



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 09-113

**Application of a STUDENT WITH A DISABILITY, by his parent, for review of a determination of a hearing officer relating to the provision of educational services by the Board of Education of the [REDACTED] School District**

### **Appearances:**

Law Office of Andrew K. Cuddy, attorneys for petitioner, Andrew K. Cuddy, Esq., and Jason H. Sterne, of counsel

Shaw, Perelson, May, & Lambert, LLP, attorneys for respondent, Michael K. Lambert, Esq., of counsel

### **DECISION**

Petitioner (the parent)<sup>1</sup> appeals from the decision of an impartial hearing officer, which determined that the educational program and services respondent's (the district's) Committee on Special Education (CSE) recommended for her son for the 2007-08 school year were appropriate, that the district properly found the student eligible for special education programs and services as a student with an other health-impairment (OHI),<sup>2</sup> and that equitable relief was not warranted as a remedy for the district's failure to offer the student a free appropriate public

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<sup>1</sup> The term "parent" in this decision refers only to the student's mother (see Tr. pp. 1-7, 1815-16).

<sup>2</sup> The student's eligibility for special education programs and services as a student with an OHI was in dispute in this proceeding (see 34 C.F.R. § 300.8[c][9]; 8 NYCRR 200.1[zz][10]). State regulations define the term "other health[-]impairment" as "having limited strength, vitality or alertness, . . . , that results in limited alertness with respect to the educational environment, that is due to chronic or acute health problems, including but not limited to . . . attention deficit disorder or attention deficit hyperactivity disorder . . . , which adversely affects a student's educational performance" (8 NYCRR 200.1[zz][10]; see 34 C.F.R. §300.8[9]).

education (FAPE)<sup>3</sup> for the 2008-09 school year. The district cross-appeals from those portions of the impartial hearing officer's decision that denied the district's request to dismiss the parent's claims regarding the 2007-08 and 2008-09 school years as moot and concluded that the district failed to offer the student FAPE for the 2008-09 school year. The appeal must be dismissed. The cross-appeal must be sustained in part.

At the time of the impartial hearing, the student attended ninth grade at a district high school pursuant to pendency (Tr. p. 14; Dist. Ex. I.A at p. 6; see Tr. pp. 1716-17). In this case, the district initially found the student eligible for special education programs and services as a student with a learning disability (LD) in June 2003 and developed an individualized education program (IEP) for the 2003-04 school year (Dist. Ex. II.A at pp. 1, 3).<sup>4</sup> The student continued to receive special education programs and services at the district throughout his educational history (see Dist. Exs. II.A-II.L).

According to the hearing record, the student had been diagnosed as having a life-threatening seizure disorder in 2001, which was controlled by medications that could affect his learning (Tr. pp. 787-89; Parent Ex. 1). In addition, the student displayed average cognitive ability, slower processing speed, a "great gift of verbal abilities," learning disabilities, anxiety, Asperger's syndrome, bipolar type behaviors, and emotional concerns (Tr. p. 31). While the student demonstrated "low functioning in math and reading," he demonstrated "many personal interests," including "law," "music," social studies (American History), and global environmental issues (earth science) (Tr. pp. 500-01).

During the student's 2005-06 (sixth grade), 2006-07 (seventh grade), and 2007-08 (eighth grade) middle school years, he attended the district's Keys for Educational Achievement (KEA) program (Tr. pp. 14-15, 494-500; Dist. Exs. II.C-II.J). The district's director of special education and student services (director) developed the KEA program because the district required a more "self-contained model" for students moving into the middle school "that would help [the students] to facilitate their educational[,] social-emotional[,] physical[,] and management needs in the middle school" (Tr. p. 24).<sup>5</sup> The director designed the KEA program to provide middle

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<sup>3</sup> The term "free appropriate public education" means special education and related services that--  
(A) have been provided at public expense, under public supervision and direction, and without charge;  
(B) meet the standards of the State educational agency;  
(C) include an appropriate preschool, elementary school, or secondary school education in the State involved;  
and  
(D) are provided in conformity with the individualized education program required under section 1414(d) of this title.  
(20 U.S.C. § 1401[9]; see 34 C.F.R. § 300.17).

<sup>4</sup> State regulations define the term "learning disability" as a "disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which manifests itself in an imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations," and includes the following conditions: "perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia and developmental disabilities" (8 NYCRR 200.1[zz][6]; see 34 C.F.R. § 300.8[10]).

<sup>5</sup> The district's entire middle school population attended school in one building, and the KEA program was a self-contained model housed on one floor of that building (Tr. pp. 26-27, 30, 355-57).

school students with the "tool[s] and keys and intensive instruction" to be ready for high school, noting that high school students needed to "manage the building" and participate in either "collaborative" or "intensive" classes (Tr. pp. 20, 23-29; see Tr. pp. 408-09). Typically, KEA students exhibited an average cognitive ability, but struggled with "either math or English language arts" (ELA) and required "additional academic support" (Tr. pp. 27-28, 340-41, 353-54).<sup>6</sup> The KEA special education teacher explained that in the KEA program, the teachers provided "extra support in sixth and seventh grade where [the teachers] scaffold current curriculum with remediation," in eighth grade, the student move into to the "intensive model, which . . . prepares them for high school" (Tr. pp. 494, 497-98, 500).<sup>7</sup>

The sixth and seventh grade KEA program consisted of 12:1+1 classes with a special education teacher and a teacher assistant (TA) in each class; the eighth grade KEA program consisted of 12:1+1 classes also, but with an additional TA to provide more support and to accommodate those students whose IEPs recommended 1:1 support (Tr. pp. 25-26). Based upon a student's individual abilities, a CSE could recommend that a KEA student attend a "special class intensive" (intensive class), which the director described as a 15:1 class for a core academic subject, such as mathematics, science, social studies, or ELA (Tr. pp. 26-28; see Tr. p. 506). In connection with the KEA program philosophy to prepare students to attend high school in a more mainstreamed environment, eighth grade KEA students would "typically" be recommended to attend an intensive class for one or more of these core academic subjects (Tr. pp. 24-29; see Tr. pp. 519-20).<sup>8</sup> The special education teacher testified at the impartial hearing that "up until last year," the 15:1 intensive classes were "integrated" and contained no more than "10 or 12 total" disabled and nondisabled students (Tr. pp. 498-500, 542). The students in the KEA program also attended the "mainstream . . . explore cycle," as well as "mainstream" lunch and physical education (Tr. pp. 25-26).<sup>9</sup> The KEA program allowed students to receive an "intensive specially designed instruction model, yet still feel a part of [the district's] middle school" (Tr. pp. 25-27).<sup>10</sup>

In preparation for the student's annual review for the 2007-08 (eighth grade) school year, district staff prepared related services' progress reports and a teacher observation report in April 2007 (Parent Exs. 86; 102-103; see Dist. Exs. II.G at p. 5; II.H at p. 5). The student's occupational therapist noted that during the 2006-07 school year, the student worked to improve

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<sup>6</sup> The district's coordinator of special education testified that she "chaired several CSE meetings over the course of the past two years" for the student in this case (Tr. p. 342). The district's coordinator of special education will be referred to as the "CSE chairperson" in this decision.

<sup>7</sup> The KEA special education teacher (special education teacher) instructed the student in ELA, mathematics, science, and social studies during sixth and seventh grade (Tr. p. 498; see Tr. pp. 502-18). In eighth grade, she only provided ELA instruction to the student (Tr. pp. 498, 536).

<sup>8</sup> In this case, the student did not attend intensive classes in any of his core academic subjects during sixth or seventh grade (see Dist. Exs. II.C-II.F).

<sup>9</sup> At the impartial hearing, the special education teacher described the "explore cycle" as electives, such as "health, music, computers, research class, home and careers, . . . and art" (Tr. pp. 494-500, 503-04, 513-14).

<sup>10</sup> KEA students also received related services per their individual needs and individual IEPs (Tr. p. 25).

his postural control, organization of written work, keyboarding, and visual perception skills, and recommended a continuation of occupational therapy (OT) services to address those needs (Parent Ex. 102). A counseling summary indicated that the student participated in a peer mentoring program, which included "guided support" during lunch with peer mentors (Parent Ex. 103 at p. 1).<sup>11</sup> The counseling summary identified the following annual goals to address the student's social/emotional needs: "[c]ommunicate and interact in a socially acceptable manner with peers;" "[i]dentify and display appropriate reactions and appropriate alternative solutions to challenging social situations in school;" and "[i]dentify ten past decisions [the student] has made and the outcomes or consequences of each, and identify alternative activities and predicted outcomes" (id. at p. 3).

The special education teacher completed the teacher observation report, which indicated that the student began the school year with "task avoidance" behaviors, such as "constant yawning, falling asleep, inappropriate arguments and long delays in beginning a task" (Parent Ex. 86). She reported that although the student made "great strides" in the previous school year, the current school year had not been "as positive," as the student remained "very argumentative and [could] cause many disruptions to himself, the class and the student body including kicking the lockers incessantly and banging the locks as he walk[ed] the halls" (id.). The special education teacher indicated that although the student demonstrated "many weaknesses" last year in mathematics, it had been the student's "best subject" during the 2006-07 school year because "most classes were taught directly related to [the student's] limited interests in forensic science" (id.). The special education teacher further noted that the student could "self-teach," that he enjoyed "anything related to his limited areas of interest [in] law, forensics and police work," and that he was a "motivated independent learner who will work hard and persevere" in a topic "related to these areas" (id.). For the 2007-08 school year, the special education teacher recommended placing the student in the 12:1+1 KEA class for ELA, and in KEA 15:1 intensive classes for mathematics, social studies, and science (id.; see Dist. Exs. II.G at pp. 1-2; II.H at pp. 1-2).

