his organizational writing needs, including editing skills, punctuation, and capitalization (Tr. pp. 55, 248). I find that the recommended services and goal in the October 2008 IEP would have addressed the student's needs and permitted him to benefit educationally from instruction in his general education program (Tr. pp. 54-55, 81-82, 240-41; Dist. Ex. 1 at pp. 1-2, 4-6). Thus, I find that the October 2008 IEP was reasonably calculated to confer educational benefit on the student and the district did not deny the student a FAPE.

Next, I concur with the district's assertion that Hearing Officer 3 erred by ordering it to commence a due process proceeding against the parents to override their refusal to consent to reevaluation. Federal and State regulations mandate that each student with a disability be reevaluated at least once every three years (34 C.F.R. § 300.303[b][2]; 8 NYCRR 200.4[b][4]). Subject to certain exceptions, a school district must obtain informed parental consent prior to conducting an evaluation (34 C.F.R. § 300.300[c]; 8 NYCRR 200.5[b][1][i]; see Letter to Sarzynski, 51 IDELR 193 [OSEP 2008])⁵ and provide adequate notice to the parent of the proposed evaluation (8 NYCRR 200.5[a][5]). However, if the parent refuses to consent to the evaluation, the school district "may, but is not required to," pursue the reevaluation using consent override procedures, including mediation and the filing of a due process complaint notice (34 C.F.R. § 300.300[c][1][ii]; 8 NYCRR 200.5[b][3]) (emphasis added). I find that Hearing Officer 3 erred by ordering the district to commence a due process proceeding if the parents continue to withhold consent for the district to reevaluate the student (IHO Decision at pp. 26, 29). The district is not required to commence a due process proceeding against the parents, and is not in violation of its obligations to locate, identify, and evaluate the student in the event that it does not pursue a due process proceeding to override the parents' refusal to consent to the reevaluation (34 C.F.R. § 300.300[c][1][ii],[iii]; 8 NYCRR 200.5[b][3]). While, I agree with Hearing Officer 3 that a comprehensive reevaluation is needed in order for the CSE to reconsider its eligibility and classification determinations (IHO Decision at pp. 25-26, 29), and the district requests to reevaluate the student without parental consent, the district has not followed the necessary procedures to obtain such relief (34 C.F.R. § 300.300[c][1][ii]; 8 NYCRR 200.5[b][3]). I remind the district that if the parents continue to refuse consent to reevaluation, it may avail itself of the procedures set forth in the State and federal regulations as described above.

In addition, I remind both parties that formulating an IEP is a collaborative effort (Schaffer, 546 U.S. at 53; Cerra, 427 F.3d at 192-93) and I encourage the parties to work cooperatively in the future.

Finally, the parents ask for relief pertaining to a number of issues that were not properly raised before Hearing Officer 3 in their February 9, 2009 due process complaint notice, relating to the student's 2009-10 IEP. I decline to address those issues, in part because they were not

⁵ "Consent" is defined in the federal and State regulations as meaning that the parents have been informed of all relevant information in their native language or other mode of communication, that they understand and agree in writing to the activity for which consent is sought, that the written consent form fully describes the activity for which consent is sought, lists any records that will be released and the people to whom any records will be released, and further that the parent must be aware that the consent is voluntary, may be revoked at any time, and if revoked, that revocation is not retroactive (34 C.F.R. § 300.9; 8 NYCRR 200.1[1]).

properly raised below and are not properly before me (see Educ. Law § 4404[2]; 8 NYCRR 200.5[j][1][ii], [k]; Application of a Student with a Disability, Appeal No. 09-004; Application of a Student with a Disability, Appeal No. 08-156; Application of a Student with a Disability, Appeal No. 08-125; Application of a Student with a Disability, Appeal No. 08-118; Application of a Student with a Disability, Appeal No. 08-117; Application of a Child with a Disability, Appeal No. 07-085).

I have considered the parties' remaining contentions and find that it is unnecessary to address them in light of my determinations herein.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the portion of the impartial hearing officer's decision dated July 17, 2009 that ordered the district to commence a due process proceeding against the parents to override their lack of consent for reevaluation is hereby annulled.

Dated: Albany, New York
September 15, 2009


JOSEPH P. FREY
STATE REVIEW OFFICER