



The University of the State of New York

The State Education Department

State Review Officer

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No. 10-100

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 [REDACTED]

Appearances:

Law Offices of Anton Papakhin, P.C., attorneys for petitioner, Anton Papakhin, Esq., of counsel

Michael Best, Special Assistant Corporation Counsel, attorney for respondent, Tracy Siligmuller, Esq., of counsel

DECISION

Petitioner (the parent)¹ appeals from the decision of an impartial hearing officer which determined that respondent's (the district's) March 14, 2009 individualized education program (IEP) offered the student a free appropriate public education (FAPE) for the 2009-10 school year and denied her request to immediately place the student and provide funding for the student's placement in an out-of-State approved nonpublic school (NPS). The appeal must be sustained in part.

At the time of the impartial hearing, the student was attending ninth grade at a district high school in an integrated co-teaching (ICT) classroom and receiving counseling as a related service (Tr. pp. 12-15).^{2, 3} The student's eligibility for special education programs and services

¹ The student is represented by his legal guardian who will be referred to as the "parent" for purposes of this decision (see 20 U.S.C. § 1401[23][B]; 34 C.F.R. § 300.30[a][3]; 8 NYCRR 200.1[ii][1]).

² The student attended ninth grade at the same district high school for both the 2008-09 and 2009-10 school years. At the impartial hearing on April 27, 2010, a district witness testified that the student was currently "failing all of his classes at the end of his ninth grade" and that he was "at risk of not being promoted to the 10th grade for September 2010" (Tr. p. 58).

³ State regulation defines "integrated co-teaching" as "the provision of specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students" (8 NYCRR 200.6[g]). School personnel assigned to an integrated co-teaching class shall minimally include a special

as a student with an emotional disturbance is not in dispute in this matter (see 34 C.F.R. § 300.8[c][4]; 8 NYCRR 200.1[zz][4]; Tr. p. 14).

Initially, the student exhibited aggressive behavior toward other children when he was four years old at his Head Start program, and subsequent to an evaluation, he began receiving psychiatric counseling services once a month at a mental health agency (Tr. pp. 129-31). The student continued to receive psychiatric counseling services once per month until approximately sixth grade, when the student exhibited violent behavior at school and his psychiatric counseling services increased to two sessions per month (Tr. p. 130). In January 2005, a second mental health agency (agency) conducted a psychosocial assessment of the student due to the parent's concern that the initial mental health agency overmedicated the student (Tr. pp. 131-32; Parent Ex. E at pp. 13, 21, 27). At that time, the student demonstrated low frustration tolerance, he often appeared angry, he was disrespectful and disruptive at home and at school, and he hit both "staff and peers" at school (Parent Ex. E at pp. 3, 14, 27). In addition, the student fought with others and did not have friends (id. at p. 20). As a result of the assessment, the student received a diagnosis of an attention deficit hyperactivity disorder (ADHD), and the agency recommended that the student receive individual/play therapy, collateral guidance/therapy, and family therapy (id. at p. 27).

As reported in an agency psychosocial update from February 2006, the student's behavior had improved and he no longer lashed out or became "inappropriately angry" (Parent Ex. E at p. 9). At that time, the student had friends at school, he was "doing well" in school, and the school "rarely" called about the student's behavior (id.). As a result, the agency reduced the student's therapy to one session per month, and maintained the student's monthly psychiatric evaluation for medication management (id.). The agency recommended child, collateral, and child/collateral treatment services, as well as adjunctive services of medication management (id. at p. 10). The updated report noted the following diagnoses for the student: "ADHD R/O bipolar disorder" (id.).

In February 2007, the agency prepared a psychosocial update, which reported "[n]ew [p]resenting symptoms or behavior" and "[c]hanges in [p]sychiatric presentation" (Parent Ex. E at p. 11). Socially, the student maintained friendships, but he did not complete homework (id.). In addition, the update noted a recent suspension from school and that the student had engaged in a fight (id.). At that time, the student had missed approximately 50 percent of his scheduled appointments due to his parent's illnesses (id.). The updated report maintained the student's diagnosis of ADHD (id.). The agency continued to recommend child and collateral treatment services, as well as adjunctive services of medication management (id. at p. 12).

In March 2008, the student underwent a psychiatric reevaluation "for medication for treatment of ADHD" (Parent Ex. E at p. 8). At that time, the student was "oppositional at home"

education teacher and a regular education teacher (8 NYCRR 200.6[g][2]). The Office of Special Education issued an April 2008 guidance document entitled "Continuum of Special Education Services for School-Age Students with Disabilities," which further describes integrated co-teaching services (see <http://www.p12.nysed.gov/specialed/publications/policy/schoolagecontinuum.html>). For purposes of clarity, the term "collaborative team teaching" or "CTT" is used interchangeably throughout this decision with "ICT" and "integrated co-teaching."

and "fighting in school" (id.). The psychiatrist maintained the student's diagnosis of ADHD and added a diagnosis of oppositional defiant disorder (id.). In addition to continuing medication for ADHD, the psychiatrist recommended consultation with the agency psychiatrist as needed (id.).

In September 2008, the student began attending ninth grade at a district high school for the 2008-09 school year (Tr. pp. 112, 133). The student continued to receive agency therapy services during this academic year, and in a February 2009 psychosocial update, the student reported experiencing difficulty in his relationships with "a few of his male peers" and with his parent (Parent Ex. E at p. 6). The update characterized the student's progress as "inconsistent" due to his "sporadic . . . compliance to therapy" (id.). At that time, the student's expressed desire for "more independence at home" conflicted with his difficulties in "making appropriate decisions, including cleaning his room, completing chores, keeping [treatment] appointments and adhering to his [parent's] rules" (id.). The update noted that the student was "not doing well" at school and might "need to attend summer school" if the student did not complete his assignments (id.; Tr. pp. 133-35).⁴ The updated report included the following diagnoses for the student: ADHD, R/O bipolar disorder (Parent Ex. E at p. 7). The agency recommended child, collateral, child/collateral, family and group treatment services, as well as adjunctive services of medication management, family support services, and school records (id.).

