



The University of the State of New York

The State Education Department

State Review Officer

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No. 10-118

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:

Queens Legal Services, attorney for petitioner, Tara Foster, Esq., of counsel

Michael Best, Special Assistant Corporation Counsel, attorney for respondent, Jessica C. Darpino, Esq., of counsel

DECISION

Petitioner (the parent) appeals from a decision of an impartial hearing officer which determined that the placement respondent (the district) had recommended for her son for the 2010-11 school year was appropriate. The appeal must be sustained in part.

At the time of the impartial hearing, the student was receiving home instruction pursuant to an interim service plan (ISP)¹ (Tr. pp. 18; Dist. Ex. 24).² The student's eligibility for special education and related services as a student with an emotional disturbance is not in dispute in this appeal (see 34 C.F.R. § 300.8[c][4]; 8 NYCRR 200.1[zz][4]).

The hearing record reflects that the student received early intervention services at home before attending a State-approved nonpublic preschool program between the ages of three and

¹ The ISP was agreed upon by the parties as a viable alternative to a pendency placement during a prior proceeding and was subject to withdrawal at any time by either party (Dist. Ex. 24 at p. 5).

² The opening statements of both parties presented on June 24, 2010 indicate that the student was receiving home instruction at the time of the impartial hearing (Tr. pp. 8, 14). The parent, however, indicated in testimony that the student's home instruction began in July 2010 (Tr. p. 68).

five years old,³ and that the student subsequently attended a district special education kindergarten class (8:1) for students with emotional disturbance (Dist. Ex. 22 at pp. 1, 2, 4). The hearing record further reflects that between January and October 2007, while the student was in kindergarten, he was seen at a pediatric clinic for disruptive and hyperactive behavior (Dist. Ex. 4 at p. 1). During this time period, a psychiatric evaluation was conducted. In the psychiatric report dated February 27, 2007, the student was described as having a "very short" attention span, difficulty learning, a tendency to disturb others, and restlessness (Dist. Ex. 22 at p. 1). In addition, the student was described as displaying aggressive conduct toward peers, and engaging in tantrums by throwing objects or biting (*id.* at pp. 1-2). The psychiatric report indicated that at times the student ran out of the classroom when disciplined and he displayed poor frustration tolerance (*id.* at p. 1). The report noted that the parent described the student's mood at the time as "happy, unless he's frustrated" (*id.*). In addition, the student was noted to experience difficulty in making transitions (*id.* at pp. 1-2). The psychiatric report also noted that the student displayed a "paucity of speech" and was "hard to understand" (*id.* at p. 3). Although no formal testing was reported, the evaluator indicated that the student's intelligence appeared below average, probably in the mentally retarded range (*id.*). The report also noted that during the psychiatric evaluation the student presented as "cheerful," but became irritable when told to stop playing (*id.*). Axis I diagnostic impressions included an attention deficit hyperactivity disorder (ADHD), a receptive and expressive language disorder, and "R[ule]/O[ut]" pervasive developmental disorder-not otherwise specified (PDD-NOS) (*id.* at p. 4).

Returning to the student's educational history, the hearing record reflects that at the beginning of the 2009-10 school year when the student was in the third grade, he attended a district school, but transferred in November 2009 to another district school (Tr. pp. 65, 67; Dist. Ex. 13).⁴ The student's attendance report for the 2009-10 school year shows a pattern of unexcused absences from school (Tr. p. 35; Dist. Ex. 13).

A November 18, 2009 updated teacher report indicated that the student attended a district 12:1+1 special class for students with an emotional disturbance (Dist. Ex. 5). The teacher report described the student as a visual learner who functioned at the kindergarten level in reading, math, and listening comprehension (*id.*). Teacher comments indicated that the student needed help in all areas; he could not work independently, he "act[ed] out" when frustrated, did not complete work, did not participate in class, tended to call out, and did not understand lessons (*id.*).

A December 1, 2009 social history report completed by a hospital social worker when the student was eight years old indicated that the student's symptoms at the time included hyperactivity, impulsivity, inattention, and frequent angry outbursts (Dist. Ex. 8 at p. 1). The report indicated that the student's behavior was well-managed at home and self-help skills were age-appropriate, but that in school the student frequently became angry and frustrated (*id.*). According to the report, the student's behavior problems were apparent as early as preschool and

³ The hearing record indicates that the student began receiving medication in July 2006, but that he had not received "treatment" since September 2006 (Dist. Ex. 22 at pp. 2, 4).

