



The University of the State of New York

The State Education Department

State Review Officer

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No. 09-109

**Application of the BOARD OF EDUCATION OF THE
[REDACTED] SCHOOL DISTRICT for review of
a determination of a hearing officer relating to the provision of
educational services to a student suspected of having a
disability**

Appearances:

Law Offices of Guercio & Guercio, LLP, attorneys for petitioner, Gary L. Steffanetta, Esq., of counsel

John J. McGrath, attorney for respondents, John J. McGrath, Esq., of counsel

DECISION

Petitioner (the district) appeals from a decision of an impartial hearing officer which determined that respondents' (the parents') son is eligible for special education programs and services as a student with an other health impairment (OHI) and authorized the parents to obtain an independent educational evaluation (IEE) at public expense. The appeal must be sustained in part.

At the commencement of the impartial hearing in spring 2008, the student was attending a second grade regular education class in a district elementary school (see Dist Exs. 17; 31). The hearing record reflects that the student had received diagnoses of an attention deficit hyperactivity disorder (ADHD) and an opposition defiant disorder (ODD); diagnoses that neither party disputes (Dist Ex. 31). The hearing record also reflects that the student had fine motor and writing difficulties (id.). During the 2007-08 school year, when the student was in second grade, he received accommodations and services under section 504 of the Rehabilitation Act of 1973 (section 504) (29 U.S.C. §§ 701-796[1] [1998]), which included, among others, occupational therapy (OT) for writing and fine motor difficulties, counseling, adapted physical education, and as a result of a functional behavioral assessment (FBA), a behavioral intervention plan (BIP) had been developed, which included the services of a 1:1 aide (Dist. Exs. 18; 31). The student's eligibility for special education and related services as a student with an OHI is in dispute in this

proceeding (see 34 C.F.R. § 300.8[c][9]; 8 NYCRR 200.1[zz][10]). The parents are not seeking a change in the services provided to the student.

The hearing record reflects that in 2004, when the student was attending a private preschool, he experienced a significant illness that resulted in extensive absence from school and continues to require ongoing monitoring of symptoms (July 3, 2008 Tr. pp. 22-28; Dist. Exs. 39 at p. 1; 41). The student received no publicly funded special education preschool services at that time (July 3, 2008 Tr. p. 29). Prior to beginning kindergarten for the 2005-06 school year, the parents engaged the services of a private psychologist to be the student's "kindergarten coach" and to talk to the student about his feelings regarding going to kindergarten (July 3, 2008 Tr. pp. 29-30). The hearing record indicates that the student's mother felt that missing so much preschool due to illness was "traumatic" for the student (July 3, 2008 Tr. p. 29). The student's mother also indicated that she was concerned about the student's social skills (July 3, 2008 Tr. p. 30).

The student entered kindergarten during the 2005-06 school year (July 3, 2008 Tr. p. 31). The hearing record indicates that the student experienced difficulty with organization, arrival and dismissal routines, distractibility, and with completing his work independently (Dist. Ex. 38 at p. 3). Implementation of a behavior chart from February 2006 through the end of that school year helped to increase the student's work completion and independence (id.). Although the student's mother reported some behavioral incidents, she indicated that the student "seemed to do okay" in kindergarten and "his report card was pretty good" (July 3, 2008 Tr. p. 33; see Parent Ex. H at pp. 1-2).

The hearing record reflects that early in the 2006-07 school year when the student was transitioning into the first grade, he began to exhibit difficulties related to his behavior, a need for constant reminders, and was not completing his schoolwork (July 3, 2008 Tr. pp. 36, 39-41). The hearing record further reflects that a parent meeting was held in September 2006 to discuss how to help the student transition into first grade (July 3, 2008 Tr. p. 42; Dist. Ex. 38 at p. 3). On October 2, 2006, a positive behavior support plan was developed for the student to increase the student's ability to complete his work and to stay on task (Dist. Ex. 38 at p. 3). Due to the student's continuing behavioral difficulties in class, the behavior plan was revised in November 2006 (id.). In addition, the student received private individual counseling outside of school and began receiving individual educationally related support services (ERSS) of counseling in school (id.).

By letter to the district coordinator of special education dated December 4, 2006, the parents requested a special education evaluation of the student and that the student "be given the consideration of a child with a disability until the results of his testing are evaluated" (Dist. Ex. 38 at p. 3; Parent Ex. O). The student's mother summarized her concerns regarding the student's reaction to academic and behavioral difficulties in the classroom and indicated that he had come home from school with "headaches so severe that he ha[d] vomited" (Parent Ex. O). The letter stated that the student was about to undergo a private neurological/psychological evaluation, and that when the evaluation was completed, the student's mother would "allow the district to observe the findings" (id.). The student's mother noted in the letter that she had communicated her desire to have the student evaluated to the student's classroom teacher and the school

psychologist and informed the coordinator of special education that the student had been going to a private counselor on a regular basis and would be meeting with the school psychologist weekly on a short-term basis to work on developing coping strategies in the classroom (id.). The letter further reflected the student's mother's concerns that the student had been periodically disciplined for not completing his schoolwork by missing a 30-minute recess (id.). The student's mother explained in the letter that although she had addressed her concerns with the student's classroom teacher who agreed to send some of the student's work home as long as he "tries his best" in class to finish; the student's mother found this response inadequate (id.). The student's mother requested that "in light of the stress-related symptoms that ha[d] emerged since [the student] has experienced difficulty this year in his classroom," the student be "disciplined as a student with a psychiatric, cognitive and/or neurological disability until testing was completed and reviewed" (id.).

In a letter dated December 13, 2006, the student's mother thanked the school psychologist for taking the time to meet with the parents to explain the procedures regarding the special education evaluation of the student (Parent Ex. P). The letter indicated that it was the parents' understanding that if they proceeded with their request to have the student evaluated before the district implemented a number of educational interventions, it would be likely that a Committee on Special Education (CSE) would reject the parents' request to secure a section 504 plan or an individualized education program (IEP) for the student, regardless of the results of the private neuropsychological examination (id.). The letter indicated that the parents were "seriously" considering the school psychologist's suggestion that they withdraw their request to have the student evaluated at that time, with the provision that the school would provide the student with additional general education support services, including an informal written behavioral program (id.). The letter noted that, if the parents withdrew their request for evaluation, they desired a written description of the services that the student would receive, which they understood was required to be provided to them under "Section 200.4 of the Special Education Law" (id.). The student's mother requested an "informal list" of possible behavioral and educational interventions, as well as the district's policy reflecting that "students cannot receive these general education support services if they pursue a [s]pecial [e]ducation evaluation" (id.). The student's mother also noted in the letter that she would ask the private neuropsychologist for all tests administered to the student and provide the information to the district if the parents decided to pursue a special education evaluation of the student (id.).

In a letter dated December 18, 2006, the student's mother indicated to the school psychologist that the parents wished to withdraw their request for a special education evaluation of the student (Parent Ex. Q). The letter indicated that the parents wanted to schedule a meeting with "[the district's] team" following completion of the student's private neuropsychological evaluation, in order to reevaluate the interventions put in place for the student, with special attention to the BIP (id.). The letter also indicated the parents' understanding that the student required OT services to address his fine motor skills and writing, and their request that consideration be given to the student taking tests in a quiet space (id.).