On March 14, 2009, a district regular education teacher, a district special education teacher, the student, and the parent convened to conduct the student's annual review and to develop an IEP to be implemented from March 4, 2009 through March 4, 2010 (Parent Ex. B at pp. 2-3). In the present levels of academic performance and learning characteristics, the IEP team noted that the student could read fluently and that according to teacher assessment, he exhibited comprehension skills at "around" the seventh grade level (id. at p. 3). In addition, the IEP team indicated that the student could "comprehend material" presented in his classes (id.). Referring to the student's performance on a State-wide assessment in January 2007, the IEP team noted that the student demonstrated "significant delays" in writing (id.). Similarly, the IEP team noted that although the student's performance on the mathematics problem solving portion of the January 2007 State-wide assessment indicated that he was "in need of serious remediation," he displayed a "higher" ability to perform computational work (id.).

To address the student's academic needs, the IEP team recommended the following environmental and human/material resources: special education teacher support in the classroom, preferential seating, modified classroom and homework assignments, instructions and directions repeated, and extended time to copy blackboard notes (Parent Ex. B at p. 3). In addition, the IEP team further indicated that the student would benefit from a multisensory approach, the use of manipulatives, extended time for tests, group work, and the use of a calculator (id.).

Turning to the student's present levels of social/emotional performance, the IEP team indicated that the student tended to "drift off" in class, but that he complied with reminders to "stay on task" (Parent Ex. B at p. 4). The IEP team noted that the student would talk at "inopportune times" and that he needed "to be pulled up about it" (id.). The student was also described as "respectful" and "not a behavior problem" (id.). According to the IEP team, the student benefited from counseling services and special education teacher support in the

⁴ The parent testified that the student did not attend summer school during summer 2009 (Tr. pp. 134-35).

classroom (id.). With respect to his health and physical development, the IEP team noted that the student appeared to be in good health and that he was administered medication at home for ADHD and asthma (id. at p. 5).

To address the student's academic and social/emotional needs described in the IEP, the IEP team recommended that the student be placed in a collaborative team teaching (CTT) classroom (Parent Ex. B at p. 1). In addition, the IEP team recommended that the student receive one 40-minute session per week of group counseling (id. at p. 10). The IEP team also recommended the following program modifications and supports for school personnel to address the student's needs: access to the student's IEP; consultation with a special education teacher and collaboration with the related services provider (counseling); information on learning disabilities, including implications for instruction; and staff development in the use of instructional and behavioral interventions (id. at p. 8). The IEP included the following testing accommodations: extended time, separate location, and use of a calculator (id. at p. 10). The student's March 14, 2009 IEP included long term adult outcomes and a list of transition services, as well as annual goals (id. at pp. 6, 12).

According to the hearing record, the student's academic performance declined during the second half of ninth grade, and he failed "almost all" of his classes (Tr. pp. 112-13, 133-34; see Parent Ex. D at pp. 4, 6). During the 2008-09 school year, district attendance records reported the student absent from school for a total of 24 days and late for a total of eight days (Parent Ex. D at p. 7). Because the student did not earn sufficient course credits during ninth grade in the 2008-09 school year, he repeated ninth grade for the 2009-10 school year (Tr. pp. 113, 134-35; Parent Ex. A at p. 1).

Shortly after the start of the 2009-10 school year, the agency discharged the student and terminated his services due to the student's treatment non-compliance and failure to attend an excessive number of scheduled appointments (Parent Ex. E at p. 3). An agency psychiatric case note, dated October 6, 2009, indicated that the student expressed concern "about his anger" and had asked for the appointment (id. at p. 5). The case note further indicated that at that time the parent was "arranging" to place the student at NPS (id.). On October, 20, 2009, the student failed to attend his scheduled appointment or respond to the treatment provider's outreach, which prompted the agency's decision to terminate services (id. at p. 3). On a discharge summary, the agency noted a "slight improvement" in the student's status and maintained the diagnoses of ADHD and R/O bipolar disorder (id.).

By letter dated November 16, 2009, the parent advised the district that the student was "not making any notable progress behaviorally or academically" and that his behavior at home and at school had deteriorated (Parent Ex. C at p. 1). The parent requested an evaluation of the student and asked that the "IEP" reconvene "for the purpose of adding" a residential placement for the student, since the "current educational approach [was] not effectively working" (id.). The parent also requested copies of the student's school records (id.).

By letter dated December 14, 2009, the district's guidance counselor notified the parent that the student had failed one or more classes in the last marking period and that two or more failures would jeopardize the student's promotion to the next grade (Parent Ex. D at pp. 1-2).

The guidance counselor invited the parent to meet with her and the student's teachers and noted that the parent should not hesitate to telephone her if she had any concerns (id.). At that time, district attendance records reported the student absent from school for a total of 26 days and late for an additional 19 days (id. at p. 7).

On December 28, 2009, the parent requested a copy of the student's records from the agency to aid her efforts in securing a residential placement for the student (Parent Ex. E at p. 1). By letter dated January 14, 2010, NPS notified the parent of the student's acceptance for immediate enrollment into the center's residential program (Parent Ex. F at p. 1).

On January 27, 2010, the student's teachers issued progress reports, which indicated that the student did not attend classes (Parent Ex. P at pp. 1-3). The teachers rated the student's grades and homework as "poor" (id.). The student's science teacher characterized the student's behavior as "respectful" and "low key," and opined that his behavior "may be a sign of depression" (id. at p. 1).