On May 4, 2007, a subcommittee of the CSE convened to conduct the student's annual review and to develop his IEP for the 2007-08 school year (Dist. Ex. II.G at pp. 1, 4-5).<sup>12</sup> According to the special education teacher, the student "did really well" during the 2006-07 school year, and he improved his behavior (Tr. p. 517; see Dist. Ex. III.GG at pp. 10-14). She reported the student's performance in seventh grade to the CSE subcommittee, and the CSE subcommittee discussed the student's academic achievements, social achievements, homework completion, peer-related issues, and the student entering intensive classes for eighth grade (Tr. pp. 519-20; see Dist. Ex. II.G at p. 5). The CSE subcommittee noted within the academic achievement, functional performance, and learning characteristics section of the IEP that the student's cognitive functioning was within the "average range," but that he demonstrated "weaknesses in writing, spelling, and mathematics" (Dist. Ex. II.G at p. 3). The CSE subcommittee also noted that the student easily lost focus and benefited from rereading

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<sup>11</sup> The counseling summary referred to the peer mentoring program as the "SOS Peer Mentoring program" and described the "SOS curriculum" covered during the 2006-07 school year (Parent Ex. 103 at p. 1).

<sup>12</sup> Prior to the CSE subcommittee meeting, the student's special education teacher met with the "parents twice for 90 minutes each time as pre-conferencing" for the meeting (Dist. Ex. II.G at p. 5).

directions during tests (id.). With respect to academic needs, the CSE subcommittee indicated that the student required "attention to written expression, math problem solving, organizational skills and time management" (id.). The student benefited from the use of "graphic organizers, activities which limit[ed] the amount of writing, and support when transitioning between subjects," in addition to visual aids to support his "learning needs and arithmetic tables" (id.).

The 2007-08 IEP contained information from the student's most recent educational evaluation performed in March 2006, which included, among other things, the administration of the Woodcock-Johnson III Tests of Achievement (WJ-III ACH) (Dist. Ex. II.G at pp. 3-4; see Dist. Ex. III.Z at pp. 2-5). When compared to peers his age, the student performed within the average range in tasks assessing broad written language (Dist. Ex. III.Z at p. 2). In the evaluation report, the evaluator noted that although the student's "overall reading standard score" fell within the low average range, he performed within the average range on tasks measuring his ability to use "syntactic and semantic cues in comprehending written discourse" read to him (id.). The evaluator characterized the student's written expression as "low average to average" and his "overall ability to express himself in writing" as average (id.). On tasks assessing broad math skills, the student performed within the low to low average range, and he performed within the low range on mathematic calculation skills (id.).

With regard to the student's social development, the CSE subcommittee noted that he became "very focused on inappropriate behaviors," which continued to "impede his learning" (Dist. Ex. II.G at p. 4). The student demonstrated "moderate success" as a result of his participation in a social skills program (id.). The IEP documented the student's physical development, indicating that he presented with low muscle tone, poor posture control, and poor physical endurance, and that he demonstrated "poor formation, sizing, and alignment" in his writing (id.). In the management needs section of the IEP, the CSE subcommittee indicated that the student exhibited "higher functioning skills and intelligence when presented with content he enjoy[ed]," but could be "completely defiant and oppositional when presented" with "unfamiliar materials" (id.).

The CSE subcommittee recommended placement in the eighth grade KEA program in 15:1 intensive classes for mathematics, science, and social studies, and for ELA, recommended placement in a 12:1+1 KEA class (Dist. Ex. II.G at pp. 1-2, 5; see Tr. p. 520).<sup>13</sup> The CSE subcommittee also recommended related services of weekly group counseling and weekly group OT, participation in mainstream physical education and the explore program, program modifications, accommodations, supplementary aids and services, and testing accommodations (Dist. Ex. II.G at pp. 1-3). The IEP also contained 22 annual goals to address the student's needs in the areas of study skills, reading, writing, mathematics, social/emotional/behavioral, and motor skills (id. at pp. 6-9). As noted in the meeting information summary, the parent requested TA support in the student's recommended intensive classes and for transitioning between classes, and further indicated that the student required support in taking notes, completing assignments, organization, remaining on task, and following instructions (id. at p. 5). The parent requested evaluations in the following areas: assistive technology, speech-language, central auditory processing, neuropsychological, and psychoeducational (id.). In addition, the parent requested

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<sup>13</sup> During the 2007-08 school year, the student's intensive classes contained no more than 10 to 12 students (Tr. p. 542).

teacher training in the area of "Asperger's" for all individuals that worked with the student (id.). The CSE subcommittee agreed to reconvene at a later date to complete discussions of the parent's requests and concerns (id. at p. 5; see Tr. p. 526; Dist. Ex. II.H at p. 5).

On June 20, 2007, the CSE reconvened to complete the student's annual review for the 2007-08 school year (Dist. Ex. II.H at pp. 1, 5). At this meeting, the special education teacher reported that the student had a "good year" and "passed all of his 7th grade final exams" (id. at p. 5; see Dist. Ex. III.GG at pp. 10-14). She also reported that the student did not present with any behavior management issues during testing and had made "great strides" since sixth grade (Dist. Ex. II.H at p. 5). At this time, the parent requested placement in the district's "TSP program" or in an "out of district placement" (id.).<sup>14</sup> The CSE discussed the "profile of the typical students" in the TSP program, noting that the "levels of the students in that classroom [were] significantly of higher abilities cognitively and academically" than the student (Tr. pp. 349-51). The school psychologist who attended the CSE meeting indicated that the TSP program targeted "gifted" students with cognitive abilities in the "high average to superior range," and thus, voiced his opinion that it was not an appropriate placement for the student (Tr. pp. 660-63). After a discussion and noting the student's "great gains and significant progress . . . in the KEA program," the CSE did not support the parent's requested placement in the TSP program or in an out-of-district placement and declined the parent's request (Dist. Ex. II.H. at pp. 1-2, 5; see Tr. pp. 350-55, 530-32, 660-63).

The parent also requested a change in the student's classification from a student with an LD to a student with autism due to the student's "diagnosis" of Asperger's (Dist. Ex. II.H at p. 5; see Tr. pp. 532-35).<sup>15, 16</sup> At that time, the CSE advised the parent that it "did not have sufficient documentation to review" her request to change the student's classification (Dist. Ex. II.H at p. 5). With respect to the evaluations previously requested by the parent, the CSE supported a speech-language evaluation, an assistive technology evaluation, and a neuropsychological evaluation, but declined the parent's request for a central auditory processing evaluation and would reconsider the request after the completion of the speech-language evaluation (id.; see Tr. p. 354).<sup>17</sup> The CSE's final recommendations for the student's 2007-08 school year duplicated the

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<sup>14</sup> The "TSP program" refers to the district's "therapeutic support program" (TSP) at the middle school (Tr. pp. 348-50).

<sup>15</sup> The parent testified that the student first received a diagnosis of Asperger's in either summer or fall 2005 (Tr. p. 1589). The parent further testified that she first requested a change in the student's classification at the June 20, 2007 CSE meeting based upon the diagnosis of Asperger's (Tr. pp. 1588-89). In addition, the parent testified that since the CSE had initially classified the student, she had received "copies of [her] procedural safeguards rights" on numerous occasions and was aware that she could seek an impartial hearing if she disagreed with the CSE's recommendations, including the student's classification (Tr. pp. 1552-53).

<sup>16</sup> State regulations define the term "autism" as a "developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age 3, that adversely affects a student's educational performance" (8 NYCRR 200.1[zz][1]; see 34 C.F.R. § 300.8[1]). The term includes "characteristics often associated with autism," such as "repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences" (id.).

<sup>17</sup> By letter dated July 27, 2007, the district requested the parent's signed consent to proceed with the evaluations (Dist. Ex. VI.O at pp. 1-4).

recommendations contained in the May 2007 IEP, with the exceptions of recommending 1:1 OT, an additional session of OT per week, the use of a word processor, and the use of Alpha Smart as integrated within the KEA program (compare Dist. Ex. II.G at pp. 1-2, 5, with Dist. Ex. II.H at pp. 1-2, 5). According to the meeting information summary, the parent "voiced her disagreement" with the CSE's recommendations (Dist. Ex. II.H. at p. 5; see Tr. pp. 1363-64).

The student's eighth grade year (2007-08) in the KEA program "started . . . off well" (Tr. pp. 354-55). However, with the increasing academic and social demands associated with eighth grade, the student became increasingly frustrated and agitated (Tr. pp. 355-57, 538-40; see Tr. p. 45). Minutes from an October 12, 2007 Child Study Team (CST) meeting indicated that the student was not "doing well" in his intensive classes and that the parent wanted a team meeting (Dist. Ex. V.E at p. 1).<sup>18</sup> At that time, the student arrived late to class, fell asleep in class, and he was in danger of failing his intensive classes (id.). The school psychologist at the CST meeting indicated that he would discuss possibly adjusting the student's medication with the parents (id.). Staff meeting minutes, dated October 25, 2007, documented the current strategies and assistance implemented in an effort to address the student's needs, including constant refocusing, additional time for writing, use of the Alpha Smart in his ELA class, copies of class notes, modified tests, additional time for tests, tests given in a separate location, reminder notes to the parent, breaking down of information, printed copies of Smart-Board notes, graphic organizers, snacks and breaks, color-coded materials, picture symbols for assignments, a check-off list in his locker, and taping a daily schedule to his desk (Parent Ex. 105 at p. 1). The minutes also noted that the student currently occupied approximately "99%" of the TA's time during his intensive courses (id.). At the meeting, district staff recommended a trial use of the Alpha Smart throughout the student's school day and for scheduling purposes, and further, that OT could address the student's responsibility for transporting the Alpha Smart to classes, as well as the student's use of a cart to carry his books, binders, and the Alpha Smart (id. at p. 2).