In a letter dated December 21, 2006 to the school principal following a behavioral incident in school, the student's mother expressed her increasing concern regarding the student's emotional and psychological well being in his first grade class (Parent Ex. R). The letter

indicated that the parents were not asking the teacher to overlook the student's misbehavior, but to "understand from where it comes," and to be understanding of the situation while supports for the student were put in place (id.).

On January 18, 2007, an initial Instructional Support Team (IST) meeting occurred (Dist. Exs. 38 at p. 3; 41). At that time, the first grade classroom teacher indicated that the student performed well on classroom tests and demonstrated grade level reading skills and well-developed math ability (id.). The student exhibited the most difficulty with writing activities (id.). In addition, the student continued to struggle with "whole-body" listening, disruptive behavior, and work completion (id.). He also exhibited a marked number of visits to the nurse that frequently coincided with writing activities in the classroom (Dist. Ex. 38 at p. 3). Also, the parents reported at the January 18, 2007 IST meeting that the student was being seen for a full neuropsychological evaluation (Dist. Exs. 38 at p. 3; 41). Following the January 18, 2007 IST meeting, a fifth grade "mentor" was assigned to meet with the student weekly, and it was decided that the student's visits to the nurse would be monitored and his pain rated on a scale of one to ten for symptoms of headaches, stomach aches, and leg aches (Dist. Ex. 38 at p. 3). It was also requested that an occupational therapist observe the student in the class setting and it was determined that there would be a change to a response-cost behavior modification system if the then current behavior modification chart was no longer effective (id.). Classroom accommodations included preferential seating, breaking down of tasks into small steps, use of "masks," frequent breaks, and refocusing and redirection (Dist. Ex. 41).

As noted above, the parents had referred the student for a private neuropsychological evaluation due to school and learning difficulties, poor attention, increased anxiety, and headaches (Dist. Ex. 39 at p. 5). The neuropsychological evaluation was conducted over four days between December 7, 2006 and January 2, 2007 (id. at p. 1). The purpose of the evaluation was to provide diagnostic clarity, outline the student's areas of cognitive strengths and weakness, and assist in the development of a treatment plan in order to assist in the development of the student's academic planning and social/emotional functioning (id. at p. 5).

Behaviorally, the neuropsychological evaluation report indicated that the student made a smooth transition to the testing process, and rapport with the evaluator was easily established (Dist. Ex. 39 at p. 2). The student was verbal and his speech was described as "clear and fluent," as he engaged in spontaneous conversation (id.). The report noted that the student asked the evaluator why certain tasks had to be done, and if a task was difficult or boring for the student he expressed his dissatisfaction by saying, "[t]his is stupid" or "[t]his is dumb" (id.). The report further indicated that the student's attention and focus was fleeting throughout the evaluation (id.). Particularly for tasks involving reading and writing, the student required verbal prompting and redirection back to task (id.). The report indicated that when the student did not want to engage in a task or continue working, his affect tended to change; he became increasingly moody, oppositional, and defiant; and he was unable to be redirected or reengaged and as a result, testing needed to be discontinued (id. at pp. 2-3). When engaged in a task, the student was able to sustain his attention, focus, and put forth effort (id. at p. 3). The evaluator also noted that it was important for the student to take breaks and for him to eat during testing (id.). The student's response style was described as "quick and impulsive," as he appeared interested in getting the work done quickly so that he could leave (id.). The evaluator indicated that the

student appeared easily frustrated with reading and writing tasks and tended to give up quickly (id.). The evaluator noted that the student appeared to be aware of these difficulties as demonstrated by his change of affect, demeanor, and facial expressions (id.). In addition, the evaluation report indicated that, although present test findings were considered to be a valid indicator of the student's intellectual and social/emotional functioning at the time of the assessment, "they may be an under-representation of [the student's] true intellectual capabilities due to his mood lability" (id.).

The neuropsychological evaluation report noted that evaluation results indicated that the student's intellectual functioning and academic achievement were variable (Dist Ex. 39 at p. 5). Intellectual functioning ranged from below average to high average (id.). Strong verbal ability and abstract reasoning skills were evident (id.). When in a 1:1 setting with minimal distractions, the student demonstrated good short-term and working memory (id.). His greatest areas of weakness were in his below average processing speed and visual motor integration (id.). The student's academic performance ranged from borderline to high average, with the student exhibiting strength in mathematical reasoning, but borderline to below average weaknesses in reading comprehension and written expression (id.). The evaluator noted that reading comprehension and written expression tasks were more challenging for the student, which in turn tended to influence his mood, motivation, and cooperation (id.). At times, the student tended to "shut down" and refused to continue working, which negatively affected his performance (id.). The evaluator further noted that the student's overall intellectual and achievement ability appeared to be mostly within the average to high average range, and when mood did not play a factor, the student demonstrated good cognitive ability (id. at pp. 5-6).

The neuropsychological evaluation report noted that results attained on memory and learning tasks indicated that the student's rate of learning tended to be more inconsistent than consistent (Dist Ex. 39 at p. 6). The student displayed difficulty retaining new information (id.). However, his intellectual capability served as a "springboard" for his ability to learn, and with repetition and practice, the student appeared better able to learn and retain information (id.). The evaluator noted that in a structured environment with minimal distractions, the student was able to maintain focus and attention most of the time (id.). In contrast, the evaluator indicated that a classroom setting might prove much more challenging for the student as it would be difficult for him to filter out extraneous noise or distractions (id.). Reinforcement and redirection assisted the student in sustaining attention and completing tasks (id.). In addition, the evaluator indicated that the student's attention difficulties, restlessness, fidgeting and impulsive behaviors supported a diagnosis of an ADHD-combined type and that at the time of the evaluation, the student also continued to meet the criteria for an ODD (id.). Furthermore, the evaluator concluded that the student's increasing opposition in defiance to authority or group norms might either be indicative of poor self-concept related to academic performance and/or the possibility of an underlying mood disorder (id.). The evaluator indicated that at the time of the evaluation, the student did not appear to meet the clinical criteria for an anxiety disorder or a mood-based disorder, but noted that the student's affect and emotional lability should be monitored as he matured (id.).

Concerning the student's visual-motor abilities, the neuropsychological evaluation results indicated significant difficulty with tasks involving efficiency, rate of speed, and rote copying (Dist Ex. 39 at p. 6). The student's ability to discriminate among visual stimuli and cues was

average to high average, but fine motor weaknesses and fine motor dexterity were observed in both hands (id.). Tasks involving fine motor manipulation and dexterity were particularly challenging for the student as he exhibited difficulty with grip and eye-hand coordination, something that carried over into writing tasks (id.). The evaluation report indicated that this was particularly challenging and laborious for the student, resulting in his frustration and tendency to give up quickly (id.). The evaluator indicated that although at the time of the evaluation the student did not appear to meet the criteria for having a learning disability in written expression, "it may be more likely that fine motor weakness is serving as one of [the student's] biggest roadblocks" (id.).