On March 1, 2010, the district issued a "Promotion in Doubt Status" letter to the parent (Parent Ex. N). According to the letter, the student was in "danger of failing" English based upon the following reasons: excessive absences, which "prevent[ed] material to be learned and practiced;" the student missed "more than 15 class periods;" the student was "disruptive daily, and distract[ed] other[s] in class, which prevent[ed] comprehension;" the student had "low grades on tests or quizzes;" the student was "missing required projects/ labs/ assignments/ papers in this course;" the student failed to complete or hand in "more than half of the homework assignments;" the student failed to wear his "uniform," which was required for participation in cooking/baking; and the student "rarely" participated in "class discussions or activities" (id.). To increase the student's chances of passing English, the letter recommended, among other things, that the student attend "tutoring" and "focus on paying attention, instead of disrupting the class" (id.).

On March 11, 2010, a district regular education teacher, a district special education teacher, a district representative, the student, and the parent (via telephone) convened to conduct the student's annual review and to develop an IEP to be implemented from March 15, 2010 through March 14, 2011 (Dist. Ex. 3 at pp. 1-2). The March 11, 2010 IEP repeated, verbatim, much of the information contained in the March 14, 2009 IEP (compare Parent Ex. B, with Dist. Ex. 3). For example, the IEP team repeated the description of the student's present levels of academic performance and social/emotional development from the student's March 14, 2009 IEP, but added some information regarding the student's post-secondary plans and school attendance (compare Parent Ex. B at pp. 3-4, with Dist. Ex. 3 at pp. 5-6). The IEP team also added information regarding the student's "issues with school attendance and possible substance abuse/experimentation" (compare Parent Ex. B at p. 4, with Dist. Ex. 3 at p. 5). The IEP team repeated three of the student's annual goals from the March 14, 2009 IEP in the March 11, 2010 IEP, and added three new annual goals (compare Parent Ex. B at pp. 6-7, with Dist. Ex. 3 at pp. 8-9). In addition, the IEP reduced the student's testing accommodations by no longer recommending the use of a calculator (compare Parent Ex. B at p. 10, with Dist. Ex. 3 at p. 12). To address the student's needs, the IEP team continued to recommend placing the student in a

CTT classroom with counseling as a related service (compare Parent Ex. B at pp. 1, 8-10, with Dist. Ex. 3 at pp. 1, 10-12).⁵

By letter dated March 18, 2010, the district's school principal informed the parent that the student had received a two-day principal's suspension because the student left class or the school premises without the permission of school personnel and because the student had been insubordinate and defied or disobeyed school personnel (Parent Ex. O).

On March 26, 2010, the district's school psychologist conducted a psychoeducational evaluation of the student for his "[m]andated 3-[y]ear review" (Dist. Ex. 5 at p. 1).^{6, 7} According to the report, the student accrued 4.0 credits in his first semester and 1.0 credit in his second semester out of a total of 22.40 possible academic credits, and had earned a "cumulative grade point average" of 59 percent (id.). The psychologist noted that the student had accumulated 33 absences and was late on 27 additional days since the beginning of the school year (id.). The evaluation report included information obtained from the student's teachers (id.). The student's then-current special education teacher described the student as having "good intellect, . . . but low motivation" (id.). A teacher also reported that the student was a "pleasure" when engaged in class, and he raised his hand and made thoughtful contributions to class discussions; however, at other times, the student appeared quiet and "under the influence" (id. at pp. 1-2). At times, the student would be cooperative and follow school rules, but he had received a principal's suspension "last year" (id. at p. 2).

The school psychologist also interviewed the parent as part of the psychoeducational evaluation (Dist. Ex. 5 at p. 2). The parent reported seeking "help for [the student] since four years of age when [she] took him to a psychiatrist" and that the student received medication for his ADHD since age nine (id.). She further indicated that the student's "case was dropped" by the agency "due to too many missed appointments" (id.).⁸ At the time of the evaluation, the parent reported that the student refused to take medication and refused to attend mental health counseling services (id.). According to the parent, the student exhibited poor impulse control, he was "increasingly oppositional," and he "smoke[d] weed everyday" (id.). The parent explained that when the student did not "smoke weed," he became "moody," he would throw things, and he would slam doors (id.). In order to get the student to attend school, the parent locked the student out of the apartment and had walked the student to his classes (id.). The parent reported feeling "exasperated" and that she wanted the student to attend either a "residential school or voluntarily

⁵ Neither the hearing record, nor the IEP itself, denotes whether the parent received a copy of the student's March 11, 2010 IEP (Tr. pp. 1-248; Dist. Exs. 1-6; Parent Exs. A-R; see Dist. Ex. 3 at p. 2; see also Parent Ex. A at p. 2).

⁶ The hearing record does not indicate why the student's mandated 3-year review did not occur prior to the March 11, 2010 IEP team meeting (Tr. pp. 1-248; Dist. Exs. 1-6; Parent Exs. A-R).

⁷ A district witness testified that the March 26, 2010 psychoeducational evaluation did not occur as a result of the parent's request for an evaluation of the student in her November 16, 2009 letter (Tr. p. 80; Parent Ex. C).

⁸ The school psychologist testified at the impartial hearing that she did not seek to obtain the student's treatment records from the mental health agency and further, that she had no knowledge of whether other school personnel had obtained the records (Tr. pp. 46-48).

attend a dual diagnosis drug rehabilitation facility where both his drug and mental health issues [could] be addressed" (id.).