On November 8, 2007, the CST met as a follow up to conversations with the director and the special education teacher (Dist. Ex. V.E at p. 2). At that time, the CST recommended considering an out-of-district placement for "next year" (id.). The CST did not yet have results from the assistive technology evaluation or the speech-language evaluation, and noted that the special education teacher would "follow up" with the parent regarding the "neurological evaluation offered" by the district (id.). Minutes from a CST meeting held on November 30, 2007, indicated that the student exhibited "difficulty behaviorally and academically within the school setting," that his relationship with the special education teacher had become "argumentative," and further, that the parent had reportedly been "harassing" the special education teacher (id. at p. 3). According to the minutes, the parent wanted an "outside placement for next year" (id.). At that time, the CST noted that the student did not complete homework despite school staff e-mailing a "weekly outline" to the parent at the beginning of the week and e-mailing a summary of homework to be completed to the parent at the end of the week (id.). The minutes described the student as being disruptive and distracting in class, and

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<sup>18</sup> The CST provided the "first avenue in the building support" to address a student "in need" (Tr. p. 543). The CST offered "support, guidance, strategies and assistance to staff members" (Tr. pp. 43-44). The CST could recommend additional testing, evaluations, or a referral to the CSE if implemented strategies and supports did not prove successful (id.).

that he continued to arrive late to class and then "announc[ed]" his arrival, that he had become more aggressive, and that he roamed the building (id.). During classes, the TA assigned to the entire classroom focused exclusively on the student to ensure organization and the completion of homework (id.). The CST decided, at that time, to begin looking for an outside placement for the student for the remainder of the 2007-08 school year (id.).

On December 3, 2007, the parent met with the principal, who advised her that the student's current placement was not "working out" and that an out-of-district placement for the student was being recommended (Tr. pp. 1597-1600). The parent signed consent forms to release the student's records to out-of-district placements on that same day, but revoked her consent "within an hour" (Tr. pp. 1600-03). The parent then requested additional information about the potential out-of-district placements and the information packets that would be sent to the potential placements, which the director forwarded to the parent by letter and facsimile, dated December 4, 2007 (Dist. Exs. IV.A-IV.B; see Tr. pp. 1602-07; Dist. Exs. V.B-V.D). Shortly after the December 3, 2007 meeting, the parent picked up a copy of the sample packet of information that the district intended to send to potential out-of-district placements (Tr. pp. 1605-08). At that time, the district had identified two Board of Cooperative Educational Services' (BOCES) programs as potential placements and sought the parent's cooperation to send the information packets to explore these options (see Dist. Exs. IV.A-IV.B; V.B-V.D).

The CST met again on December 4, 2007, and discussed the need to locate an out-of-district placement for the student (Dist. Ex. V.E at p. 4). At that time, the student continued to be disruptive and distracting during class, arrived late, and entered class in a disruptive manner (id.). The minutes indicated that the student's academic work suffered due to incomplete or late homework—despite frequent e-mails home to the parent—he failed tests, and the CST could not determine whether the test failures resulted from the student's lack of studying or his inability to comprehend concepts (id.). In addition, the CST indicated that the student's processing and visual perception issues contributed to his frustration in class, and he required the full attention of the TA in order to "function in class" (id.). The minutes noted the parent's request to change the student's classification to autism, but that the CSE lacked the necessary "report and diagnosis from a clinician" (id.). According to staff, the student's increasing difficulties arose from his difficulty "navigating the building and [the] classes expected of an 8th grade student" and that a more "self-contained environment" would benefit the student (id.).<sup>19</sup> In addition, the student's social and peer interactions remained an area of "great difficulty" (id.). At that time, the CST recommended a trial of 1:1 TA support for the student and scheduling a CSE meeting once an out-of-district placement had been secured (id.).

On December 19, 2007, the parent met with the director, the CSE chairperson, and the student's father to discuss the status of the search for an out-of-district placement (Tr. pp. 1607-09). At that meeting, the parent presented and read a letter she had prepared, dated December 19, 2007 (Tr. pp. 1607-08; see Parent Ex. 6). In the letter, the parent acknowledged that the district had requested her permission to send information packets to two BOCES' programs as potential out-of-district placements (Parent Ex. 6 at p. 1). The letter documented that in order to

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<sup>19</sup> The student's father testified that the student's eighth grade placement required "several transitions" in the day "moving from class to class," and the curriculum moved "very quickly" for the student" (Tr. pp. 790-91). The student's father agreed that by December 2007, the student required a different placement (id.).

provide her consent to send the information packets to potential out-of-district placements, the parent required "changes" to the student's 2007-08 IEP, such as changing the student's classification from LD to autism, and inserting, deleting, or otherwise rewording language in the IEP (id. at pp. 1-3; see Tr. pp. 56-57). The director advised the parent that although the district did not require her consent to send information packets to the potential placements, the director's "goal was to work together . . . to collaborate on this process" (Tr. pp. 55-56). The CSE chairperson testified that the district could have secured an out-of-district placement within a "four to six-week period" if information packets had been sent out at that time (Tr. pp. 373-74).

By letter dated December 20, 2007, the director advised the parent that she had received the December 19, 2007 letter identifying and requesting specific changes to the student's "records" and that a meeting would be scheduled upon returning from an upcoming vacation (Dist. Ex. VI.Q). On January 9, 2008, the student's father e-mailed the parent and asked that she "find time in [her] schedule as early as possible" to attend a meeting, as "[t]his cannot wait until February" because the student should be entering a "different program by then" (Parent Ex. 16 at p. 2; see Tr. pp. 793-96). The student's father further urged the parent that if she could not "find time" in her schedule, "the[n] please allow the packet to go out with the current IEP and we will tweak it later as needed" (Parent Ex. 16 at p. 2). After failing to receive the parent's collaboration in the process, the director instructed the CSE chairperson to send the student's information packets to the potential placements (Tr. pp. 57-58). On January 9, 2008, the district sent the student's information packets to the two BOCES' programs previously identified to the parent in the December 4, 2007 letter (Tr. pp. 374-76; see Tr. pp. 58-59; Dist. Exs. IV.A-IV.B). By e-mail dated January 10, 2008, the parent acknowledged receiving letters from the district, dated January 7 and 8, 2008, attempting to schedule a CSE meeting to review the student's recent evaluations, and she further noted the necessity of correcting the "errors" in the student's IEP in order to send the information packets to out-of-district placements (Parent Ex. 16 at p. 1).<sup>20</sup>

Upon initially receiving the student's information packet on January 17, 2008, the school psychologist at one of the potential BOCES' placements (BOCES 1) called the parent and left her a message (Tr. pp. 1853-62; Dist. Ex. V.C; Parent Ex. 20 at pp. 1-2). On January 22, 2008, the parent contacted the BOCES 1 psychologist to discuss "setting up a phone conference" with the student's father (Dist. Ex. V.C at p. 1; see Tr. p. 1862).<sup>21</sup>

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<sup>20</sup> In a January 18, 2008 e-mail, the parent notified the district of her disagreement with the district's recently conducted speech-language evaluation, assistive technology evaluation, educational evaluation, functional behavioral assessment (FBA), and behavioral intervention plan (BIP), and she requested "outside, independent" evaluations to conduct the same (Parent Ex. 18 at p. 1; see Dist. Exs. III.X-III.Y; III.AA-III.BB). The parent also requested an "outside, independent" OT evaluation and central auditory processing evaluation (Parent Ex. 18 at p. 1). By letter dated February 19, 2008, the director notified the parent that consistent with district policy for independent educational evaluations (IEEs), the parent needed to provide the evaluators' "resume, credentials and the proposed fee schedule" for approval, and the director enclosed a copy of the district's IEE policy "again" for the parent's review (Parent Ex. 24 at p. 2). The director advised that since the district had not yet conducted a central auditory processing evaluation, the district would conduct the same upon receipt of the parent's signed consent (id.; see Dist. Ex. III.FF).

<sup>21</sup> Throughout his contact with the parent between January and May 2008 regarding an out-of-district placement for the 2007-08 school year, the BOCES 1 psychologist remained in contact with the CSE chairperson to update her on the intake process (see Dist. Exs. V.B at pp. 1-2; V.C).

By letter dated January 29, 2008, the director responded to parent's e-mails, dated January 18 and 22, 2008 (Dist. Ex. VI.R at pp. 1-2; Parent Exs. 18; 20). The director enclosed information regarding the potential BOCES' placements, which had been forwarded to the parent on December 4, 2007, as well as copies of the student's information packets sent to the two placements (Dist. Ex. VI.R at p. 1). The director asked the parent to provide available dates for a CSE meeting and notified the parent that her requests for IEEs were being reviewed (*id.* at pp. 1-2). In addition, the director advised the parent that "an intake" was necessary prior to providing the parent with a class profile of the BOCES 1 program and encouraged participation in the intake process (*id.* at p. 2).

On February 1, 2008, the parent, the student's father, the BOCES 1 psychologist, and a "student advocate" participated in a telephone conference to discuss the BOCES 1 program and placement (Dist. Exs. V.C at p. 1; V.D; *see* Tr. pp. 1863-67). During the telephone conference, the BOCES 1 psychologist explained to the parent his "clinical need" to "actually see the [student]" as part of the intake process (Tr. pp. 1855-67).<sup>22</sup>

In an e-mail dated February 12, 2008, the parent acknowledged contact from the second potential BOCES' placement (BOCES 2) (Parent Ex. 23 at p. 1).<sup>23</sup> The student's father visited the BOCES 1 program on February 15, 2008 (Dist. Ex. V.C at p. 1). By letter dated February 19, 2008, the director responded to parent e-mails, and reiterated that the student's participation in the intake process was necessary in order to determine whether the potential BOCES' programs were appropriate for the student, and that class profiles of the programs would be provided to the parent upon locating an appropriate program (Parent Ex. 24 at p. 1).

On February 26, 2008, the CSE convened for a program review and to review the student's speech-language evaluation, the assistive technology evaluation, the FBA, and the BIP (Dist. Ex. II.I at pp. 1, 5-6; *see* Dist. Exs. III.X-III.Y; III.A-III.B). As noted in the meeting information summary, although the student demonstrated difficulty in mathematics, he showed "signs of improvement now that he [was] working in a smaller group setting" (Dist. Ex. II.I at p. 5).<sup>24</sup> According to staff, the student required a lot of "support" and needed to be "refocused and redirected to task frequently, which require[d] 1:1 support and intervention" (*id.*). The assistive technology evaluation identified "weaknesses" with the student's "short-term and long-term memory" that impacted upon his "organizational and planning needs" (*id.* at pp. 5-6; *see* Dist. Ex. III.Y at pp. 5-7). To address this need, the CSE recommended the use of an Alpha Smart as

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<sup>22</sup> The BOCES 1 psychologist testified that the "most important part of the intake procedure [was] to have a visit with the student as soon as possible" (Tr. pp. 1858-59).