In regard to the student's social/emotional functioning, the neuropsychological evaluation report indicated social concerns, poor self-concept, impulsivity and hyperactivity, and defiant behavior (Dist Ex. 39 at p. 6). In addition, assessment results revealed some features of anxiety, a depressed mood and withdrawn behavior that tended to "negatively impact [the student's] academic performance (primarily on writing tasks), as well as in social interactions with peers" (id.). The evaluation report noted that the student displayed difficulty in understanding social and group norms, expressing empathy, and executing thought about potential consequences of his behaviors on others (id.). The evaluation report noted that, although the student displayed some characteristics of a pervasive developmental delay such as Asperger's disorder, it might be likely that with proper school-based supports, including counseling, social skills counseling, parent training, mentoring and an individual behavior plan with clear reinforcements and consequences for acceptable and unacceptable behavior, the student would be able to progress socially (id.).

Recommendations noted in the neuropsychological evaluation report included conducting an FBA specific to the student's classroom behavior and development of a BIP, with the participation of the parents and the student's private therapist to facilitate communication and consistency between school and home (Dist Ex. 39 at p. 6). Additional recommendations were for individual and group school-based counseling; an OT evaluation to assess the student's fine motor strength, dexterity and visual motor processing; and parental consultation with a pediatric neurologist and/or pediatric psychiatrist concerning the student's ADHD and the possibility of medication (id. at p. 7). Additional recommendations were for the continuation of private individual counseling to address social skills and self-esteem; continuation of a school-based mentoring program for as long as possible to allow the student to model appropriate social interactions in a more personal and structured way; modifications and accommodations including extended time, directions repeated and/or clarified, models and examples provided and/or explained; as well as additional classroom support and/or more individualized instruction such as resource room for writing (id.). The evaluator also suggested that the parents might want to pursue an updated neurological and/or rheumatologic examination regarding the student's headaches and other health concerns (id.). A March 26, 2007 letter, which served as an addendum to the aforementioned neuropsychological evaluation, indicated that during a parent feedback session conducted on January 24, 2007, a recommendation was made for the student to receive a language evaluation to further assess his communication skills, including auditory processing, as it related to the student's performance in social settings and in the classroom (id. at p. 15).

On February 5, 2007, a district occupational therapist observed the student, whereby the student was noted to display inefficient grasp patterns, but was able to use the finer musculature in his fingers (Dist. Ex. 38 at p. 3). Recommendations were given to the classroom teacher to improve the student's grip and spacing for writing (id.).

A "NICHQ" Vanderbilt Assessment Scale-Teacher Informant rating form dated March 16, 2007 indicated that the student's first grade teacher rated the student's behavior as "never" for deliberately destroys others' property, is self-conscious or easily embarrassed, or is afraid to try new things for fear of making mistakes (Dist. Ex. 42). The teacher rated the student's behavior as "occasionally" for does not seem to listen when spoken to directly; runs around or climbs excessively in situations in which remaining seated is expected; initiates physical fights; lies to obtain goods for favors or to avoid obligations (e.g., "cons" others); is physically cruel to people; and is fearful, anxious, or worried (id.). The teacher rated the student's behavior as "often" for interrupts or intrudes on others (e.g., "butts" into conversation/games); is angry or resentful; and is spiteful and vindictive; bullies, threatens, or intimidates others (id.). The teacher rated the student's behavior as "very often" for fails to give attention to details or makes careless mistakes in schoolwork; has difficulty sustaining attention to tasks or activities; does not follow through on instructions and fails to finish schoolwork (not due to oppositional behavior or failure to understand); has difficulty organizing tasks and activities; avoids, dislikes, or is reluctant to engage in tasks that require sustained mental effort; loses things necessary for task or activities (school assignments, pencils, or books); is easily distracted by extraneous stimuli; fidgets with hands or feet or squirms in seat; leaves seat in classroom or in other situations in which remaining seated is expected; has difficulty playing or engaging in leisure activities quietly; is "on the go" or often acts as if "driven by a motor;" talks excessively; blurts out answers before questions have been completed; has difficulty waiting in line; loses temper; and actively defies or refuses to comply with adult's request or rules (id.).

By letter dated March 20, 2007 to the district coordinator of special education, the student's mother requested special education "testing" of the student (Dist. Ex. 67). The district responded the same day by providing the parents with a parent referral to the CSE form (Dist. Ex. 68).

On March 26, 2007, a family interview was conducted as part of the student's private diagnostic evaluation at a university center for autism and developmental disabilities (Dist. Ex. 43 at p. 1). The family interview report indicated that prior to the interview, an information packet from the center and the student's private neuropsychological evaluation report were reviewed (id.). No documentation from the student's school was provided to the center (id.). The family interview report indicated that the student's mother requested the evaluation at the center to determine whether the student had a pervasive developmental disorder (PDD) and to help the student manage his symptoms (id.). The report indicated that the parents' specific concerns included the student's "inappropriate behavior with teachers and students, inability to complete work - constant trips to the bathroom and nurse, meltdowns in class with fits of crying, self-loathing language and hitting himself" (id.). The remainder of the family interview report summarized the student's birth and developmental history and then current functioning specific to speech-language, cognition, affect, social, play, transitions, motor skills, eating, sleeping, self-

care, hygiene, grooming, interests, and sensory areas; as well as the student's previous evaluations, treatment, and medical and family history (id. at pp. 2-4).

The hearing record reflects that the parents' March 28, 2007 CSE referral regarding the student occurred after a March 2007 meeting between the parents and district staff regarding the results of the March 2007 private neuropsychological evaluation report (July 3, 2008 Tr. pp. 106-12; Dist Ex. 3 at p. 1). The referral form indicated the parents' desire to refer the student to the CSE to conduct an individual evaluation and to determine whether a disability existed that would make the student eligible for special education services (Dist. Ex. 3 at p. 1). The parents specifically requested an OT evaluation and a "full battery of speech-language tests" including language processing, as well as an FBA (id.). The referral form indicated that an IST Meeting and ERSS counseling were interventions that had already been provided to the student within the general education environment (id.). On the same day, the parents provided the CSE with a signed consent for referral and evaluation and indicated that they had received a copy of the procedural safeguards notice (id. at p. 3).

The hearing record also includes a March 28, 2007 referral to the CSE form completed by the district's school psychologist (Dist. Ex. 4 at p. 1). The referral form indicated that the student's suspected disability was an "OHI" because of the diagnoses of "ADHD-Combined and ODD" (id.). The school psychologist indicated that her reasons for referring the student to the CSE were that he was "disorganized," "d[id] not stay in assigned areas for specified time," "need[ed] questions and directions frequently repeated," "had difficulty concentrating, attending, focusing," had "difficulty with the mechanics of writing," "d[id] not work on assignments during class time," could not "work independently," made "unnecessary comments/noises," was "easily angered, annoyed or upset," "d[id] not resolve conflict appropriately," "blame[d] other persons or materials," was "upset easily by a suggestion or constructive criticism," "avoid[ed] situations, assignments, responsibilities," "behave[d] impulsively," was "overactive," "d[id] not follow directions from teachers or other school personnel," "demonstrate[d] inappropriate behavior on the school grounds," "d[id] not follow classroom rules," and had "frequent visits to nurse" (id. at pp. 1-3). In addition, she described the student as displaying "marked difficulty" with focus, attention, impulsivity and overactivity, most frequently in independent and group lessons (id. at p. 3). The referral form indicated that in an attempt to resolve the student's difficulties, he had an individual behavior plan involving response-cost; he had a fifth grade peer mentor; he was seen in ERSS counseling one time per week for 30 minutes on an individual basis; and that an OT observation was recommended (id. at p. 4). The referral form also noted instances of the district's contact with the parents and indicated that a private neuropsychological evaluation had been conducted (id. at p. 5).