⁴ The parent testified at the impartial hearing that the student's transfer was at the parent's request and based upon the student's allegation that teachers at the first district school were "beating him" (Tr. pp. 65, 67). The parent further testified that although she spoke to the principal about the student's allegation, she did not go to the police about the matter (Tr. pp. 65-66).

had continued (id.).⁵ The social history report further indicated that when angry or frustrated, the student's behaviors included running out of the classroom; cursing at staff; or acts of physical aggression such as hitting, scratching, throwing objects, or biting (id.).

A December 1, 2009 district psychological evaluation report indicated that the student was referred for an evaluation because the student displayed "behavioral discontrol in the classroom," becoming extremely aggressive and hitting others, including his teacher, when frustrated (Dist. Ex. 9 at p. 1).⁶ Regarding an incident where the student was physically aggressive toward his teacher, the evaluation report indicated that, although the student spoke about the incident, he was unable to relate what happened in a clear and cogent manner (id. at p. 2). The student complied with a draw-a-person task, responded to questions regarding the picture, identified and described the feeling of anger his picture depicted, and indicated that he had little control over his feelings of anger (id.).

The December 2009 psychological evaluation report indicated that during administration of the Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV), the student was cooperative for most of the testing, established eye contact, and appeared motivated to do well except for the final subtest administered (symbol search subtest), when he crossed out answers in a random manner because he wanted to return to class (Dist. Ex. 9 at p. 2). The evaluator reported results of the WISC-IV as follows (composite score/qualitative description): verbal comprehension index (67/extremely low), perceptual reasoning index (84/low average), and working memory index (low average) (id. at pp. 1, 5).⁷ Behaviorally, the evaluator indicated that the student required continuous redirection and refocusing as he quickly drifted off task (id. at p. 2). According to the evaluator, it was difficult to refocus the student and his frustration tolerance and impulse control were poor (id.). The evaluator also indicated that the student demonstrated poor word recall and very poor ability to communicate verbally; that the student displayed a significant articulation problem; and that the student's thinking seemed unclear at times and his affect was "labile" (id.). Overall, the evaluator indicated that the student appeared to have "significant language processing problems" (id. at p. 4). Cognitive skills involving verbal comprehension were within the deficient range and visuo-spatial skills fell within the low average range (id.). The evaluator indicated that no formal educational assessment was completed at the time because the student was not in school on a regular basis (id. at p. 3). However, according to the psychological evaluation report, the student's teacher reported that the student functioned on kindergarten level for all academic areas and that he was unable to keep up with the skills of his classmates (id.). The evaluator indicated that the student's impulse control and judgment were "exceedingly poor;" that the student needed psychotherapeutic help; and that the student's present program seemed unable to meet his psychotherapeutic needs (id. at p. 4).

⁵ The social history report noted that the student's developmental milestones were significantly delayed (id.).

⁶ Incident reports between November 2009 and March 2010 described the student's behaviors in the classroom and cafeteria, and characterized his behaviors as disruptive and including inappropriate language, inappropriate physical contact, defiant and disrespectful noncompliance (see Dist. Ex. 7 at pp. 1-15; see also Dist. Ex. 9 at pp. 3-4).

⁷ A full scale IQ, a measure of global intelligence, was not obtained because the score is derived from a combination of ten subtests of the WISC-IV and the student did not complete the final subtest (Dist. Ex. 9 at pp. 2-3). Instead, the evaluator focused on more narrow domains of cognitive functioning (id.).

A December 9, 2009 brief psychiatric summary report included a review of the student's history and in part provided information regarding the student's treatment for disruptive and hyperactive behavior that included inconsistent use of prescribed medication (Dist. Ex. 4 at p. 1).⁸ The report noted that as a result of a November 2009 incident where the student yelled, cursed, hit his teacher, and threatened to kill himself, a change in medication was prescribed, which the student seemed to be tolerating well (id.). The student was described as calm, able to control himself at home and at the clinic, sleeping well, listening to his mother at home, and tolerating frustration reasonably well (id.). The report described the student's mood as euthymic and his affect as constricted (id.). The student was noted to have a paucity of speech and poor articulation and he spoke off topic frequently (id.). The report indicated that the student displayed no loose associations, delusions, auditory or visual hallucinations, or suicidal or homicidal ideation (id.). The student's insight and judgment were characterized as "very poor" and his intelligence was described as in the "retarded range" (id. at pp. 1-2). The evaluator determined that the student met the criteria for the following diagnoses: ADHD, PDD-NOS; and mental retardation, unspecified (id. at p. 2). The evaluator also recommended referral to a day treatment program because of the student's inability to maintain behavioral control in his small self-contained special education classroom (id.).