<sup>23</sup> In a chronology prepared by the CSE chairperson documenting the district's attempts to secure an out-of-district placement for the student, an entry dated February 13, 2008 indicated that the BOCES 2 representative participated in a "lengthy phone conversation" with the parent and an advocate and that the parent would "call back to arrange [an observation of the program] in the future" (Dist. Ex. V.B at p. 1). An entry dated March 11, 2008, noted that the parent was "not willing to participate in the intake process" at BOCES 2 (*id.* at p. 2).

<sup>24</sup> At time, the student received instruction in a smaller group within his 15:1 intensive class for mathematics, which provided "further reinforcement of math skills an support" (Tr. p. 361).

a "writing tool and palm pilot" and the use of a "cart" to "manage [the student's] materials . . . more efficiently" (Dist. Ex. II.I at pp. 2, 6). The CSE also recommended the use of a "seat cushion wedge" that "already been trialed" (id. at pp. 2, 6). After reviewing and discussing the student's FBA and BIP, the CSE reviewed and discussed the speech-language evaluation (see id. at p. 6). According to the meeting information summary, the student performed within the "average to above average range" with "weaknesses in memory and manipulating information" and "[d]elays" in the student's auditory processing and reasoning abilities (id.). The student exhibited "stronger" expressive language skills when compared to his receptive language skills, and the CSE recommended two sessions per week of group speech-language therapy services to support this area of need, as well as a central auditory processing evaluation (id. at pp. 2, 6). Although the CSE continued to recommend counseling, the meeting information summary indicated that the parent "waived this service in December" (id.). The CSE also recommended a 1:1 TA for the student and a bus monitor for transportation (id. at pp. 1-2, 6).<sup>25</sup> In addition, the CSE developed and incorporated three annual goals to address the student's identified speech-language needs (id. at pp. 9-10). Based upon the information presented, the CSE modified the student's present levels of academic achievement, functional performance, and individual needs, and incorporated the student's testing results into his 2007-08 IEP (compare Dist. Ex. II.I at pp. 3-5, with Dist. Ex. II.H at pp. 3-4).

On February 26, 2008, the BOCES 1 psychologist received a message from the parent; he contacted the parent on February 27, 2008, and scheduled a "visit" with the parent and the "student advocate" for March 3, 2008 (Dist. Ex. V.C at p. 1; see Tr. pp. 1867-70). The student did not attend the March 3 visit, and the BOCES 1 psychologist next made contact with the parent on March 12, 2008 to schedule an intake with the student on March 19, 2008 (Dist. Ex. V.C at p. 1). The parent and the student did not appear for the intake on March 19, 2008, and when contacted by the BOCES 1 psychologist, the parent reported that an illness prevented the visit and that rescheduling the visit within the "next week" did not "look good" (id.).<sup>26</sup> On March 28, 2008, the parent left a message for the BOCES 1 psychologist indicating that her "schedule [was] still too tight to make plans right now" (id.). Upon returning a message left for the BOCES 1 psychologist on April 1 or 2, 2008, the parent indicated that she would be "[v]ery busy these next 2 weeks prior to the Spring Break" (id.). The parent next contacted the BOCES 1 psychologist on May 2, 2008, to "review where things [were]" and to advise that updated testing results "[were] now available" (id.). The parent did not produce the student for an intake at BOCES 1 (Tr. p. 1867).

By letter dated March 13, 2008, the director wrote to the parent, noting that she had not yet received any further information regarding the parent's requested IEEs, that she had not yet received a signed consent for the district to conduct a central auditory processing evaluation of the student, and that she had been advised that the parent had not yet allowed the student to participate in the intake process at either of the two potential out-of-district BOCES' placements

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<sup>25</sup> By e-mail dated May 13, 2008, the parent acknowledged that the purpose of the February 2008 CSE meeting had been to "approve program accommodations that had been in place since December 2007" (Parent Ex. 42).

<sup>26</sup> The BOCES 1 psychologist testified that the March 19, 2008 intake was "specifically designed to have [the student] present" and that the parent did not "call ahead" in advance of failing to arrive for the appointment, and thus, he referred to it as a "NO SHOW" on his intake log (Tr. pp. 1876-77; see Dist. Ex. V.C at p. 1).

(Parent Ex. 26).<sup>27</sup> At the impartial hearing, the director testified that while the parent had telephone conversations with the two potential BOCES' programs and may have visited the two programs without the student, she did not participate in a "full intake" with the student for an out-of-district placement until June 2008 (Tr. pp. 58-66; see Tr. pp. 374-81, 383-86, 793-801; Dist. Exs. V.B-V.D; see also Parent Ex. 26). The director testified that due to the parent's "lack of cooperation with . . . the intake process," the district was unable to secure an out-of-district placement for the remainder of the student's 2007-08 school year, and that in spring 2008, the district shifted its focus to begin searching for an out-of-district placement for the student's 2008-09 school year (Tr. pp. 62-69; see Tr. pp. 382-86, 804-05).

By letter dated April 28, 2008, the Forum School, notified the parent of the student's acceptance for immediate placement for the 2007-08 school year (Parent Ex. 30). By e-mail dated April 30, 2008, the parent advised the director that she "ruled out" the "only two programs" recommended by the district, that the Forum School as an appropriate placement, and that the director should forward the student's records to the Forum School because "we need to decide on this placement immediately" since "[s]pots are at a premium at this time of the year" (Parent Ex. 32 at pp. 2-3).

In an OT report dated May 6, 2008, the occupational therapist indicated that despite being initially resistant to therapy, the student became "much more motivated to participate in therapy and [was] proud of his accomplishments" (Parent Ex. 88 at p. 1). During therapy, the student worked on keyboarding and improving upper body strength (id.). The therapist indicated that the student used a wedge air cushion seat to address low muscle tone and to achieve a more neutral seated position, which helped the student "better attend in class" (id.). The student also benefited from self-administered "sensory integration breaks" during classes (id. at p. 2). For the 2008-09 school year, the therapist recommended continued OT and the use of educational software to address the student's organizational needs arising from his difficulties with attention (id.).

In a speech-language progress report, dated May 8, 2008, the speech-language therapist reported that the student had received two sessions per week of speech-language therapy for the "last two months" with good attendance and participation (Parent Ex. 108 at p. 1). At that time, the student's therapy focused on conversational skills (id.). Although the student had become more "cognizant of maintaining" a topic, he would still interject off-topic subjects, and he continued to exhibit difficulties with "allowing others to speak" without interruption (id.). On a topic of his own choosing, the student could maintain a conversation for "an extended period of time" (id.). The therapist recommended continued speech-language therapy for two sessions per week for the 2008-09 school year (id.).

According to a "Math Update" dated May 12, 2008, the student currently had a "70 average in math" (Parent Ex. 89). The report indicated that the student could perform addition, subtraction, and multiplication, but exhibited difficulty with division (id.). In addition, the report noted that with "constant review and 1:1 attention," the student could understand certain concrete concepts, but due to the "pace and difficulty of the 8th grade curriculum," the student had

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<sup>27</sup> By e-mail dated May 29, 2008, the parent acknowledged that the district had scheduled a central auditory processing evaluation to begin on June 2, 2008, which had to be rescheduled until June 6, 2008, due to transportation issues (Parent Ex. 54 at pp. 1-3; see Parent Ex. 61).

"difficulty comprehending" algebraic concepts (id.). The report further noted that the student worked in a 1:1 setting every day during mathematics to keep the student on task, to refocus the student, and to continue working on his mathematics lesson (id.). The student went to class prepared with his Alpha Smart, and the Alpha Smart contained the student's notes, models of the work done in class, and the TA's notes (id.).

On May 12, 2008, the CSE convened to conduct a program review, which arose as an "outgrowth of [the] annual review discussion" for the student's 2008-09 school year (Dist. Ex. II.J at pp. 1, 5-6; see Tr. pp. 363-65, 553-54; Dist. Ex. IV.D at pp. 3-4). At the meeting, the CSE modified the student's 2007-08 IEP to reflect the implementation of "additional support" in mathematics (Dist. Ex. II.J at pp. 2, 5-6). The CSE recommended continued placement in the KEA 15:1 intensive class for mathematics and added three additional period of mathematics in the KEA 12:1+1 class with the student's 1:1 TA support (id. at pp. 2, 6; see Tr. pp. 363-65). According to the meeting minutes sent to the parent, the CSE noted that the parent did not allow the student to participate in the intake process at either BOCES 1 or BOCES 2, and that the district would continue to search for an appropriate out-of-district placement for high school (Dist. Ex. IV.D at p. 4). In addition, the CSE identified five potential out-of-district placements for high school and noted that the district would send information packets to explore these placement options (id.).<sup>28</sup> At that time, the CSE recommended, among other things, placing the student in an interim placement while the district continued to search for an appropriate out-of-district placement (id.; see Dist. Ex. II.K at pp. 1-2).

By e-mail dated May 15, 2008, the parent advised the district that she disagreed with the recommendations made at the May 12, 2008 CSE meeting, and further, she requested that the district change the student's classification to autism (Parent Ex. 44 at p. 1).

In a "Teacher Observation Report," dated May 19, 2008 and prepared by the student's special education teacher, the teacher described the student as a concrete learner who benefited from a small student-to-teacher ratio, who became "easily frustrated when faced with a challenging concept," and who was "easily distracted" (Parent Ex. 90 at p. 1). The special education teacher indicated that the student benefited from "repetition and explicit directions using a step-by-step approach" and from adapting materials into smaller chunks when presenting a new topic to the student (id.). With respect to reading, the student exhibited difficulty with "pace and fluency" and benefited from "using post-its to 'track' reading, whereby, he [would] jot down details or unknown words using codes" (id.). According to the report, the student also benefited from taking "notes in the margin and changing written text into his words" to "identify unknown meanings," which the student had begun to apply independently (id.). For the 2008-09 school year, the special education teacher recommended an out-of-district placement in a self-contained program with a small student-to-teacher ratio, limited transitioning, a behavior modification program, and consistent adult support (id.). The report also contained

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<sup>28</sup> By letter dated May 13, 2008, the district sent the parent a copy of the May 12, 2008 CSE meeting minutes, listed the five potential out-of-district placements identified and discussed at the CSE meeting, and noted that information packets would be sent to explore the programs (Dist. Ex. IV.D at pp. 2-4). In the letter, the district noted that if the parent wanted information packets sent to other potential placements, a list of State-approved schools had been enclosed for the parent's review (id. at pp. 2, 5-17).

recommended goals to address the student's identified areas of need in organizational skills, transitioning, and academic achievement (id. at p. 2).