On April 19, 2007, an IST meeting was conducted as a follow-up to the January 18, 2007 IST meeting (Dist. Ex. 38 at p. 3). Additional class strategies were recommended to assist the student although the student had already been referred by the parents to the CSE for a full evaluation (id.).

The district conducted a speech-language evaluation on April 18 and April 24, 2007 (Dist. Ex. 46 at p. 1). Administration of various standardized tests suggested that the student presented with age appropriate receptive and expressive language skills, with many of his

language skills falling within the above average range (id. at pp. 1-3). The report reflected that based on standardized testing and informal observation results, the speech-language pathologist determined that the student did not present as a student with a speech-language impairment at that time but recommended that his pragmatic language skills continue to be monitored (id. at p. 3). The evaluation report also included suggestions for developing "feeling" vocabulary (id.).

The district conducted a confidential psychological evaluation on April 23 and 24, 2007 (Dist. Ex. 38 at p. 1). The evaluation report included cognitive and academic testing information from the student's prior private neuropsychological evaluation report (id.). The psychological evaluation report indicated that at the time of the evaluation, the student had an individual behavior plan to increase task completion and compliance and that he was seen in individual ERSS counseling one time per week (id. at p. 6).

The April 2007 district psychological evaluation report indicated that behaviorally, the student readily accompanied the evaluator, appeared to enjoy the individual attention that the testing sessions afforded him, he participated in conversation, and was polite (Dist. Ex. 38 at p. 3). Expressive language development was described as "excellent" and his thought processes were described as "mature for his age" (id.). The student tended to exhibit an impulsive style of responding, as well as difficulty maintaining attention to task (id.). The evaluator reported that the student appeared to attempt to avoid emotionally charged stimuli (id.). She indicated that at times the student appeared to be looking to gain a reaction from the evaluator through his thematic content of anger, aggression, and death (id.). When no response was given to him, he reverted to more generic story themes and constructed responses (id.).

Due to concerns with the student's emotional and behavioral difficulties, observation rating scales and individual projective assessments were completed (Dist. Ex. 38 at pp. 2-4). Completion of the Conner's Teacher Rating Scale-Revised: Long Form (Conner's) by the student's classroom teacher revealed scores in the "markedly atypical range" for total scores that coincided with diagnoses of an ADHD-combined type and an ODD (id. at pp. 4, 6). The psychological evaluation report further noted that the student's teacher also completed the Student Behavior Survey (SBS) (id. at pp. 4, 6).¹ Results of the SBS revealed similar behavioral concerns as the Conner's results (id.). Completion of the Asperger's Syndrome Diagnostic Scale (ASDS) did not reveal significant levels of behaviors characteristic of Asperger's syndrome, indicating the "unlikely" probability of a diagnosis of Asperger's syndrome (id.).

The student's self-report and projective testing revealed that the student struggled with perspective taking, all or none thinking, and attention and control (Dist. Ex. 38 at p. 6). The psychological evaluation report indicated that the student strove for positive peer interactions and desired inclusion in a peer group (id.). In addition, the student saw himself as bright and capable but did not translate those abilities and his sense of achievement to the classroom setting (id.). According to the psychological evaluation report, the student struggled with accepting limits from peers and adults and displayed a limited tolerance for frustration across settings (id.).

¹ The psychological evaluation report indicated that the SBS is a brief multi-dimensional assessment that incorporates estimates of student achievement, academic and social skills, and observations of school specific behaviors that reflect the presence of problems in emotional and behavioral adjustment (Dist. Ex. 38 at p. 4).

An April 24, 2007 OT evaluation report completed by the district indicated that during the evaluation, the student was friendly and cooperative for all tasks (Dist. Ex. 47 at pp. 1, 4). Behaviorally, the student's excessive talking was noted to interfere during testing as he was frequently asked to refocus to the task at hand (id. at p. 3). The OT evaluation report indicated that the student displayed difficulties with manipulating objects in his hands as well as with spatial awareness abilities (id. at p. 4). The evaluator also noted that "these decreased abilities are impacting his ability in the classroom," as observed with the student's handwriting abilities (id.). When asked to produce a handwriting sample by copying a sentence from the board, the student's work showed decreased spacing between words as well as a tendency for his letters to "float off the line" and "run in between lines on the paper" (id.).

An April 27, 2007 letter from the student's pediatric neurologists indicated that a pediatric neurology evaluation had occurred earlier in the month, and that based on various evaluation tools, the student presented with an ADHD (Dist. Ex. 48 at pp. 1-3). The letter indicated that the neurologists recommended a section 504 accommodation plan that included preferential seating, frequent breaks, extra time and help when needed, and other accommodations as determined by educators (id. at p. 3). The pediatric neurologists' letter further indicated that it was "counterproductive" for children with an ADHD to stay inside during recess to complete work because without positive outlets for energy, such children's overall functioning and behavior tended to suffer (id.).

On May 8, 2007, a diagnostic evaluation of the student was conducted at the university center for autism and developmental disabilities (Dist. Ex. 50 at p. 1). The Autism Diagnostic Observation Schedule (ADOS), module 3 was administered to the student (id.). The diagnostic evaluation report indicated that the student willingly participated in all aspects of the evaluation, but had difficulty remaining in his seat (id.). Although he responded well to redirection, he quickly returned to moving about the room (id.). The evaluation report noted that the student remained actively involved in evaluation procedures and that his "activity level did not significantly interfere with the assessment" (id.). The evaluation report indicated that the student's spontaneous speech was fluent and grammatical with age appropriate rate, volume, and prosody (id.). The diagnostic evaluation report reflected no communication difficulties in the evaluation setting, and among other things, the evaluation report noted that eye contact was direct and consistently integrated into social interactions (id.). Furthermore, the student demonstrated adequate insight into the emotional states of others in fictional and real life events, and he appeared aware of the nature of several typical social relationships, including the role he played in them (id. at p. 2).