A December 17, 2009 screening/admission note reflects that on November 17, 2009, the student participated in a mental status screening process at a day treatment center (Dist. Ex. 23). At that time the student was eight years old, in the third grade and still enrolled in a small special class setting (12:1+1) at the district school (id. at p. 1). Results of the examination during the screening process revealed that the student was heavily sedated and required several prompts to wake up and remain awake during the interview (id. at p. 3). The evaluator noted that, as reported by the parent, the student had just started a new medication regimen (id.). The evaluator indicated, among other things, that the student did not seem to understand most questions asked during the interview and that the questions had to be simplified for him (id.). In addition, the evaluator indicated that "[t]he lack of goal directedness seem[ed] to be caused more by the student's severe comprehensive language deficit rather than a thought process disorder" (id.).⁹

The screening/admission note summarized much of the information included in prior reports and indicated that the student presented with a long history of impairment regarding appropriate modulation of his affect, behavior, and impulses; significant impairment of language and social skills; and intellectual functioning "probably in the mild MR level" (Dist. Ex. 23 at p. 4).¹⁰ The screening team found "the [student's] principal diagnostic issues to be within the realm of the Pervasive Developmental Disorders, with rule-outs of a severe Mixed Expressive/Receptive language Disorder, [and] MR with behavioral disturbances" (id.). The

⁸ Testimony by the parent indicated that she discontinued the student's medication at times because increased dosages of medicine were making the student sick (Tr. pp. 104, 106).

⁹ The December 17, 2009 screening/admission note indicated that during the evaluation the student stated, "I don't like school, I can't do the work" (Dist. Ex. 23 at p. 1).

¹⁰ The December 17, 2009 screening/admission note included results of a January 2006 administration of the Stanford Binet Intelligence Scales-5th Edition (SB-5) which revealed at the time a full scale IQ of 68, a nonverbal IQ of 66, and a verbal IQ of 72 (Dist. Ex. 23 at p. 2). Also at that time, administration of the Vineland Adaptive Behavior Scales revealed moderately low scores for communication, receptive and expressive language skills, and socialization skills (id.).

screening/admission note indicated that due to the severity of the student's social skill impairments, low level of academic functioning, and lack of consistency in implementation of psychiatric treatment recommendations on an outpatient basis, the student was not a candidate for the day treatment center (id.). Instead, the screening team indicated that the student would benefit from a "PDD/MR type of school program," with psychiatric services provided in the program or as part of an outpatient clinic (id.). The screening team "strongly recommended" a full neurological evaluation (id.).

A January 20, 2010 updated teacher report reflected that the student still attended a 12:1+1 special class for students with an emotional disturbance at a district school (Dist. Ex. 10 at p. 1). The January 2010 teacher report indicated that the student was an auditory learner, and that he still functioned at the kindergarten level for reading, math, and listening comprehension (id.).¹¹ The January 2010 teacher report further indicated that the student refused to do classwork; he became angry and violent if errors were corrected; he did not stay focused on tasks; he ran around the classroom; he did not come prepared to work; and he was disorganized (id.). According to the teacher report, the student was a danger to himself and others during class time and displayed behaviors such as throwing himself to the floor and throwing objects including desks, chairs, and books (id. at p. 2). Other behaviors displayed by the student included cursing, punching, hitting, and kicking (id.). The teacher report noted that the student did not have friends and the other children were afraid of him (id.). The teacher report further indicated that the student completed his homework "at times" but that he tore up his work (id. at p. 1). As a strength, the report indicated that the student liked to draw (id. at p. 2).