According to the psychologist, a review of previous testing in 2001 and 2004 indicated that the student's cognitive level fell within the "[a]verage" range (Dist. Ex. 5 at p. 2). The psychologist characterized the previous test scores as "reliable and stable" and therefore, further intelligence testing would not be necessary at that time (id.). She also noted that an administration of the Wechsler Individual Achievement Test—Second (WIAT-II) in April 2007 revealed that the student functioned academically in the "[a]verage" range and "on grade level" with the exception of written expression, where the student functioned in the "[l]ow [a]verage" range (id.). On previous testing, the student's teachers reported that the student demonstrated "difficulty maintaining focus" and tended to be "too playful" (id.).

For the March 2010 evaluation, the school psychologist administered the WIAT-II to the student, which yielded the following standard scores: word reading, 89; reading comprehension, 84; pseudoword decoding, 100; numerical operations, 77; math reasoning, 84; listening comprehension, 90; and oral expression, 95 (Dist. Ex. 5 at p. 4). The student's WIAT-II scores reflected "slightly below" grade-level and age-level expectancies in "all academic areas" (id. at p. 2). The student could read high school level passages with some fluency, but he tended to not pay attention to important details (id.). As a result, the student sometimes grasped the opposite idea of what the readings intended or provided "tangential" responses to test questions (id.). The psychologist concluded, however, that the student could "successfully read high school level passages" and derived "proficient meaning from reading" (id.).

Based upon the testing results, the psychologist opined that the student could express his ideas orally, and in general, he could express abstract ideas (Dist. Ex. 5 at p. 2). In addition, the psychologist reported the student's listening comprehension as a relative strength and mathematics as an area of weakness (id. at p. 3). She noted that although the student appeared to have a "solid foundation in beginning math," the student would often make "careless mistakes" and his solutions to test items "were often off by 1 digit" (id.). In addition, the student could perform basic mathematics operations with two and three digit numbers, but he exhibited "difficulty and inconsistency with place value" (id.). The psychologist further noted that "[t]esting of the limits revealed adequate ability to grasp new and complex information" (id.).

After analyzing the student's testing results, the psychologist noted that the student reported "smok[ing] weed" prior to the testing session, but denied being "high" and that he had "performed to the best of his ability" (Dist. Ex. 5 at p. 3). The psychologist opined that the testing session "underestimate[d]" the student's "skill levels and abilities" (id.). She concluded that the student's refusal of mental health treatment, his drug use, and "emotional factors related to anger, depression, and a history of rejection and abuse severely limited [the student's] ability to function academically" (id.). In summary, the psychologist noted that the student presented with mathematics skills at approximately the "6.6 grade level of instruction" and with reading comprehension skills at approximately the "7.5 grade level" (id.). She deferred the student's recommendation and placement decisions for a determination at an "Educational Planning Conference" (id.). However, the psychologist did include the following recommendations: "treatment from a mental health facility" to address the student's "drug and mental health issues,"

encouragement for the student "to participate in school wide social activities to foster a sense of belonging and community," and to increase the student's academic counseling to include one 40-minute individual session and one 40-minute small group session (id.).

By due process complaint notice dated March 29, 2010, the parent alleged that the district failed to offer the student a FAPE for the 2009-10 school year based upon both procedural and substantive grounds, and further, that the CSE failed to conduct an annual review to develop the student's IEP for the 2010-11 school year (Parent Ex. A at pp. 1-2). According to the parent, the student's "long history of behavioral and emotional problems . . . significantly interfered" with his education, and since entering the district's high school in the 2008-09 school year, the student's behavior had deteriorated and now required a residential placement (id.). The parent argued that the district's recommendation in the March 14, 2009 IEP to place the student in a CTT program for the 2009-10 school year was not appropriate given the student's "severe behavior needs" (id. at p. 2). In addition, the parent noted that the student was currently failing "all subjects due to non-participation and avoidance of school work" (id.). As relief, the parent requested a finding that the district failed to offer the student a FAPE for the 2009-10 school year, an order directing the district to immediately place the student at NPS, and an order directing the district to fund the student's attendance at NPS through either the issuance of a Nickerson letter or direct funding to NPS (id. at pp. 2-3).

On April 9, 2010, the student's teachers completed progress reports, which indicated that the student did not attend class and that his grades and homework were "poor" (Parent Ex. P at pp. 4-6).

On April 16, 2010, a district school psychologist (who also acted as the district representative),⁹ a district regular education teacher, a district special education teacher, the student's then-current district special education teacher, a district guidance counselor, a related service provider, and the parent convened to conduct the student's triennial review and to develop an IEP to be implemented from April 30, 2010 through April 16, 2011 (Dist. Ex. 2 at pp. 1-2; see Tr. pp. 25-26; see also Parent Ex. P).¹⁰ In the student's present levels of academic performance, the IEP team inserted information directly from the student's March 26, 2010 psychoeducational evaluation report (compare Dist. Ex. 2 at pp. 3-5, with Dist. Ex. 5 at pp. 1-2, 4).¹¹ Under academic management needs, the IEP repeated a majority of the environmental

⁹ The school psychologist in attendance at the April 2010 IEP meeting was the same school psychologist who conducted the student's March 2010 psychoeducational evaluation (compare Dist. Ex. 2 at p. 2, with Dist. Ex. 5 at p. 3).

¹⁰ In the district's answer submitted in response to the parent's petition for review, the district indicated that the "April 2010 triennial was conducted as a result of a partial resolution agreement reached on April 15, 2010" (Answer at p. 10, n.6). The district is cautioned that both State and federal regulations require districts to conduct an appropriate reevaluation of students with disabilities "at least once every three years, except where the school district and the parent agree in writing that such reevaluation is unnecessary" (8 NYCRR 200.4[b][4]; see 34 C.F.R. § 300.303[b][2]).