The evaluation report indicated that the student demonstrated flexible and imaginative play abilities including symbolic use of objects and the use of characters as active agents (Dist. Ex. 50 at p. 2). The evaluator also noted that the student demonstrated no unusual sensory interests, or complex or stereotyped mannerisms (id.). The diagnostic evaluation report indicated that, based on the student's performance, he did not meet ADOS criteria for an autism spectrum disorder (id.). The evaluator indicated that, based on the student's history and presentation, diagnoses of an ADHD - combined type and an ODD appeared to most adequately describe the student's difficulties (id.). The evaluator indicated that the student's weaknesses in social interaction were "likely secondary to his ADHD and reflect[ed] difficulties in behavioral control,

an impulsive and, at times, aggressive interaction style, and inattention to social cues" (id.). Recommendations included that the student receive special education services as a student with an OHI, placement in an inclusion classroom setting, and modifications of preferential seating, multimodal and interactive instruction, frequent interaction with the student to keep him involved in classroom activities, provision of visual and verbal cues, requiring the student to perform only one task at a time and introducing another task only when the first one was completed, provision of breaks, breaking work sessions into smaller chunks, and provision of positive reinforcement (id. at p. 3). Additional recommendations included collaboration between the school psychologist and the student's private psychologist to allow for consistency of behavioral interventions, continued counseling or psychotherapy services to address the student's difficulties with emotional regulation, explicit social skills instruction in a group, instruction and organizational strategies, conducting an FBA and developing a BIP, use of a daily home/school communication journal, and consultation with a child psychiatrist if behavioral interventions failed to produce sufficient improvement in the student's attention and impulse control difficulties (id. at pp. 3-5).

In a letter dated June 4, 2007 to the district's coordinator of special education, the student's private psychologist summarized her understanding of the student (Dist. Ex. 51 at pp. 1-2). The private psychologist indicated that she agreed with a diagnosis of an ADHD for the student, and that based on reading the student's evaluation reports and her conversations with the student, the private psychologist determined the student's behaviors of going to the nurse and bathroom in school served as an escape of demands (id. at p. 2). The private psychologist indicated that it was important to consider the student's OT evaluation and his graphomotor skills deficits as these behaviors particularly occurred when the student was presented with writing tasks (id.). The letter also indicated that the private psychologist had provided the parents with a "contract" for use in school, where the student could earn a five minute break for work accomplished (id.). The letter noted that, although there was initial resistance from school staff to use the contract and to recognize the student's need for breaks, at the time of the letter, she understood that the contract was being implemented in school (id.). Furthermore, the private psychologist noted that she hoped the CSE would be able to develop an IEP that would support the student's strengths and address his weaknesses (id.).

A fully constituted CSE convened on July 11, 2007 to determine the student's initial eligibility for special education (Dist. Ex. 17 at p. 1).² Minutes from the CSE meeting reflected that the student experienced behavioral difficulties in school and was experiencing symptoms at home that the student's mother identified as being related to his difficulties in school (id.). The July 2007 CSE reviewed evaluations provided by the student's mother from outside evaluators and physicians, as well as evaluations conducted by the district (id. at pp. 1-2). The July 2007 CSE minutes indicated that the student presented as a student who had diagnoses of an ADHD and an ODD (id.). The student's then current academic functioning was appropriate for his age and grade (id. at p. 1). In addition, the July 2007 CSE meeting minutes noted that in conjunction with the parents and the student's private counselor, the district implemented a BIP under which the student was able to earn a five-minute break and that the student had met with some success in improving his behavior (id.). The meeting minutes reflected that after an extensive discussion,

² The hearing record reflects that the student's mother declined the presence of an additional parent member at the July 2007 CSE meeting (Dist. Ex. 17 at p. 1).

the July 2007 CSE agreed that it would not make a determination regarding the student's eligibility at that time, but would reconvene with the student's private counselor and first grade teacher (*id.*). The meeting minutes indicated that the parents requested that the July 2007 CSE consider a classification of an OHI and either an inclusion class placement or an individual aide for three to six months (*id.*). The meeting minutes reflected that the CSE planned to reconvene in August 2007, and either determine the student's eligibility for special education services or possibly refer the student to the section 504 committee, which would meet immediately following the CSE (*id.*).

On August 28, 2007, the CSE reconvened and found the student ineligible for special education services (Dist. Ex. 18 at p. 2). Instead, the student was immediately referred to the section 504 committee, which determined that the student was eligible for accommodations for the 2007-08 school year due to his fine motor deficits, peer/adult interactions, and compliance difficulties associated with diagnoses of an ADHD and an ODD; conditions which limited his learning, particularly in the areas of writing and peer interactions and adversely affected his appropriate participation in academic activities (*id.* at pp. 1-2). The "Section 504 Accommodation Plan" indicated that the student would be assigned a 1:1 aide to assist in data collection for an FBA (*id.* at p. 2). The use of the 1:1 aide was considered to be a temporary accommodation, and the student's need for one would be reassessed following the development of a BIP (*id.* at pp. 1-2). Targeted behaviors for the projected FBA included compliance with requests, completion of assignments by staying focused on tasks and working independently, management of transition and organizational skills, and use of the bathroom and somatic complaints (*id.* at p. 2). Additional accommodations included OT on an individual and small group (5:1) basis, each for 30 minutes weekly to improve the student's fine motor abilities and graphomotor skills needed for written assignments, and small group (5:1) counseling one time weekly for 30 minutes to address the student's difficulties with peer interactions and attending to tasks within a group setting (*id.* at pp. 1-2). Recommended program modifications and accommodations were for positive behavioral support, use of a "BREAK" chart, preferential seating, incorporating the student's need for opportunity to get up from his seat quietly, refocusing and redirection, modified homework assignments, reduction in the amount of written output required, and modified class assignments (*id.* at p. 2).

The student's mother stated that when the student was in second grade, the parents attended a parent information night at the student's school in mid-September 2007 (Aug. 15, 2008 Tr. p. 116). The student's mother stated that after viewing her son's writing sample in comparison with his classmates writing samples, the parents became concerned that the student needed more than a section 504 plan (Aug. 15, 2008 Tr. pp. 116-17). The student's mother testified that she believed it was "glaringly obvious" that the student's writing was problematic, and that "it alarmed" the parents (Aug. 15, 2008 Tr. p. 117). The student's mother stated that she was also concerned that the student would not be able to meet the academic writing goals that were based on State standards for second grade (*id.*).

By letter dated September 27, 2007, the student's father requested "an emergency CSE meeting" to clarify the 1:1 aide's role in the classroom because the aide "was restricted from helping" the student when he "acted out" in class (Dist. Ex. 83). By letter dated October 1, 2007, the student's father indicated that the district's coordinator of special education responded to his

letter by calling the father on the telephone to explain that the aide's purpose was to record the student's behavior for an FBA (Dist Ex. 84). By letter dated October 3, 2007, the district's coordinator of special education responded that the district had already scheduled another section 504 committee meeting for October 24, 2007 (Dist Ex. 85).

By letter dated October 19, 2007, the student's mother informed the district's coordinator of special education that the parents would not be able to attend the October 24, 2007 section 504 committee meeting (Dist. Ex. 28). The district rescheduled the meeting for November 28, 2007 (Dist. Ex. 29).

The section 504 Committee convened on November 28, 2007 for a program review (Dist. Ex. 31 at pp. 1-2). The section 504 plan comments section indicated that the student's teacher reported progress since the beginning of the 2007-08 school year (id. at p. 2). Regarding writing, the student was described as "opposed," but compliant in testing situations (id.). Math appeared to be an interest for the student (id.). The student was described to benefit from breaks outside of the classroom, which usually coincided with writing activities (id.). Regarding counseling services, the student was reported to be doing well and was working on identifying actions in relation to feelings, and relaxation and coping skills (id.). According to an OT report reviewed at the meeting, the student's sessions focused on sizing, spacing, and grasp (id.). The district's school psychologist reviewed the FBA and the resultant draft BIP (id.).