The district school psychologist conducted a twenty-minute observation of the student in a "time-out room" on January 26, 2010 (Dist. Ex. 2). The January 2010 observation report indicated that the student was in the time-out room because he refused to go to his classroom upon entering the building (id.). During the observation, the student yelled at the teacher, screamed that he hated school, and screamed that his mother should take him home (id.). When the student was told that his mother would not take him home, the student screamed that he hated his mother and wanted to kill her (id.). The student's "ranting" continued for a while and the teacher was unable to calm the student (id.).¹²

The Committee on Special Education (CSE) met on February 1, 2010 with the district representative, school psychologist, special education teacher, two guidance counselors, and the parent in attendance (Dist. Ex. 3 at pp. 1, 2). The February 2010 CSE continued the student's eligibility for special education programs and related services as a student with an ED (id. at p. 1). The February 2010 CSE recommended continuation of related services of individual speech-language therapy and individual occupational therapy (OT), each two times per week for 30 minutes, and individual counseling one time per week for 30 minutes (id. at pp. 1, 13). Regarding the student's placement, the February 2010 CSE alternatively considered and rejected a special class in a specialized school within the district because such a placement was not able

¹¹ The earlier November 18, 2009 teacher report indicated that the student was a visual learner (see Dist. Ex. 5).

¹² The hearing record includes other examples of the student's anger toward his mother for taking him to school, behavioral difficulties in school, and one occasion when police were contacted and emergency medical services (EMS) personnel transported the student to a hospital (Tr. pp. 33-34; Dist. Exs. 7 at pp. 13-14; 14; 21).

to address the student's "severe emotional problem" (*id.* at p. 12).¹³ The CSE also considered and rejected a residential treatment center because the student did not need 24-hour supervision (*id.*). Instead, the February 2010 CSE recommended referral to the district's central based support team (CBST) for a placement of the student in a State-approved nonpublic day school (*id.* at pp. 1-2).¹⁴ The CSE recommended modifying the criteria for promotion to the next grade, whereby the student would be promoted if he met 75 percent of the second grade math and English language arts (ELA) standards as evidenced by student work, teacher observation, and assessments and grades (*id.* at p. 13). The student's February 2010 individualized education program (IEP) indicated that the student's crisis management paraprofessional was terminated, but included a behavior intervention plan (BIP) (*id.* at pp. 13-14).

An educational update report dated February 9, 2010 indicated that the district psychologist attempted to test the student's cognitive abilities on November 11, 2009, but that the student refused to complete cognitive testing and completely refused to participate in academic testing (Dist. Ex. 15 at p. 1). The psychologist obtained the information included in the February 9, 2010 narrative report from the student's special education teacher and a paraprofessional that worked closely with the student (*id.*). The educational update report indicated that the student was able to add and subtract single digits (*id.*). The student's teacher reported that the student's ability to add and subtract two-digit numbers was emerging and that he was able to do addition with regrouping; however, he was unable to borrow (*id.*). The student's reading ability was limited to high frequency sight words and his reading level appeared to be at the beginning of first grade or at the high end of kindergarten level (*id.*). The update report described the student's expressive language skills as "extremely poor," with significant word recall difficulties and an articulation problem (*id.* at p. 2). The psychologist surmised that the student's "poor language processing problems w[ould] undoubtedly cause him to have difficulty in all academic areas that are basically language based" (*id.*).

On March 10, 2010, the student's special education teacher, guidance counselor, 1:1 crisis management paraprofessional and school principal conducted a functional behavioral assessment (FBA) of the student (Dist. Ex. 20). The FBA described the participants' perceptions of the student's strengths, the target behavior, the setting in which the target behavior occurred, relevant antecedents preceding the target behavior, consequences that resulted from the target behavior, environmental variables that might affect the student's behavior, and a hypothesis of the functional intent of the target behavior (*id.*).

In a letter to the parent dated April 7, 2010, the educational administrator of the CBST summarized the process by which the student would need to be interviewed by approved nonpublic schools prior to possible admission (Dist. Ex. 17). The letter included a list of six State-approved nonpublic schools (NPS) to which the district sent the student's information (*id.*). The letter reflected that according to information the CBST received from one of the listed schools, NPS 1, the parent was not interested in a placement there for the student (*id.*). The letter indicated that the parent's "refusal to cooperate" prevented the district from facilitating the

¹³ The hearing record reflects that the CSE found a 12:1+1 district class unsuitable for the student, even with provision of supplementary aids and supports of counseling and 1:1 aide services (Dist. Ex. 19 at p. 1). The hearing record reflects that the student demonstrated a lack of progress in the 12:1+1 program as ten out of ten goals on his IEP had not been achieved (*id.*).