¹¹ At this time, district attendance records reported the student absent a total of 53 days and late on 33 additional days (see Parent Ex. D at p. 7). According to the attendance record, the student had attended only 66 days of a total of 134 days of school (id.).

modifications and human/material resources needed to address the student's academic and social/emotional management needs as contained in the student's March 2009 and March 2010 IEPs, but added the following: frequent checks to monitor the student's comprehension, provide the student with opportunities for repetition and redirection, and that the student benefitted from having a special education teacher in the classroom and from receiving counseling (compare Dist. Ex. 2 at pp. 4-5, with Parent Ex. B at pp. 3-4, and Dist. Ex. 3 at pp. 5-6). In addition, the IEP team removed "modified class/ homework assignments" and "use of a calculator" from the student's IEP (compare Dist. Ex. 2 at p. 3, with Parent Ex. B at p. 3, and Dist. Ex. 3 at p. 5).

According to the April 2010 IEP, the IEP team developed a behavior intervention plan (BIP) for the student (Dist. Ex. 2 at p. 5).¹² The IEP team revised the student's annual goals and short term objectives to include goals related to the student developing awareness of the social and academic behaviors that affected his school performance, demonstrating knowledge and understanding of the components of a story, demonstrating improved spelling and expressive writing skills, solving word problems, solving multi-step multiplication and division equations, formulating a realistic post-high school plan, relating school subjects to potential careers and exploring career information, and increasing his writing skills (id. at pp. 7-8). In addition, the IEP team revised the student's transition services to include greater detail (compare Dist. Ex. 2 at pp. 12-13, with Parent Ex. B at p. 12, and Dist. Ex. 3 at pp. 13-14). The IEP team also modified the student's testing accommodations to add "directions read and reread aloud" (compare Dist. Ex. 2 at p. 11, with Dist. Ex. 3 at p. 12).

Ultimately, the IEP team continued to recommend placing the student in an ICT classroom with counseling as a related service (compare Dist. Ex. 2 at p. 1, with Parent Ex. B at p. 1, and Dist. Ex. 3 at p. 1).¹³ However, the IEP team increased the student's counseling services by recommending one additional 40-minute session of individual counseling per week to the IEP (Dist. Ex. 2 at pp. 2, 11).

On April 27, 2010, the parties proceeded to an impartial hearing that was conducted over the course of two, nonconsecutive days and concluded on June 21, 2010 (Tr. pp. 1, 162). By decision dated August 31, 2010, the impartial hearing officer determined that the district sustained its burden to establish that the March 14, 2009 IEP offered the student a FAPE, and denied the parent's request for "prospective tuition reimbursement" (IHO Decision at pp. 23-25). The impartial hearing officer concluded that the student's poor school attendance was "clearly related" to his substance abuse, and further, that his substance abuse and "behavior problems at home" could be addressed with "appropriate counseling" (IHO Decision at pp. 23-25). The impartial hearing officer determined that the March 14, 2009 IEP was reasonably calculated to provide the student with educational benefits and that the student did not "appear to require a

¹² The April 16, 2010 IEP submitted into evidence at the impartial hearing did not include a BIP (see Tr. pp. 50-51; Dist. Ex. 2). In addition, a district witness testified that the district did not conduct a functional behavior assessment (FBA) prior to developing the BIP (Tr. pp. 52-53). The district witness further testified that she did not conduct an FBA because the "student was not in school" (id.).

¹³ The school psychologist testified at the impartial hearing that the recommended ICT classroom with counseling as a related service was an appropriate program for the student because when the student attended on a "regular basis, he did very well;" however, it was "his attendance and his other issues that [were] interfering with his ability to be successful" (Tr. pp. 30-31).

highly restrictive residential out of state school placement to resolve [his] problems" (id. at pp. 24-25).

On appeal, the parent contends that the impartial hearing officer erred in finding that the March 14, 2009 IEP offered the student a FAPE for the 2009-10 school year, and further, that the district failed to offer the student a FAPE for the 2009-10 and 2010-11 school years because the recommended CTT classrooms were not appropriate to meet the student's special education needs. The parent argues that the district failed to evaluate the student in all areas of his disability, and failed to properly assess the student's social/emotional needs, which compromised the district's ability to recommend an appropriate program for the student. The parent asserts that the recommendation to place the student in a CTT classroom was not reasonably calculated to confer educational benefits to the student and that the student requires a residential placement in order to receive a FAPE. The parent also contends that the impartial hearing officer erred as a matter of law in finding that the student's "academic failure and truancy" were "directly related" to his "substance abuse" (Pet. ¶ 98). In addition, the parent argues that the district's failure to consider a residential placement denied her of a meaningful opportunity to participate in the formulation of the student's IEP, and further, that the district impermissibly engaged in predetermination of the student's recommended program. The parent asserts that the impartial hearing officer's failure to issue a timely decision violated the Individuals with Disabilities Education Act (IDEA) and thus, constituted a denial of a FAPE. Finally, the parent argues that she sustained her burden to establish the appropriateness of NPS and that equitable considerations support her request for relief. The parent seeks to reverse and annul the impartial hearing officer's decision in its entirety.

In its answer, the district contends that the parent's appeal regarding the March 14, 2009 IEP is moot because the 2009-10 school year has expired, and further, that the parent failed to amend her due process complaint notice to include the "existence of the March 2010 IEP" (Answer ¶¶ 57-58). In addition, the district argues that the parent is precluded from arguing that the district failed to offer the student a FAPE for the 2010-11 school year because she failed to raise that claim in the proceedings below. Alternatively, the district argues that the parent's appeal must be dismissed because the parent did not sustain her burden to establish that NPS was appropriate to meet the student's special education needs, and equitable considerations do not support the parent's request for relief. The district seeks to uphold the impartial hearing officer's decision in its entirety.