On June 5, 2008, the CSE convened to conduct a program review for the student's 2008-09 school year and to review the results of a privately obtained neuropsychological evaluation (Dist. Exs. II.K at pp. 1, 6; III.C).<sup>29</sup> The following individuals attended the CSE meeting: the CSE chairperson, the principal, a school psychologist, a guidance counselor, the special education teacher, a regular education teacher, the student's father, the parent, two family friends, and the clinical psychologist who had conducted the privately obtained neuropsychological evaluation (Dist. Ex. II.K at p. 6).<sup>30</sup> At the meeting, the clinical psychologist explained that the student's "low frustration tolerance with significant performance anxiety . . . could be impacted by internal and external issues" (id.). She described the student's language as an area of "relative strength with significant and severe attention problems" and that his processing speed and working memory fell within the "extremely low to borderline range" (id.). In addition, she noted that the student exhibited "[s]ignificant difficulties with anxiety, depression and mood regulation" (id.). As a result of her evaluation, the clinical psychologist indicated that the student met the criteria for Asperger's Disorder based upon clinical observations of "his deficits with socialization and repetitive rigid patterns," and in addition, the student presented with a "nonverbal Learning Disorder, Anxiety and Bipolar Disorder" (id.).<sup>31</sup> The CSE members asked questions about the evaluation report, and a lengthy discussion ensued regarding the student's classification (id.; see Tr. pp. 559-60, 1425-26).<sup>32</sup> Based upon the student's co-morbid features of epilepsy; seizure activity; learning difficulties in reading, writing, and mathematics; sensory motor difficulties; Asperger's Disorder; and emotional and attentional difficulties, the CSE recommended changing the student's classification from LD to OHI (Dist. Ex. II.K at pp. 1, 6; see Tr. pp. 559-60, 1425-28). The parent disagreed with the recommended OHI classification, noting that she wanted the student's classification changed to "[a]utism," which the CSE did not support (Dist. Ex. II.K at p. 6).<sup>33</sup> The CSE also discussed and recommended a physical therapy (PT) evaluation, and discussed the issue of extended school year services, which the CSE did not support at that time (id.). The IEP contained modifications to the student's present levels of academic achievement, functional performance and individual needs, incorporated the testing

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<sup>29</sup> The parent testified that she provided the district with a copy of the privately obtained neuropsychological evaluation report at the May 2008 CSE meeting (Tr. p. 1425). According to the evaluation report dated April 14, 2008, the student's evaluation occurred on February 14, 18, and 28, 2008 (Dist. Ex. III.CC at p. 1).

<sup>30</sup> The parent waived the participation of the additional parent member (Dist. Ex. II.K at p. 6).

<sup>31</sup> On June 25, 2008, the student underwent a privately obtained psychiatric evaluation, which indicated that the student's "agitation and reactivity" did not reflect an underlying bipolar disorder (Dist. Ex. III.EE at p. 2). The parent testified that she provided the district with the privately obtained psychiatric evaluation report at the July 15, 2008 CSE meeting (Tr. p. 1535).

<sup>32</sup> At the impartial hearing, the student's father described how the district had already been implementing almost all of the recommendations contained in the privately obtained neuropsychological evaluation report (Tr. pp. 887-95).

<sup>33</sup> The student's private psychiatrist for approximately five years advised the parent and the student's father that the student would be properly classified as OHI, and that autism would not be an appropriate classification for the student (Tr. pp. 806-14; see Dist. Ex. VI.T).

results from the February 2008 neuropsychological evaluation, and contained new or modified annual goals to address the student's identified needs in the areas of study skills, reading, writing, mathematics, speech-language, social/emotional/behavioral, and motor skills (compare Dist. Ex. II.K at pp. 1-6, 8-11, with Dist. Ex. II.J at pp. 1-5, 7-11). The CSE continued to recommend the special education programs and services and related services recommended at the May 12, 2008 CSE meeting (compare Dist. Ex. IV.D at p. 4, with Dist. Ex. II.K at pp. 1-2).<sup>34</sup>

Between the June 2008 CSE meeting and early July 2008, both the parent and the student participated in the intake process at three of the five potential placements identified and discussed at the May 12, 2008 CSE meeting (see Dist. Exs. V.B at pp. 2-3; IV.D at pp. 2, 4).<sup>35</sup> By e-mail dated July 7, 2008, the parent indicated to the district that all of the out-of-district placements recommended at the May 12, 2008 CSE meeting were "sorely inappropriate" for the student (Parent Ex. 69 at pp. 1-2). By July 8, 2008, two of the potential placements had accepted the student for the 2008-09 school year: a State-approved private school and a BOCES program (BOCES 3) (Dist. Exs. IV.D at pp. 2, 11; IV.E at pp. 1, 7-9, 13-15; see Dist. Ex. V.B at pp. 2-3). By letter dated July 9, 2008, the parent forwarded copies of the student's educational records to the clinical psychologist who conducted the privately obtained neuropsychological evaluation in February 2008 (Dist. Ex. VI.A). After receiving the records, the clinical psychologist prepared an addendum to the original evaluation report, dated July 20, 2008 (Dist. Ex. VI.B). By e-mail dated July 10, 2008, the parent advised the district of the student's acceptance at the Forum School (Parent Ex. 74 at p. 2; see Parent Ex. 30).

On July 15, 2008, the CSE convened to conduct a program review, to review the student's recently completed PT evaluation, and to consider a more restrictive placement for the student's 2008-09 school year (Dist. Ex. II.L at pp. 1, 6; see Dist. Ex. III.DD). The following individuals attended the CSE meeting: the director (as CSE chairperson), a school psychologist, a special education teacher, a regular education teacher, the physical therapist (via telephone) who conducted the PT evaluation, a representative from the State-approved private school that accepted the student, a BOCES 3 social worker, the BOCES 3 principal (via telephone), a private therapist, the parent, the student's father, and two "parent advocate[s]" (Dist. Ex. II.L at p. 6). The CSE reviewed and discussed the PT evaluation, and at that time, the physical therapist "offered to provide the parent with a home exercise program to support the student and the parent declined this support" (id.). The CSE recommended weekly small group PT services for the student, as well as two monthly PT consultations in the classroom for additional support (id. at pp. 1-2, 6). The parent presented a letter to the CSE, dated July 14, 2008, which noted her disagreement with the PT evaluation and requested an independent PT evaluation (id. at p. 6; Parent Ex. 76). The CSE noted that at that time, the student had attended one session of the central auditory processing evaluation performed by the district (Dist. Ex. II.L at p. 6; see Dist.

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<sup>34</sup> On June 6, 2008, and August 8, and 12, 2008, the district completed an audiologic and central auditory processing evaluation of the student (Dist. Ex. III.FF at p. 2).

<sup>35</sup> By letter dated June 2, 2008, one of the identified potential placements notified the district that the program was not appropriate for the student (Parent Ex. 56; see Parent Ex. 77 at p. 2). Similarly, by letter dated June 21, 2008, a second potential placement notified the district that the program was not appropriate for the student (Parent Ex. 66; see Parent Ex. 77 at p. 2). By letter dated July 9, 2008, a third potential placement advised the district that the parent "declined an offer to meet with us," noting that the parent expressed her opinion that the placement was not appropriate for the student (Parent Ex. 72; see Parent Ex. 77 at p. 2).

Ex. III.FF at p. 2). The parent also presented the CSE with articles related to Asperger's disorder for review and consideration, as well as letters requesting that the CSE consider placing the student "out of N[ew] Y[ork] S[tate] Approved placements" (Dist. Ex. II.L at p. 7). The CSE explained to the parent, as it had on "numerous occasions," that the CSE had an obligation to pursue State-approved placements "as our first course of action" (id.).

With respect to the student's placement for the 2008-09 school year, the CSE discussed the State-approved private school and the BOCES 3 program with input from the representatives of the placements who attended the meeting (Dist. Ex. II.L at pp. 6-7). Due to concerns raised about the lack of a nurse at the State-approved private school, the CSE determined that the BOCES 3 placement was appropriate for the student (id. at p. 7). At that time, the parent presented the CSE with a letter dated July 15, 2008, which voiced the parent's disagreement with the recommended placement and invoked the student's pendency rights in the June 5, 2008 IEP (id.; see Parent Ex. 78 at pp. 1-2).<sup>36</sup>

Following the July 15, 2008 CSE meeting, the district continued its efforts to locate an out-of-district placement for the student for the 2008-09 school year (see Dist. Exs. IV.I-IV.K; IV.M; V.B at pp. 3-4). In September 2008, the district forwarded the student's information packet to the Forum School, which rejected the student's application (Dist. Ex. IV.I at p. 1; see Tr. pp. 803-04).

By due process complaint notice, dated September 11, 2008, the parent, through her attorney, notified the district of her disagreement with the student's classification, his "2008-09 IEP, services, placement and program recommended by the CSE," and requested an impartial hearing (Dist. Ex. I.A at p. 2). The parent further alleged that the district failed to offer the student a FAPE due to the following violations: the 2007-08 IEP failed to adequately address the student's academic, physical, social, and emotional needs; the 2008-09 IEP did not appropriately address the student's academic, physical, social, and emotional needs, and failed to offer an appropriate placement; the failure to provide 12-month programming; the failure to classify the student as a student with autism; the failure to provide services mandated by 8 NYCRR 200.13, specifically, 5 times per week speech-language therapy services, parent training and counseling, and transition services; the failure to provide cognitive training to address the student's working memory needs; the failure to develop and implement meaningful, measureable annual goals and short-term objectives; the failure to implement the student's testing accommodations; the CSE's failure to discuss methodologies to be used in the student's program; the failure to conduct an appropriate FBA and develop an appropriate BIP to address the student's behavioral needs; the CSE's failure to consider two private evaluation reports "diagnosing" the student with an autism spectrum disorder; the failure to address bullying, harassment, and verbal and physical abuse sustained by the student at the district's school; and the failure to provide classroom profiles of the recommended placements (id. at pp. 3-5).