The November 2007 section 504 committee agreed that the student's 1:1 aide should continue to support effective implementation of the BIP, specifically to manage the "tracking sheets" that the student used to improve his awareness of behaviors, to provide prompts to access his break area, to escort the student when a break was being taken, to assist the teacher with the visual schedule and contract, and to photocopy work not completed by the student and sent home for parental review (Dist. Ex. 31 at p. 2). OT and counseling were recommended to continue as previously approved (id.). The student's father requested consideration of the student's eligibility for special education and related services as a student with an OHI (id.). The meeting minutes indicated that the section 504 committee chairperson explained to the parents that his request could not be addressed by the section 504 committee, but that the parents could re-refer the student to the CSE (id.).

The student's mother stated that at a parent-teacher report card conference in November or December 2007, she was concerned with the student's report card because he had received "ones" in writing, which indicated that his writing was below grade level (Aug. 15, 2008 Tr. pp. 119-20; Dist. Ex. 62 at p. 1).

By due process complaint notice dated January 2, 2008, the parents, through their attorney, alleged that the district procedurally and substantively failed to provide their son with a free appropriate public education (FAPE) (Parent Ex. A at p. 1). The parents contended that the student was eligible for special education and related services as a student with an OHI (id. at pp. 8-9, 16-17). The parents asserted that the district refused to properly address the student's needs and that the student's educational problems continued from his first grade year into his second grade year because the district's interventions were ineffective (id. at pp. 4-13, 15-17). The parents requested that the district convene a CSE meeting to classify the student and develop an

appropriate IEP (*id.* at p. 17). The parents also requested an IEE and reimbursement for their expenses related to evaluating the student (*id.*).

An impartial hearing began on March 12, 2008 and concluded on June 11, 2009, after twelve days of proceedings (Nov. 24, 2008 Tr. pp. 3-14; June 11, 2009 Tr. pp. 3-13; IHO Decision at pp. 2-20).³ By decision dated August 21, 2009, the impartial hearing officer found that: (1) the student's significant and specific educational weaknesses were brought to the attention of the CSE by the parents, specifically the student's inability to express himself in writing; (2) the student's behavioral problems and incidents continued in spite of the district's section 504 plans; (3) none of the section 504 plans addressed the student's language processing, reading comprehension, and written expression problems; (4) although the school psychologist noted that the student's behavior "impedes his academic, social and behavioral functioning," she then concluded that his academic performance was within grade level expectations; (5) the student's performance on the neuropsychological evaluation demonstrated that the student had "extraordinary" discrepancies in his scores, and severe language processing, reading, and writing problems; (6) the section 504 committee rejected the parents' repeated requests that the CSE reconvene and consider an OHI classification; and (7) the parents disagreed with the school psychologist's evaluation, thus an IEE was warranted (IHO Decision at pp. 21-24). The impartial hearing officer ordered the district to classify the student as OHI upon receipt of the impartial hearing officer's decision; authorized the parents to obtain an IEE at the district's expense as soon as possible; and ordered the CSE to reconvene to consider the results of the IEE and reconsider the student's classification and IEP (*id.* at pp. 24-25).

The district appeals, and asserts that the impartial hearing officer erred by: (1) misstating the standard of review, the eligibility criteria, and the burden of proof; (2) concluding that the CSE should have classified the student with an OHI, which was unsupported by the hearing record; (3) finding, *sua sponte*, that there was clear evidence of the student's significant deficiencies in language processing, reading and writing, and that these deficiencies are aspects of a learning disability; (4) finding that the CSE improperly referred the student to the district's

³ I note that the impartial hearing was unduly lengthy. Federal and State regulations require an impartial hearing officer to render a decision not later than 45 days after the expiration of the 30-day resolution period or the applicable adjusted time periods (34 C.F.R. § 300.515[a]; 8 NYCRR 200.5[j][5]), unless an extension has been granted at the request of either party (34 C.F.R. § 300.515[c]; 8 NYCRR 200.5[j][5][i]). I remind and caution the impartial hearing officer and both parties in this matter that it is incumbent upon an impartial hearing officer to only grant extensions consistent with regulatory constraints and to ensure that the hearing record includes documentation setting forth the reason for each extension (8 NYCRR 200.5[j][5][i]). In addition, regulatory requirements set forth specific factors that an impartial hearing officer must consider prior to granting an extension (8 NYCRR 200.5[j][5][ii]). The impartial hearing officer may grant a request for an extension only after fully considering the cumulative impact of the following factors:

"(a) the impact on the child's educational interest or well-being which might be occasioned by the delay; (b) the need of a party for additional time to prepare or present the party's position at the hearing in accordance with the requirements of due process; (c) any financial or other detrimental consequences likely to be suffered by a party in the event of a delay; and (d) whether there has already been a delay in the proceeding through the actions of one of the parties" (8 NYCRR 200.5[j][5][ii]).

The regulations also provide that agreement of the parties is not a sufficient basis for granting an extension, and further that "[a]bsent a compelling reason or a specific showing of substantial hardship, a request for an extension shall not be granted because of school vacations, a lack of availability resulting from the parties' and/or representatives' scheduling conflicts . . . or other similar reasons" (8 NYCRR 200.5[j][5][iii]).

section 504 committee; (5) ordering the CSE to classify the student, then reconvene to consider the student's classification, IEP, placement and a FAPE; (6) ordering the district to authorize and reimburse the parents for an IEE; (7) failing to cite to evidence in the hearing record that supported the district's position; (8) finding that the section 504 committee continued to reject repeated parental requests for reconvening the CSE to consider an OHI classification; and (9) considering issues not raised by the parents in their due process complaint notice. The district contends that it properly determined that the student was not eligible for special education services as a student with an OHI and that the review of the CSE's determination must be based upon the information available to it at the time of its decision. The district further alleges that the impartial hearing officer mischaracterized the testimony of the district's special education coordinator, misapplied the law to the facts of the case, improperly determined that the district's psychological report was deeply flawed, exceeded his authority by ordering an IEE, and classified the student based upon evaluations that were out of date. The district asserts that the impartial hearing officer's findings were factually flawed and not legally supported and that the CSE's determination not to classify the student was supported by the evaluations. The district requests the acceptance of documentary evidence that was stipulated into evidence on the last day of the proceedings, an order affirming that the CSE correctly determined that the student was not eligible for special education, and that the impartial hearing officer's decision be annulled in its entirety.