In a reply, the parent asserts that the district waived the mootness defense because the district, itself, expanded the scope of the impartial hearing to include the 2010-11 school year by submitting both the March 2010 and the April 2010 IEPs into evidence at the impartial hearing. In addition, the parent contends that the district offered extensive testimonial evidence regarding the March and April 2010 IEPs without objection. The parent also asserts that the district waived the mootness defense by failing to raise it either at the impartial hearing or in its closing brief, and therefore, the mootness defense should not be considered for the first time on appeal. Further, the parent argues that a "real and live" controversy still exists between the parties, inasmuch as the program recommendations for the 2010-11 school year in the March 2010 and April 2010 IEPs have not expired. Moreover, the parent argues that the district continued to recommend placing the student in an ICT program in both the March 2010 and April 2010 IEPs,

which is the same placement disputed in the March 2009 IEP. Finally, the parent contends that even if the parent's challenge to the March 2009 IEP is deemed moot, the dispute regarding the March 2009 IEP is "capable of repetition, yet evading review," and thus, falls within the narrow exception of the mootness doctrine because the March 2010 and April 2010 IEPs contain the same program recommendations and must be reviewed on the merits.

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove v. T.A., 129 S. Ct. 2484, 2491 [2009]; Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). While school districts are required to comply with all IDEA procedures, not all procedural errors render an IEP legally inadequate under the IDEA (A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if a procedural violation is alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an impartial hearing officer's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 130 [2d Cir. 1998]; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211,

at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]). Also, a FAPE must be available to an eligible student "who needs special education and related services, even though the [student] has not failed or been retained in a course or grade, and is advancing from grade to grade" (34 C.F.R. § 300.101[c][1]; 8 NYCRR 200.4[c][5]).

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs (34 C.F.R. § 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. Dep't of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008]), establishes annual goals related to those needs (34 C.F.R. § 300.320[a][2]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (34 C.F.R. § 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9). Subsequent to its development, an IEP must be properly implemented (8 NYCRR 200.4[e][7]; Application of a Child with a Disability, Appeal No. 08-087).

At an impartial hearing, the school district bears the burden of proof—including the burden of persuasion and burden of production—except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at *7 [S.D.N.Y. Aug. 27, 2010]).

Initially, a procedural matter must be addressed. The parent submitted additional documentary evidence with her petition for review for consideration on appeal (Pet. Exs. S-T; Attorney Declaration in Support of Petition). Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an impartial hearing officer's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of the Dep't of Educ., Appeal No. 08-024; Application of a Student with a Disability, Appeal No. 08-003; Application of the Bd. of Educ., Appeal No. 06-044; Application of the Bd. of Educ., Appeal No. 06-040; Application of a Child with a Disability, Appeal No. 05-080; Application of a Child with a Disability, Appeal No. 05-068; Application of the Bd. of Educ., Appeal No. 04-068). The district objects to the consideration of these documents, arguing that while the documents were not available at the time of the impartial hearing, they are not necessary to complete the hearing record or to render a decision in this appeal (see Answer ¶ 13). I agree with the district's contentions and therefore, I decline to accept or consider the additional documentary evidence submitted by the parent.

Next, I will address the district's argument that the parent's appeal regarding the March 14, 2009 IEP is moot. It is well settled that the 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 the Dep't of Educ., Appeal No. 10-066; Application of a Student with a Disability, Appeal No. 10-064; Application of a Student with a Disability, Appeal No. 09-077; Application of a Student with a Disability, Appeal No. 09-065; Application of a Student with a Disability, Appeal No. 08-104; Application of the Dep't of Educ., Appeal No. 08-044; Application of a Child with a Disability, Appeal No. 07-139; Application of a Child with a Disability, Appeal No. 07-085; Application of a Child with a Disability, Appeal No. 07-077). 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., 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). Administrative decisions rendered in cases concerning such issues arising out of school years that have 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]; M.S. v. New York City Dept. of Educ., 2010 WL 3377667, at *9 [E.D.N.Y. Aug. 25, 2010]; 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).

However, an exception provides that 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]). First, 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). Second, 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; M.S., 2010 WL 3377667, at *9 [noting that each year a new determination is made based on a student's continuing development]; J.N. v. Depew Union Free School Dist., 2008 WL 4501940, at *4 [W.D.N.Y. Sept. 30, 2008]; 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).

In this case, I agree with the district's argument that the parent's appeal regarding the March 14, 2009 IEP is moot. First, it is not apparent that the challenged action was "in its duration too short to be fully litigated prior to its cessation or expiration" because in this case, the parent failed to assert the challenge to the March 14, 2009 IEP before the March 14, 2009 IEP expired on March 4, 2010 (see Parent Exs. A at p. 1; B at p. 2). Notably, the parent challenged the March 14, 2009 IEP with her due process complaint notice, dated March 29, 2010 (Parent Ex. A at p. 1). In addition, the March 14, 2009 IEP has been replaced by two subsequent IEPs, dated March 2010 and the April 2010, and as more fully discussed below, the real crux of the impartial hearing focused on the district's recommended ICT program with counseling as a related service in the student's April 16, 2010 IEP (Tr. pp. 12-20; Dist. Exs. 2-3). Therefore, the parent's appeal regarding the March 14, 2009 IEP is dismissed as moot.