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<sup>36</sup> By letter dated July 15, 2008, the parent advised the district that she was asserting her "rights to stay put" for her son, noting that he currently received the listed services pursuant to the June 5, 2008 IEP (Parent Ex. 78 at pp. 1-2). The parent further indicated that if the district failed to honor her request to "stay put" under the June 5, 2008 IEP, which constituted the "last IEP that I agreed to and that was implemented," she would be "forced to file for due process" (id. at p. 2).

As relief, the parent requested the annulment of the "current IEP;" placement in an appropriate program; the provision of an appropriate IEP; a change in the student's classification from OHI to autism; the provision of services mandated by 8 NYCRR 200.13, including 5 times per week speech-language therapy, parent training and counseling, and transitional support services; the provision of 12-month programming; the provision of an appropriate FBA and BIP; payment of the parent's attorneys' fees; and other further relief "deemed just and proper" (Dist. Ex. I.A at pp. 5-6). The parent also requested that the district implement the student's special education programs and services contained in the 2007-08 IEP as the student's pendency placement (id. at p. 6).

By October 7, 2008, the district had secured another out-of-district placement for the student (Dist. Ex. V.B at p. 4).

By letter dated November 12, 2008, the student's father wrote to the impartial hearing officer assigned to the matter and expressed his feelings and opinions regarding the impartial hearing, the student's needs, and considerations when searching for an appropriate placement for the student (Dist. Ex. V.F at pp. 1-2). The student's father e-mailed the parent on November 13, 2008 to reiterate the opinion of the student's private psychiatrist that the student's proper classification was OHI, not autism, and that the placement she was arguing for was not appropriate for the student (Dist. Ex. VI.T).

The parties proceeded to an impartial hearing on November 13, 2008 (Tr. p. 1). On that date, the parties met for approximately ten minutes prior to adjourning for the day upon an initial request from the parent's attorney so that the parent could visit a potential placement; the district's attorney joined in the requested adjournment, noting that the parent's attorney indicated that a CSE meeting had been scheduled for November 20, 2008 (Tr. pp. 1-9). Unable to resolve the matter, the impartial hearing continued on November 25, 2008, and concluded on June 16, 2009, after 10 days of testimony (Tr. pp. 11, 1850; IHO Decision at p. 2). The district's attorney offered an opening statement, and the parent's attorney stated that he would "waive opening until the start of the parent's case" (Tr. pp. 13-18). On February 24, 2009—the fifth day of testimony—the district rested its case in chief, and although the parent began the presentation of her case, the parent's attorney did not offer an opening statement (Tr. p. 910). Following the conclusion of the parent's witnesses on May 26, 2009, the district began the presentation of rebuttal testimony, which concluded on the next hearing date, June 16, 2009 (Tr. pp. 1807, 1809-46, 1853-1961). Throughout the impartial hearing, the district's attorney voiced numerous objections when the parent's attorney attempted to elicit testimonial or submit documentary evidence regarding issues not raised in the parent's due process complaint notice (Tr. pp. 101-02, 133, 137-39, 141-42, 147-48, 257-59, 330-34, 411, 454-55, 617, 854, 1078-83, 1107-09, 1118-25, 1129-30, 1139, 1153-55, 1160-62, 1165-66, 1175, 1350, 1410). At the conclusion of the impartial hearing on June 16, 2009, the parties established a briefing schedule, which called for the simultaneous submission of closing briefs by both parties no later than July 16, 2009, and in addition, indicated that upon "joint motion the district will notify [the New York State Office of Vocational and Educational Services for Individuals with Disabilities] to extend the decision date which [was] currently June 17th to July 17th and then just before July 17th to extend it to August 16th" (Tr. p. 1963).

In its closing brief, the district's attorney argued that the impartial hearing officer lacked jurisdiction to consider any issues that were not raised in the parent's due process complaint notice, that the district's attorney had repeatedly objected throughout the impartial hearing to the introduction of evidence related to issues that were not raised in the due process complaint notice, and then identified the issues over which the impartial hearing officer had jurisdiction (Dist. Post-Hr'g Br. at pp. 10-12). Next, the district argued that the impartial hearing officer should dismiss the parent's claims regarding the 2007-08 and 2008-09 school years as moot, as the parent sought "largely declaratory relief related to the appropriateness" of the 2007-08 and 2008-09 IEPs, and further argued that the parent failed to request any meaningful relief related to the challenged IEPs in the due process complaint notice (*id.* at pp. 12-13). The district asserted that no meaningful relief could be granted "for the types of things" claimed by the parent and that a 2009-10 IEP had already been created, which recommended placement of the student in an out-of-district placement (*id.* at p. 13). Alternatively, the district also argued that the 2007-08 and 2008-09 IEPs were reasonably calculated to confer educational benefits, and thus, offered the student a FAPE for the two school years in question (*id.* at pp. 13-20). In addition, the district argued that the remaining claims in the parent's due process complaint notice were without merit and should be dismissed (*id.* at pp. 20-27).

In the parent's closing brief, the parent's attorney argued that the district denied the student a FAPE by failing to classify him as a student with autism, by recommending placement in the KEA program for the 2007-08 school year, and by recommending placement at BOCES 3 for the 2008-09 school year (Parent Post-Hr'g Br. at pp. 8-14). In addition, the parent's attorney asserted that the student required an educational placement for high-functioning students with autistic spectrum disorders (*id.* at pp. 14-16). The parent's attorney then argued that the impartial hearing officer should award compensatory educational services or additional services to the parent in the form of "720 hours (2 hours per day, 180 days per year, two years) of 1:1 academic instruction, focusing primarily upon remediating [the student's] delays in math and reading" because the student "lost two years of instruction due to the bumbling of a school district that seem[ed] still adamant in its denial of his true disability" (*id.* at p. 17). The parent's attorney further asserted that "[d]ue to pendency requirements, [the student was] still receiving services under the eighth-grade IEP that so thoroughly denied him a FAPE" that the impartial hearing officer should award compensatory educational services (*id.*). As relief, the parent's attorney requested the following: an order annulling the July 2008 IEP; a finding that the district denied the student a FAPE for the 2007-08 and 2008-09 school years; an order directing the district to classify the student as a student with autism and to develop an appropriate program and placement; an order directing the district to include parent training and counseling on the new IEP; an order directing the district to include cognitive training as part of the student's program; additional services to compensate for a deprivation of instruction; and other further relief deemed appropriate (*id.* at pp. 17-18).

By decision dated September 1, 2009, the impartial hearing officer concluded that the district offered the student a FAPE for the 2007-08 school year, the district properly found the student eligible for special education programs and services as a student with an OHI, the district failed to sustain its burden to demonstrate that it offered the student a FAPE for the 2008-09 school year, and the student was not entitled to "any equitable remedy, i.e., to additional services as compensation" (IHO Decision at p. 36). In the decision, the impartial hearing officer

recounted in detail the testimonial evidence presented by the witnesses and cited to supporting documentary evidence (id. at pp. 1-27). Prior to addressing the merits of the parent's claims, the impartial hearing officer indicated that the district had requested a dismissal of the case as moot, because "a more recent IEP for the 2009-2010 school year" had been "promulgated and agreed to" (id.). Despite acknowledging that the issues presented in the case related to the 2007-08 and 2008-09 school years, the parent had not requested tuition reimbursement for a unilateral placement, and "essentially" the parent sought a "declaratory judgment as to the appropriateness of the recommendations as to the student's classification and placement" made by the CSE on earlier IEPs, the impartial hearing officer rendered a decision in this matter because the impartial hearing had been "vigorously contested by the parties" in a lengthy hearing and "hundreds of documents" had been submitted into evidence (id.). As such, the impartial hearing officer indicated that "[w]hile the import of a decision may now have limited use, it is not, especially as to the issue of classification, without any value" (id.). The impartial hearing officer further noted that "it would be unfair to deprive the parent of a conclusion on the merits because of the duration of the hearing" (id.).

Turning to the parent's claims, the impartial hearing officer first addressed the classification dispute, and determined that the district properly found the student eligible for special education programs and services as a student with an OHI (IHO Decision at pp. 28-31, 36). The impartial hearing officer noted that although the parent initially requested a change in the student's classification at a June 2007 CSE meeting, her request was not "accompanied by sufficient documentation to support a diagnosis of Asperger's" and the parent did not obtain the neuropsychological evaluation granted by the CSE until April 2008 (id. at p. 28). Noting that while a CSE "must select a classification from among those specified in the [Individuals with Disabilities Education Act] " and that the student's diagnosis of Asperger's disorder constituted a "significant descriptor of [the student] in terms of his educational needs," the impartial hearing officer opined that the CSE's "responsibility [was] to address the educational manifestations" of the student's conditions "as they affect the student in a school setting" (id.). Weighing the testimonial and documentary evidence, the impartial hearing officer concluded that the student presented with "complex medical, neurological and emotional issues," and as such his classification "would be incomplete if it did not take their educational import into account" (id. at p. 29). The impartial hearing officer was persuaded by the testimonial evidence presented by the "experienced educational professionals" that the student's proper classification was OHI and not autism, given the student's "combination of a learning disability with impairment of short-term memory, attention issues that affect his concentration, a potentially life-threatening seizure disorder, physical issues involving loss of stamina, emotional issues involving anxiety and mood changes and social deficits involving his relations with his peers" (id.).