In their answer, the parents assert that the impartial hearing officer used the appropriate standard of review and the correct legal standard to determine the student's eligibility for special education as a student with an OHI. The parents allege that the behavior interventions and program modifications that the district used are accommodations that would typically be used with a student with a disability as part of an IEP. The parents contend that the district's behavior plans were ineffective. The parents allege that the student's academic progress was based solely on the subjective opinion of the first grade teacher and the CSE ignored the student's grades relating to behavior and writing, which were below grade level. The parents contend that the August 2007 CSE meeting was not a CSE meeting because the district converted it into a section 504 committee meeting. The parents assert that, at the November 2007 section 504 committee meeting, the committee recommended continuation of his social skills group, OT services, and he was assigned a 1:1 aide to assist him in his second grade classroom. The parents assert that the district's arguments are unsupported by the hearing record and without merit. The parents object to the district's submission of additional documentary evidence since it was not discussed during its cross-examination of the parents' witnesses. The parents request that the impartial hearing officer's decision be upheld in its entirety.

The district, in its reply, asserts that since its additional documentary evidence was stipulated into evidence at the impartial hearing, but thereafter not admitted into evidence, it should be accepted and considered on appeal.

As an initial matter, the district requests the acceptance of documentary evidence, to which the parents object. The hearing record reveals that, during a teleconference conducted on June 11, 2009, the parents' attorney and the district's attorney stipulated and agreed to enter two additional district exhibits into evidence in the hearing record (June 11, 2009 Tr. pp. 5-9). The district's attorney stated that he would send the two exhibits to the impartial hearing officer and

the parents' attorney, and the impartial hearing officer and the parents' attorney agreed (June 11, 2009 Tr. pp. 7-9). Since these exhibits should have been included in the hearing record, I will accept them and consider them on appeal. I remind the impartial hearing officer to comply with State regulations, which require an impartial hearing officer to attach a list identifying each exhibit admitted into evidence to his or her decision (8 NYCRR 200.5[j][5][v]).

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 Forest Grove v. T.A., 129 S. Ct. 2484, 2491 [2009]; 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]; Tarlowe v. Dep't of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008]), 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 Individuals with Disabilities Education Act (IDEA) defines a "child with a disability" as a child with a specific physical, mental or emotional condition, "who, by reason thereof, needs special education and related services" (20 U.S.C. § 1401[3][A]; Educ. Law § 4401[1], [2][k]). In order to be classified, a student must not only have a specific physical, mental or emotional condition, but such condition must adversely impact upon a student's educational performance to the extent that he or she requires special services and programs (34 C.F.R. § 300.8[a], [c]; see 8 NYCRR 200.1[zz]; Application of the Bd. of Educ., Appeal No. 09-087; Application of a Child Suspected of Having a Disability, Appeal No. 07-086; Application of a Child Suspected of Having a Disability, Appeal No. 07-042; Application of a Child Suspected of Having a Disability, Appeal No. 07-003; Application of the Board of Educ., Appeal No. 06-120; Application of a Child Suspected of Having a Disability, Appeal No. 05-090; Application of a Child Suspected of Having a Disability, Appeal No. 01-107; Application of a Child Suspected of Having a Disability, Appeal No. 94-42; Application of a Child Suspected of Having a Disability, Appeal No. 94-36). Also, a FAPE must be made available to an eligible student who

needs special education and related services even though the student is advancing from grade to grade (34 C.F.R. § 300.101[c]; 8 NYCRR 200.4[c][5]).

A child with a disability having an other health impairment, pursuant to federal regulations, means "a child evaluated . . . as having . . . an other health impairment . . . and who, by reason thereof, needs special education and related services" (34 C.F.R. § 300.8[a][1]). Other health impairment, in turn, is defined 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--

- (i) Is due to chronic or acute health problems such as asthma, attention deficit disorder or attention deficit hyperactivity disorder, diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, sickle cell anemia, and Tourette syndrome; and
- (ii) Adversely affects a child's educational performance.

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

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]).

A thorough review of the hearing record reflects that the impartial hearing officer was correct in his determination that the district should have classified the student as eligible under the IDEA for special education programs and services as a student with an OHI at the August 2007 CSE meeting (IHO Decision p. 25). I agree with the impartial hearing officer's conclusion, but on different grounds (id.).

As noted above, the hearing record reflects that it is undisputed that the student had diagnoses of an ADHD and an ODD and demonstrated significant attention, behavioral, and graphomotor needs (March 12, 2008 Tr. p. 62). Also as noted in more detail above, a March 16, 2007 NICHQ Vanderbilt Assessment Scale-Teacher Informant rating form completed by the student's first grade teacher reflected the student's multiple difficulties in school, including inappropriate social interactions with his peers and difficulties related to inattention, disorganization, work completion, and noncompliance as well as other inappropriate classroom behavior (Dist. Ex. 42).

Also as noted above in detail, the March 28, 2007 referral to the CSE form that was completed by the district school psychologist reflected approximately 19 different behaviors that interfered with the student's classroom performance and an indication by the school psychologist that the student's suspected disability was an OHI because of the student's aforementioned diagnoses (Dist. Ex. 4 at p. 1). The form reflected that the student exhibited difficulties in the identified categories of memory, abstraction, generalization, and organization; academic performance; interpersonal relationships; behavior; and writing (id. at pp. 1-3). In addition, the school psychologist described the student as displaying "marked difficulty" with focus, attention, impulsivity and overactivity, most frequently in independent and group lessons (id. at p. 3). Despite the district's attempts to resolve the student's difficulties in the classroom prior to convening the July 11, 2007 and August 28, 2007 CSE meetings, the student continued to demonstrate ongoing difficulties in first grade as discussed below.

The student's first grade report card for the 2006-07 school year reflected that, by the end of the school year, the student had not met State standards for all areas of writing and that he was continuing to display behavioral difficulties (Dist. Ex. 37 at pp. 1-2). Although the student was "meeting standards at trimester" for the third trimester for knowing and applying grammar, sentence structure, punctuation and capitalization and applying spelling strategies in writing; he was rated by the teacher as "working towards standards at trimester" for difficulties specific to writing neatly, forming letters correctly, and demonstrating effort in writing (id. at p. 1). Furthermore, in the April 24, 2007 OT evaluation conducted by the district during the third trimester of the 2006-07 school year, the occupational therapist indicated that the student displayed difficulties with manipulating objects in his hands as well as with spatial awareness abilities (Dist. Ex. 47 at p. 4). The occupational therapist indicated that "these decreased abilities are impacting his ability in the classroom" as observed with the student's handwriting abilities (id.).

In regard to the student's social and personal growth, the first grade report card for the 2006-07 school year demonstrated the student's improved performance by the third trimester for solving problems in a positive way, adjusting to new situations and ideas, working cooperatively, showing consideration and respect for others, demonstrating organizational skills, and seeking help when needed (Dist. Ex. 37 at p. 2). However, the report card indicated that the student continued to be rated as "needs improvement" for demonstrating self-control, responding appropriately to adult direction, following school and classroom rules, listening attentively, following oral directions, following written directions, being self-directed, completing assignments on time, and working independently (*id.*). Teacher comments for the first trimester included that the student's "academic progress is hindered by his behavior," "[the student] should continue to work on controlling his behavior, following directions and completing assignments in the allotted time," and "improvements in these areas will further his academic abilities" (*id.*). Teacher comments for the second trimester included, "[the student] still needs encouragement to complete assignments, especially when it comes to writing. [The student] should continue to work on developing his writing skills" (*id.*). Teacher comments for the third trimester made positive reference to punctuation and spelling, but did not address the student's writing difficulties or his behavior (*id.*).