Turning to the 2010-11 school year, I disagree with the district's arguments that the parent failed to properly assert a challenge in the proceedings below, because upon review of the entire hearing record, the evidence reveals that the parent alleged that the district failed to develop an IEP for the 2010-11 school year in her due process complaint notice, and notably, all of the district's testimonial evidence and nearly all of the district's documentary evidence submitted at the impartial hearing focused solely on the development of the April 16, 2010 IEP and the appropriateness of special education programs and services recommended in the April 16, 2010 IEP (see Tr. pp. 1-248; Dist. Exs. 1-6; Parent Exs. A-B).¹⁴ Weighing the evidence, I find that the district failed to sustain its burden to establish that the April 16, 2010 IEP offered the student a FAPE in the LRE because the April 2010 IEP team did not have sufficient reliable, current, and comprehensive evaluative data in order to develop an IEP that accurately identified the student's academic and social/emotional needs, established annual goals related to those needs, or provided for the use of appropriate special education services to address the student's needs (34 C.F.R. § 300.320[a][1], [a][2], [a][4]; 8 NYCRR 200.4[d][2][i], [2][iii], [2][v]; Tarlowe v. Dep't of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008]; see Tr. pp. 1-248; Dist. Exs. 1-6; Parent Exs. A-R). Without sufficient evaluative data, an IEP team cannot recommend an appropriate program or placement for the student (see 8 NYCRR 200.4[d][2]-[4]).

With certain exceptions, a student's IEP is required to be reviewed periodically, but not less frequently than annually, and revised as appropriate (20 U.S.C. § 1414[d][4][A]; 34 C.F.R. § 300.324[b][1][i]; see also Educ. Law § 4402[2]; 8 NYCRR 200.4[f]). The CSE is required to develop an IEP that accurately reflects the student's special education needs (34 C.F.R. § 300.306[c][2]; 8 NYCRR 200.4[d][2]). Incumbent with that duty is the mandate that the IEP "shall report the present levels of academic achievement and the functional performance and

¹⁴ The impartial hearing officer did not offer any explanation regarding his failure to render any findings or determinations regarding the 2010-11 school year in his final decision (see IHO Decision at pp. 1-28). Due process procedures, in part, require an impartial hearing officer to render a decision on "substantive grounds based on a determination of whether the student received a free appropriate public education" (8 NYCRR 200.5[j][4][i], [ii]; see 34 C.F.R. § 300.513[a]-[b]).

indicate the individual needs of the student" (8 NYCRR 200.4[d][2]; see 34 C.F.R. § 300.320 [a][1]). Moreover, a CSE is required to "consider the results of the initial or most recent evaluation; the student's strengths; the concerns of the parents for enhancing the education of their child; the academic, developmental and functional needs of the student, including, as appropriate, the results of the student's performance on any general State or district-wide assessment programs; and any special considerations in paragraph (3) of this subdivision" (8 NYCRR 200.4[d][2]; see 34 C.F.R. § 300.324[a][1]). A CSE is also required to "consider" information about the student provided to, or by, the parents (8 NYCRR 200.4[f][2][ii]; Application of a Child with a Disability, Appeal No. 07-139).

To appropriately evaluate the student, a district must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 C.F.R. § 300.304[b][1][ii]; see Letter to Clark, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 C.F.R. § 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 C.F.R. § 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]), and an evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 C.F.R. § 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]; see Application of the Dep't of Educ., Appeal No. 07-018). A district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 C.F.R. § 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree (34 C.F.R. § 300.303[b][1]; 8 NYCRR 200.4[b][4]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]).

In this case, the hearing record indicates that the April 2010 IEP team relied solely upon the March 2010 psychoeducational evaluation report to develop the student's April 2010 IEP, which, according to the evaluation report, was administered to the student while he was admittedly under the influence of marijuana (see Dist. Ex. 5 at p. 2; compare Dist. Ex. 2 at pp. 3-5, with Dist. Ex. 5 at pp. 1, 2-4). Although the district had knowledge of the student's excessive absences, his mental health concerns, his substance abuse concerns, and his academic failures at the time of the April 2010 IEP meeting, the district did not seek to obtain the student's agency records or use any other assessment tools or strategies to gather relevant functional, developmental, and academic information to identify or determine whether, or if, the student's social/emotional needs, mental health concerns, or substance abuse concerns related to the student's academic failures or to otherwise assist in the development of the student's IEP (see Dist. Ex. 5 at pp. 1-2; Parent Exs. A at p. 1; C; D at pp. 1-2, 7; N; P at pp. 1-6; O; see also Tr. pp. 46-48, 113, 134-35).

I also note that according to the hearing record, the April 2010 IEP team developed a BIP, which was not attached to the April 2010 IEP or otherwise submitted into evidence, and further, that the BIP had been developed without conducting an FBA (Tr. pp. 50-53; Dist. Ex. 2 at p. 5).¹⁵ I remind the district that pursuant to State regulation, a reevaluation requires that the CSE include an FBA for a student whose behavior impedes his or her learning or that of others, as necessary to ascertain the physical, mental, behavioral, and emotional factors which contribute to the suspected disabilities (8 NYCRR 200.4[b][1][v]).¹⁶ State regulation also requires that a CSE "shall consider the development" of a BIP when considering more restrictive programs or placements as a result of the student's behavior (8 NYCRR 200.22[b]).¹⁷

In this case, the hearing record indicates that the student's social/emotional difficulties had been identified and treated through mental health agencies for approximately 12 years (see Tr. pp. 129-32; Parent Ex. E). It is undisputed that the student has been eligible for special education programs and services, and remains eligible for special education programs and services, as a student with an emotional disturbance (Tr. p. 14). The hearing record also indicates that during the 2008-09 school year, the student's truancy and substance abuse escalated, and the student's educational performance significantly deteriorated (Tr. pp. 112, 133-35; Parent Exs. A at p. 1; D at p. 7; E at pp. 6-7). In addition, at the time of the April 2010 IEP meeting, the student was in danger of failing ninth grade for the second year in a row and his truancy, disruptive behavior, and substance abuse concerns became more prominent (Parent Ex. N; see Dist. Ex. 5 at pp. 1-3; Parent Exs. D at pp. 1-2, 7; E at p. 3; O; P). Despite all of this information, however, the district failed to further assess how the student's social/emotional and potential psychiatric needs affected his learning, or to appropriately conduct an FBA to more fully understand the student's behaviors prior to reaching a conclusion regarding the student's