Addressing the parent's challenge to the 2007-08 school year, the impartial hearing officer concluded that the student's recommended placement in the KEA program for eighth grade "provide[d] [a] FAPE and satisfied the requirement of educating the student in the least restrictive environment" (IHO Decision at pp. 31-33). The impartial hearing officer found that the June 2007 CSE relied upon information presented to the CSE, which indicated that the student performed well in seventh grade in the KEA program and was "able to transition" to the eighth grade model of the KEA program (id. at p. 31). The impartial hearing officer also noted that when the student began to exhibit difficulties in eighth grade, the district "promptly made

revisions and accommodations to provide increase[d] support" such as a "reduction in the physical education requirement, extra periods of math and a return to the KEA class for math, a bus monitor and a one-to-one teacher assistant" (*id.* at p. 32). In addition, the impartial hearing officer noted that the district conducted an FBA and developed a BIP, and that by December 2007, the district reached the conclusion that the student required an out-of-district placement (*id.*). The impartial hearing officer indicated that while the parent did contact the potential placements via telephone, she "did not display a sense of urgency" and did not fully participate in the intake process because the student did not accompany the parent to visit the potential placements—which the impartial hearing officer identified as "a necessary component of the intake process" (*id.* at pp. 32-33). Thus, the impartial hearing officer determined that the district "acted promptly and in good faith" throughout the 2007-08 school year to secure an out-of-district placement and that his continued placement in the KEA program, "and any resulting denial of educational services, [were] mainly attributable to the parent" (*id.* at p. 33).

Turning to the parent's challenge to the 2008-09 school year, the impartial hearing officer concluded that the district failed to sustain its burden to establish that it offered the student a FAPE because the evidence failed to establish whether the recommended placement at BOCES 3 would appropriately address the student's social/emotional needs and whether the recommended placement at BOCES 3 would "adequately address the Asperger's component of [the student's] educational disability," as it could not "be disregarded among [the student's] disabilities" (IHO Decision at pp. 33-36). The impartial hearing officer indicated that the hearing record contained little to no documentary evidence about the BOCES 3 program and that she was not persuaded by the testimonial evidence presented through the BOCES 3 witness who prescreened the student's information packet during the intake process (*id.* at pp. 5-7, 34-35). While the evidence indicated that the students in the BOCES 3 program were similar to the student in terms of age and cognitive abilities in mathematics and reading, the impartial hearing officer found that the hearing record failed to contain sufficient evidence to determine the social/emotional and management needs of the students in the BOCES 3 program (*id.* at pp. 34-35). In contrast, the hearing record did contain sufficient evidence about the "potential psychological harm to [the student] from being educated in a group where the primary disabilities involve[d] psychological pathologies, even if the students [did] not display acting out behaviors" (*id.*). The proposed class contained two students classified as OHI, two students classified as LD, and ten students classified as "emotionally disturbed" (*id.* at p. 35). Thus, the impartial hearing officer found that the district failed to establish that the recommended placement at BOCES 3 would have been "reasonably calculated to provide educational benefits to the student" (*id.*). Notwithstanding this determination, however, the impartial hearing officer noted that other potential out-of-district placements identified by the district appeared "to be a better fit" for the student, but due to the parent's "delay, objections and her fixation on the Forum School, [she] effectively defeated most of the possibilities, leaving limited choice and [BOCES 3] ultimately to be recommended by default" (*id.*). The impartial hearing officer determined that because the parent "contributed to the situation," the student was not entitled to "any equitable remedy, such as compensatory services" and that although the "standard remedy" was to "remand the matter to the CSE to make an appropriate placement recommendation, it serve[d] no purpose here as the 2008-2009 year has concluded and the parties have agreed to a placement for the 2009-2010 school year" (*id.*).

On appeal, the parent contends that the impartial hearing officer erred in her determination that the district properly classified the student as OHI, which deprived the student of educational benefits provided to students with autism under 8 NYCRR 200.13, including daily speech-language services and transitional support services. The parent asserts that the impartial hearing officer erred in finding that the district offered the student a FAPE for the 2007-08 school year, and that while the impartial hearing officer correctly determined that the district failed to offer the student a FAPE for the 2008-09 school year, the impartial hearing officer erred in failing to award compensatory relief. The parent also challenges the impartial hearing officer's finding that the parties had agreed to an IEP for the 2009-10 school year, noting that the parent expected to serve a request for a due process hearing "in the very near future" (Pet. ¶94). As relief, the parent requested "granting the relief requested in the hearing request," in addition to such further relief deemed just and proper (Pet. at p. 13).

In its answer and cross-appeal, the district contends that the impartial hearing officer erred in denying the district's request to dismiss the parent's claims regarding the appropriateness of the student's 2007-08 and 2008-09 IEPs as moot, noting that the impartial hearing officer's decision acknowledged that the parent sought declaratory relief, and further arguing that the parent failed to request compensatory educational services in her due process complaint notice, the relief requested by the parent constituted programmatic and classification changes to the student's IEPs, that the 2007-08 and 2008-09 school years had already expired, and that the district had developed a 2009-10 IEP placing the student in an out-of-district placement. The district asserts that the impartial hearing officer properly concluded that the district offered the student a FAPE for the 2007-08 school year and properly classified the student as OHI. Alternatively, if the parent's claims are not moot, the district argues that the impartial hearing officer erred in concluding that the district failed to offer the student a FAPE for the 2008-09 school year. As relief, the district requests a finding that the parent's claims regarding the 2007-08 and 2008-09 school years are moot and dismissal the parent's petition in its entirety, or that the district offered the student a FAPE for the 2008-09 school year.

In her answer to the district's cross-appeal, the parent argues that the district untimely served the answer and cross-appeal, and further, that the parties had not agreed upon a program and placement for the 2009-10 school year, thus, the issues raised in this case were capable of repetition and would evade review if determined to be moot. The district prepared a reply, which addressed the untimely service issue raised by the parent.

Turning first to the district's cross-appeal, the district correctly asserts that the impartial hearing officer erred in denying the district's request to dismiss the parent's claims regarding the 2007-08 and 2008-09 school years as moot. It is well settled that a dispute between the parties in an appeal must at all stages be "real and live," and not "academic," or it risks becoming moot (see Lillbask v. State of Conn. Dep't of Educ., 397 F.3d 77, 84 [2d Cir. 2005]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]; J.N. v. Depew Union Free Sch. Dist., 2008 WL 4501940, at \*3-\*4 [W.D.N.Y. Sept. 30, 2008]; see also Chenier v. Richard W., 82 N.Y.2d 830, 832 [1993]; Hearst Corp. v. Clyne, 50 N.Y.2d 707, 714 [1980]; Application of a Child with a Disability, Appeal No. 07-139). In general, cases dealing with issues such as desired changes in IEPs, specific placements, and implementation disputes may become moot at the end of the school year because no meaningful relief can be granted (see, e.g., Educ. Law § 2[15];

Application of the Bd. of Educ., Appeal No. 06-044; Application of the Bd. of Educ., Appeal No. 05-058; Application of a Child with a Disability, Appeal No. 04-027; Application of a Child with a Disability, Appeal No. 00-037; Application of the Bd. of Educ., Appeal No. 00-016; Application of a Child with a Disability, Appeal No. 96-37). In addition, a case becomes moot when the parties lack a legally cognizable interest in the outcome (Murphy v. Hunt, 455 U.S. 478, 481 [1982]). In determining whether a controversy has become moot, the relevant inquiry is whether the facts alleged, under all the circumstances, show that there is a substantial controversy of sufficient immediacy and reality to warrant relief (Christopher P. v. Marcus, 915 F.2d 794, 802 [2d Cir. 1990]). Administrative decisions rendered in cases that concern such issues that arise out of school years since expired may no longer appropriately address the current needs of the student (see Daniel R.R. v. El Paso Indep. Sch. Dist., 874 F.2d 1036, 1040 [5th Cir. 1989]; Application of a Child with a Disability, Appeal No. 07-139; Application of the Bd. of Educ., Appeal No. 07-028; Application of a Child with a Disability, Appeal No. 06-070; Application of a Child with a Disability, Appeal No. 04-007). Thus, consistent with the mootness doctrine, State Review Officers have determined that there is no need to decide issues on appeal that are no longer in controversy, or to make a determination that would have no actual effect on the parties (Application of a Child with a Disability, Appeal No. 07-066; Application of a Child with a Disability, Appeal No. 05-018; Application of a Child with a Disability, Appeal No. 02-110; Application of a Child with a Disability, Appeal No. 98-73; Application of a Child Suspected of Having a Disability, Appeal No. 95-60). (08-035). However, a claim may not be moot despite the end of a school year for which the student's IEP was written, if the conduct complained of is "capable of repetition, yet evading review" (see Honig v. Doe, 484 U.S. 305, 318-23 [1988]; Lillbask, 397 F.3d at 84-85; Daniel R.R., 874 F.2d at 1040; Application of a Child with a Disability, Appeal No. 04-038).

The exception applies only in limited situations (City of Los Angeles v. Lyons, 461 U.S. 95, 109 [1983]), and is severely circumscribed (Knaust v. City of Kingston, 157 F.3d 86, 88 [2d Cir. 1998]). It must be apparent that "the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration" (Murphy v. Hunt, 455 U.S. 478, 482 [1982]; see Knaust, 157 F.3d at 88; Application of a Child with a Disability, Appeal No. 07-139). Controversies are "capable of repetition" when there is a reasonable expectation that the same complaining party would be subjected to the same action again (Weinstein v. Bradford, 423 U.S. 147, 149 [1975]; see Hearst Corp., 50 N.Y.2d at 714-15; Application of a Child with a Disability, Appeal No. 07-139). To create a reasonable expectation of recurrence, repetition must be more than theoretically possible (Murphy, 455 U.S. at 482; Russman v. Bd. of Educ., 260 F.3d 114, 120 [2d Cir. 2001]; Application of a Child with a Disability, Appeal No. 07-139). Mere speculation that the parties will be involved in a dispute over the same issue does not rise to the level of a reasonable expectation or demonstrated probability of recurrence (Russman, 260 F.3d at 120; Application of a Child with a Disability, Appeal No. 07-139). Mootness may be raised at any stage of litigation (In re Kurtzman, 194 F.3d 54, 58 [2d Cir. 1999]; Application of a Child with a Disability, Appeal No. 07-139).