Also, I find unpersuasive the district's contention that the student progressed academically and that he benefited from services that were being provided to him during the 2007-2008 school year, as a reason for not finding the student eligible in August 2007. A review of the hearing record reflects that, even with section 504 plan services, the student's social and fine motor needs and limited alertness with respect to the educational environment continued to adversely affect his educational performance in the second grade (the 2007-08 school year).

Similar to the third trimester report card for first grade, the student's report card for the first trimester of second grade indicated that for writing, the student was not yet meeting standards for handwriting, and was "below standards" for demonstrating effort in writing (Dist. Ex. 62 at p. 1). I note also that an October 4, 2007 OT progress report reflected the student's continued difficulties with sustaining attention to task, distractibility, difficulty with sizing and spacing of letters, and an awkward and weak grasp of his writing implement (Dist. Ex. 58 at pp. 1-2). Additionally, in the area of social and personal growth, the student continued to be rated as "needs improvement" on the first trimester report card in all but three categories, including categories in which he had demonstrated some improvement at the end of the 2006-07 school year (compare Dist. Ex. 62 at p. 3, with Dist. Ex. 37 at p. 2). Also, the November 2007 section 504 committee continued the student's 1:1 aide to support effective implementation of his BIP, specifically to manage the "tracking sheets" that the student used to improve his awareness of behaviors, to provide prompts to access his break area, to escort the student when a break was being taken, to assist the teacher with the visual schedule and contract, and to photocopy work not completed by the student and sent home for parental review (Dist. Ex. 31 at p. 2). Although the student's second grade report card indicated that the student performed in a "satisfactory" manner for speaking clearly and effectively, completing homework on time, and coming to school prepared; I note that the student's verbal communication abilities were a strength for him, and testimony by the student's mother indicated that she assisted the student in his homework completion (July 3, 2008 Tr. pp. 84, 109; August 15, 2008 Tr. pp. 102-03, 145; Dist. Exs. 46 at pp. 1-3; 62 at p. 3).

In conclusion, I find upon reading the entire hearing record, that the weight of the evidence in the hearing record supports a finding that, at the time of the August 2007 CSE meeting, the student was eligible for special education programs and services as a student with an OHI (see 20 U.S.C. § 1401[3][A]; Educ. Law § 4401[1], [2][k]; 34 C.F.R. § 300.8[a][1], [c][9]; 8 NYCRR 200.1[zz][10]; see also Muller, 145 F.3d at 105 [finding that the district's section 504 plan "was not an adequate substitute" for devising an IEP for the student pursuant to the IDEA]). In this case, the hearing record reveals that the district did not meet its burden of demonstrating that at the time of the August 2007 CSE meeting, the student was not a student with a disability who, because of mental, physical or emotional reasons can only receive appropriate educational opportunities from a program of special education (see Educ. Law § 4401[1], [2][k]). I therefore agree with the impartial hearing officer's conclusion that the student should have been determined eligible for special education and services as a student with an OHI at the August 2007 CSE meeting.

Turning to the district's contention that the impartial hearing officer erred by ordering an IEE, I agree that the hearing record does not support his conclusion. Federal and State regulations provide that, subject to certain limitations, a parent has the right to an IEE at public expense if the parent disagrees with an evaluation obtained by the school district (34 C.F.R. § 300.502[a], [b]; 8 NYCRR 200.5[g][1]). If a parent requests an IEE at public expense, the school district must, without unnecessary delay, ensure that either an IEE is provided at public expense or initiate an impartial hearing to show that its evaluation is appropriate or that the evaluation obtained by the parent does not meet the school district criteria (34 C.F.R. § 300.502[b][2][i]-[ii]; 8 NYCRR 200.5[g][1][iv]; see, e.g., R.L. v. Plainville Bd. of Educ., 363 F. Supp. 2d. 222, 234 [D. Conn. 2005] [finding parental failure to disagree with an evaluation obtained by a public agency defeated parent's claim for an IEE at public expense]; A.S. v. Norwalk Bd. of Educ., 183 F. Supp. 2d 534, 549 [D. Conn. 2002] [upholding order of reimbursement where the district failed to demonstrate that its evaluation was appropriate]; Application of a Student with a Disability, Appeal No. 08-101). If a school district's evaluation is appropriate, a parent may not obtain an IEE at public expense (34 C.F.R. § 300.502[b][3]; 8 NYCRR 200.5[g][1][v]; DeMerchant v. Springfield Sch. Dist., 2007 WL 2572357, at *6 [D. Vt. Sept. 4, 2007]; Application of a Student with a Disability, Appeal No. 08-039; Application of a Child with a Disability, Appeal No. 07-126; Application of a Child with a Disability, Appeal No. 06-067; Application of the Bd. of Educ., Appeal No. 05-009; Application of a Child with a Disability, Appeal No. 04-082; Application of a Child with a Disability, Appeal No. 04-027). In addition, an unnecessary delay in the district seeking an impartial hearing to contest a parent's request for an IEE may result in district liability for an IEE at public expense (Pajaro Valley Unified Sch. Dist. v. J.S., 2006 WL 3734289 [N.D. Cal. Dec. 15, 2006] [finding the district liable to pay for an IEE due to nearly three months unnecessary delay in requesting an impartial hearing]; but see L.S. v. Abington Sch. Dist., 2007 WL 2851268, at *9, *10, *13 [E.D. Pa. Sept. 28, 2007] [six week delay in the district requesting an impartial hearing to dispute parent's request for IEE reimbursement is consistent with procedures and intent of IDEA where the district first attempted to resolve the matter]; see also Letter to Sapperstone, 21 IDELR 1127 [OSEP 1994] [there is no specific time period within which a district must request an impartial hearing to dispute a parent's request for IEE reimbursement, but an impartial hearing request may not be delayed such that it interferes with a free appropriate public education]).

Here, the hearing record reveals that the parents requested an IEE in their due process complaint notice, but did not indicate disagreement with a particular district evaluation (Parent Ex. A at p. 17). Based upon the foregoing, I am not persuaded that the parents disagreed with a specific district evaluation, properly requested an IEE at public expense, or otherwise complied with the regulatory requirements governing IEEs (see 8 NYCRR 200.5[g]). Thus, the impartial hearing officer erred by ordering the district to provide an IEE.

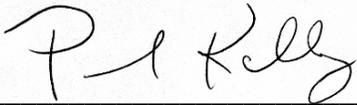
I have considered the parties' remaining contentions and find that it is unnecessary to address them in light of my determinations herein.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the decision of the impartial hearing officer dated August 21, 2009 is annulled to the extent that it authorized the parents to obtain an IEE at public expense and ordered the district to convene a CSE to consider the results of the IEE; and

IT IS FURTHER ORDERED that, unless the parties otherwise agree, the district's CSE shall reconvene within 30 days of the date of this decision, develop an IEP, and determine whether additional evaluations of the student are needed.

Dated: **Albany, New York**
 November 12, 2009



PAUL F. KELLY
STATE REVIEW OFFICER