¹⁵ In the case of a student whose behavior impedes his or her learning or that of others, the CSE shall consider positive behavioral interventions and supports, and other strategies, to address that behavior (20 U.S.C. § 1414[d][3][B][i]; 34 C.F.R. § 300.324[a][2][i]; see 8 NYCRR 200.4[d][3][i]; see also A.C., 553 F.3d at 172; J.A. v. East Ramapo Cent. Sch. Dist., 603 F. Supp. 2d 684, 689 [S.D.N.Y. 2009]; M.M. v. Dep't of Educ., 583 F. Supp. 2d 498, 510 [S.D.N.Y. 2008]; Tarlowe, 2008 WL 2736027, at *8; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 149-50 [S.D.N.Y. 2006]; Application of a Student with a Disability, Appeal No. 09-101; Application of a Student with a Disability, Appeal No. 09-038; Application of a Student with a Disability, Appeal No. 08-028; Application of the Dep't of Educ., Appeal No. 07-120).

¹⁶ State regulation defines an FBA as "the process of determining why a student engages in behaviors that impede learning and how the student's behavior relates to the environment" (8 NYCRR 200.1[r]). State regulation requires that an FBA

shall include, but is not limited to, the identification of the problem behavior, the definition of the behavior in concrete terms, the identification of the contextual factors that contribute to the behavior (including cognitive and affective factors) and the formulation of a hypothesis regarding the general conditions under which behavior usually occurs and probably consequences that serve to maintain it

(8 NYCRR 200.1[r]).

¹⁷ State regulation defines a BIP as "a plan that is based on the results of a functional behavioral assessment and, at a minimum, includes a description of the problem behavior, global and specific hypotheses as to why the problem behavior occurs and intervention strategies that include positive behavioral supports and services to address the behavior" (8 NYCRR 200.1[mmm]).

special education needs or recommending an appropriate program and placement for the student (see Dist. Ex. 2). Under the circumstances of this case, I find that it is important to understand the student's behaviors, where the behaviors come from, and what is sustaining those behaviors, and perhaps most importantly, to assess the student's social/emotional status, in order to accurately identify the student's special education and related services needs and prior to recommending an appropriate program and placement.

In light of the foregoing, I find that the April 2010 IEP team did not have sufficient reliable, current, and comprehensive evaluative data to conclude that an ICT classroom with counseling as a related service was an appropriate placement for the student as recommended in the April 16, 2010 IEP. However, given the absence of sufficient evaluative data and thus, the inadequacy of the hearing record, it is premature, at this stage, to reach a determination regarding whether NPS may be an appropriate placement for the student. Therefore, I will direct the district to conduct—at district expense—a complete independent psychiatric evaluation, which is to be administered by an individual with experience in evaluating students with co-morbid substance abuse concerns, to determine whether the student has a psychiatric illness, and the extent to which such substance abuse or psychiatric illness, if any, contributes to his behavior or interferes with the student's ability to access instruction (see J.B. v. Killingly Bd. of Educ., 990 F. Supp. 57, 80 [D. Conn. 1997]; Application of a Student with a Disability, Appeal No. 08-015; Application of a Child with a Disability, Appeal No. 94-2).^{18, 19} This evaluative data and any attendant recommendations are essential to provide the CSE with information for developing an appropriate IEP, FBA and BIP for the student and reaching a decision regarding his educational placement. Accordingly, I find that the April 2010 IEP was deficient insofar as it was developed without adequate data regarding the student's individual needs, thus, denying the student a FAPE for the 2010-11 school year (Application of a Student with a Disability, Appeal No. 08-015; Application of the Dep't of Educ., Appeal No. 07-098; Application of a Child with a Disability, Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 94-2). Upon completion of the abovementioned evaluations, this matter is to be remanded to an impartial hearing for further proceedings regarding whether NPS—or any residential placement—is an appropriate placement for the student and the extent to which the parent is, or is not, entitled to tuition reimbursement for the student's placement at NPS—or any residential placement—for the 2010-11 school year.^{20, 21}

¹⁸ State regulation defines an "independent educational evaluation," in part, as an "evaluation of a student with a disability . . . , conducted by a qualified examiner who is not employed by the public agency responsible for the education of the student" (8 NYCRR 200.1[z]).

¹⁹ I remind the impartial hearing officer that pursuant to State regulation, an impartial hearing officer may request an evaluation of a student "as part of the hearing" (8 NYCRR 200.5[g][2]).

²⁰ According to State law, the school year runs from July 1 through June 30; thus, question regarding the parent's entitlement to tuition reimbursement must encompass placement and reimbursement through June 30, 2011 (see Educ. Law §2[15]).

²¹ The parent is not precluded from offering for admission the evidence attached to the petition upon remand at the impartial hearing, during which the district should be afforded an opportunity to confront witnesses and present its own evidence regarding NPS.

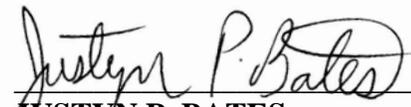
I have considered the parties' remaining contentions and find that in light of my determination, I need not reach them.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the district shall conduct, at district expense, a complete and independent psychiatric evaluation and a complete and independent FBA, within 60 days of the date of this decision; and

IT IS FURTHER ORDERED that within 30 days from the completion of the evaluations, the parties shall reconvene at an impartial hearing to address the limited issues of whether NPS, or any residential placement, is an appropriate placement for the student and whether the parent is entitled to reimbursement for the costs of the student's attendance at NPS, or any residential placement, through the conclusion of the 2010-11 school.

Dated: Albany, New York
December 20, 2010


JUSTYN P. BATES
STATE REVIEW OFFICER