Upon due consideration and independent review of the entire hearing record, the district correctly argues—and the impartial hearing officer correctly acknowledged in her decision—that the parent in this case sought a declaratory judgment as to the appropriateness of the student's 2007-08 and 2008-09 IEPs and requested, as relief, programmatic and classification changes to

the student's IEP, which, by virtue of the expiration of the respective school years, renders the parent's claims moot because no meaningful relief can be given (see IHO Decision at p. 27; see, e.g., Dist. Exs. I.A at pp. 3-6; I.B at pp. 2-4; IV.C; IV.F). Moreover, while it is generally accepted that a request for compensatory educational services as relief can survive a mootness challenge, the parent's attempt to evade dismissal of her claims as moot by requesting compensatory educational services for the first time in her closing brief must fail in this case because the request was both untimely and not supported by the hearing record (see generally Lillbask, 397 F.3d 77, 89-90; Brennan v. Regional Sch. Dist. No. 1 Bd of Educ., et al, 531 F. Supp. 2d 245, 264-65 [D.Conn. 2008] [noting that the remedy of compensatory education services is "designed to compensate a student who was actually educated under an inadequate IEP"]; Reid v. Dist. of Columbia, 401 F.3d 516, 524 [DC Cir. 2005] [holding regarding compensatory awards that "the inquiry must be fact-specific and, to accomplish the I[n]dividuals with] D[isabilities] E[ducation] A[ct's] purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place"]; Application of a Student with a Disability, Appeal No. 08-078; Application of a Student with a Disability, Appeal No. 08-035; Application of a Student with a Disability, Appeal No. 07-118 [finding that the impartial hearing officer improperly allowed a party to raise the issue of compensatory educational services as relief during the impartial hearing when compensatory educational services was not raised in the due process complaint notice as either an allegation or as a basis for relief]).<sup>37,38</sup> Here, the parent did not raise the issue of compensatory educational services as

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<sup>37</sup> A party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 C.F.R. §§ 300.511[d], 300.508[d][3][i]; 8 NYCRR 200.5[j][1][ii]) or the original complaint is amended prior to the impartial hearing per permission given by an impartial hearing officer at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 C.F.R. § 300.508[d][3][ii]; see Application of the Dep't of Educ., Appeal No. 07-059; Application of the Dep't of Educ., Appeal No. 07-046; Application of a Child with a Disability, Appeal No. 06-065; Application of a Child with a Disability, Appeal No. 06-139).

<sup>38</sup> Within the Second Circuit, compensatory education has been viewed as instruction provided to a student after he or she is no longer eligible because of age or graduation to receive instruction. It has been awarded if there has been a gross violation of the IDEA resulting in the denial of, or exclusion from, educational services for a substantial period of time (see Somoza v. New York City Dep't of Educ., 538 F.3d 106, 109 [2d Cir. 2008]; Mrs. C. v. Wheaton, 916 F.2d 69 [2d Cir. 1990]; Burr v. Ambach, 863 F.2d 1071 [2d Cir. 1988]; Application of a Child with a Disability, Appeal No. 03-078 [awarding two years of instruction after expiration of IDEA eligibility as compensatory education]; but see Newington, 546 F.3d 111, 123 [upholding an award of compensatory education for a school aged student without finding a gross violation of the IDEA]; Student X v. New York City Dep't of Educ., 2008 WL 4890440, at \*23 [E.D.N.Y. Oct. 30, 2008] [finding that compensatory education may be awarded to students under the age of twenty-one]). Compensatory education is an equitable remedy that is tailored to meet the circumstances of the case (Wenger v. Canastota, 979 F. Supp. 147 [N.D.N.Y. 1997]). State Review Officers also have awarded compensatory "additional services" to students who remain eligible to attend school and have been denied appropriate services, if such deprivation of instruction could be remedied through the provision of additional services before the student becomes ineligible for instruction by reason of age or graduation (Bd. of Educ. v. Munoz, 16 A.D.3d 1142 [4th Dep't 2005] [finding it proper for a State Review Officer to order a school district to provide "make-up services" to a student upon the school district's failure to provide those educational services to the student during home instruction]; Application of a Child with a Disability, Appeal No. 08-072 [awarding after school and summer reading instruction as compensatory services to remedy a denial of a FAPE]; Application of the Bd. of Educ., Appeal No. 08-060; Application of the Bd. of Educ., Appeal No. 06-074; Application of a Child with a Disability, Appeal No. 05-041; Application of a Child with a Disability, Appeal No. 04-054).

either an allegation or as a basis for relief in her due process complaint notice, the parent did not request to amend her due process complaint notice at any time prior to or during the nearly year-long impartial hearing to include such a claim for relief, the district's attorney raised numerous objections to attempts to introduce either testimonial or documentary evidence related to issues not raised in the due process complaint notice, and notably, the hearing record does not reflect that a deprivation of educational services occurred that caused harm and that could be rectified by an award of compensatory educational services. Given the circumstances of this case—and as noted by the impartial hearing officer in the decision—a more appropriate equitable remedy would have been to remand the matter to the CSE to recommend an appropriate placement for the 2008-09 school year, which would serve no purpose because the 2008-09 school year had expired and the parties had developed an IEP for the 2009-10 school year. To the extent that the parent asserts on appeal her intent to prepare and serve a request for an impartial hearing related to the 2009-10 school year, such intent constitutes no more than "mere speculation" that the parties will be involved in a dispute over the same issues raised in the instant matter and thus, does not rise to the level of a reasonable expectation or demonstrated probability of recurrence to invoke the exceptions to the mootness doctrine.

In addition, a review of hearing record reveals that during the 2007-08 school year, the student's educational needs did change, prompting the district to revise and implement additional strategies and eventually seek an out-of-district placement. The hearing record contains no evidence or information about the student's current educational needs or placement, and thus, rendering an administrative decision in this case, where the issues arose out of two school years long since expired, would be meaningless, as it may no longer appropriately address the current educational needs of the student (see Daniel R.R. v. El Paso Indep. Sch. Dist., 874 F.2d 1036, 1040 [5th Cir. 1989]; Application of a Child with a Disability, Appeal No. 07-139; Application of the Bd. of Educ., Appeal No. 07-028; Application of a Child with a Disability, Appeal No. 06-070; Application of a Child with a Disability, Appeal No. 04-007). Thus, given the circumstances of this case and as the impartial hearing officer noted in her decision, although the "standard remedy" would be to remand this case to the CSE to determine an appropriate placement for the student, it would serve no purpose under these facts.

To the extent that the parent argues that the district unduly protracted the length of the impartial hearing, and thus, the exceptions to the mootness doctrine apply, this argument must also fail as the hearing record does not support this assertion. To the contrary, the hearing record does not contain objections by either party regarding the scheduling or requests for adjournments, and further, the parent mutually agreed to the same (see Tr. pp. 1-1965; see generally, Application of the Bd. of Educ., Appeal No. 09-081; Application of the Dept. of Educ., Appeal No. 08-061). Both federal and State regulations require an impartial hearing officer to render a decision within 45 days after the expiration of the resolution period (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 do, however, remind and caution the impartial hearing officer, as well as both parties in this matter, that it is incumbent upon the impartial hearing officer to only grant extensions consistent with regulatory constraints and to ensure that the record documents 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, settlement discussions between the parties or other similar reasons." (8 NYCRR 200.5[j][5][iii]).

Alternatively, even if the matter had not been moot, upon independent review and due consideration of the hearing record in this matter, I find that the impartial hearing officer, in a thorough and well-reasoned 48-page decision, correctly determined that the district offered the student a FAPE for the 2007-08 school year, the district properly classified the student as OHI, the district failed to sustain its burden to establish that it offered the student a FAPE for the 2008-09 school year, and further, that equitable relief in the form of compensatory educational services was not warranted to remedy the district's failure to offer a FAPE for the 2008-09 school (see Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]; Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 130 [2d Cir. 1998]; Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1121-22 [2d Cir. 1997]; Application of the Bd. of Educ., Appeal No. 05-081; see generally Forest Grove v. T.A., 129 S. Ct. 2484, 2491 [2009]). The impartial hearing officer accurately recounted the facts of the case, she set forth the proper legal standard to determine whether the district offered the student a FAPE for the 2007-08 and 2008-09 school years and whether the district properly classified the student as OHI (IHO Decision at pp. 1-48). The decision shows that the impartial hearing officer carefully considered the testimonial and documentary evidence presented by both parties, and further, that she carefully marshaled and weighed the evidence in support of her conclusions and properly supported her conclusions with citations to the hearing record (id.). In short, based upon my review of the entire hearing record, I find that the impartial hearing was conducted in a manner consistent with the requirements of due process and that there is no need to modify the determinations of the impartial hearing officer (34 C.F.R. § 300.510[b][2]; Educ. Law § 4404[2]). Therefore, I adopt the findings of fact and conclusions of law of the impartial hearing officer, with the exception of the impartial hearing officer's rationale asserted for declining to award compensatory educational services (see Application of a Child with a Disability, Appeal No. 06-136; Application of the Bd. of Educ., Appeal No. 03-085; Application of a Child with a Disability, Appeal No. 02-096). As explained above, the parent would not be entitled to an award of compensatory educational

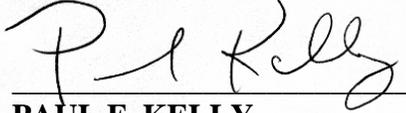
services due to her failure to timely request such relief and because the hearing record does not reflect a deprivation of educational services to be remedied by an award of compensatory educational services (see generally Lillbask, 397 F.3d at 89-90; Brennan, 531 F. Supp. 2d at 264-65; Reid, 401 F.3d at 524; Application of a Student with a Disability, Appeal No. 08-078; Application of a Student with a Disability, Appeal No. 08-035; Application of a Student with a Disability, Appeal No. 07-118).

I have considered the parties remaining contentions and find that in light of my determinations, I need not reach them or they are without merit.

**THE APPEAL IS DISMISSED.**

**THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.**

**Dated:**            **Albany, New York**  
**December 14, 2009**

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