¹⁴ An "assurance checklist" dated February 1, 2010 was provided to the CBST (Dist. Ex. 12).

process for placing the student in an approved NPS (id.). The letter further indicated the district would cease attempting to contact the parent regarding placement of the student in an NPS, and would consider "[the parent's] refusal to cooperate as a declination of services" recommended on the student's February 1, 2010 IEP (id.).

In a letter to the district dated April 14, 2010, the principal of another NPS, (NPS 2), advised that an intake "process" occurred with the student and his parent on two separate occasions (Dist. Ex. 16). According to the letter, NPS 2 was "willing to accept" the student based on availability (id.).

In a memorandum also dated April 14, 2010 to the CSE chairperson, the CBST case manager advised that placement for the student had been "secured" at NPS 2 and that the CSE needed to reconvene to add this information to the student's IEP (Dist. Ex. 18). Additional information instructed the CSE chairperson about its administrative responsibilities in regard to data entry, transportation requests, and the need for a detailed written rationale if the CSE determined the student's needs would not be addressed at NPS 2 (id.).

The CSE reconvened on April 14, 2010 with the district representative, school psychologist, the student's special education teacher, the school guidance counselor, the parent, and an additional parent member in attendance (Dist. Ex. 11 at pp. 1-2). The resultant IEP indicated that the April 14, 2010 CSE continued the student's eligibility for special education programs and related services as a student with an ED and added a 12:1+4 special class at NPS 2 as the student's placement (id.). The April 2010 IEP indicated that the recommended program would commence on April 16, 2010 for a duration of no longer than one year, at which time the CSE would reconvene (id.). The April 2010 CSE also recommended continuing the student's related services of individual speech-language therapy and individual OT, each two times per week for 30 minutes, and individual counseling one time per week for 30 minutes; testing accommodations of a separate location and extended time for State and local assessments; modified criteria for promotion to the next grade; and door-to-door special education transportation (id. at pp. 1, 13). The April 2010 IEP included the same BIP as the February 2010 IEP, but changed the date of the BIP to April 14, 2010 (see Dist Exs. 3 at p. 14; 11 at p. 14).¹⁵

In a due process complaint notice dated April 23, 2010, the parent sought an "appropriate school setting" for the student (Dist. Ex. 1 at p. 1). The parent asserted that the student had been traumatized at a prior school because of physical and verbal abuse (id. at p. 1). As relief, the parent requested home instruction, with a long-term goal for the student to return to school with "one on one" assistance until the student became comfortable with other children (id. at pp. 1-2).

An impartial hearing convened on June 24, 2010, and in an interim order dated July 25, 2010 rendered after one day of testimony, the impartial hearing officer found that the student was

¹⁵ In a separate administrative proceeding assigned to another impartial hearing officer, the district initiated an impartial hearing in March 2010, seeking approval of the change in placement from the district school to NPS 2 (Tr. pp. 12-13; Dist. Ex. 24 at pp. 2, 3). On April 23, 2010, the impartial hearing that had been requested by the district convened and was dismissed by a decision dated April 26, 2010, based upon a finding that approval of the change in the student's placement was not required (Dist. Ex. 24 at pp. 2, 3). The impartial hearing officer in that proceeding took judicial notice that the parent had filed her own due process complaint notice, and also determined, among other things, that the parent was entitled to seek an independent evaluation for the student, including a neuropsychological evaluation at district expense (id. at pp. 3, 6).

not mentally retarded, that NPS 2 was for mentally retarded students, and that it was an inappropriate placement for the student (IHO Interim Order at p. 2). The impartial hearing officer ordered the district to contact three named schools and others that had previously offered placement to the student to obtain an immediate placement for the student (id.). The impartial hearing officer directed that the hearing would "continue" on a specified date at which time she would be advised of the student's placement in an NPS.

In a second interim order dated August 17, 2010, the impartial hearing officer indicated, among other things, that the student had been accepted at NPS 1 and that the parent rejected the placement (IHO Second Interim Order at p. 2). The impartial hearing officer further found that the student had not received instruction from November 2009 to July 2010 (id.). The impartial hearing officer ordered the district to issue the student a Nickerson letter¹⁶ for the 2010-11 school year and directed the parent to place the student in an approved private day school "immediately" (id.). The impartial hearing officer further indicated that if the parent did not place the student in a school by the next hearing date, the impartial hearing officer would appoint a guardian ad litem to represent the interests and rights of the student (id.). The impartial hearing officer further terminated all home instruction for the student effective September 20, 2010 and directed that the "[s]tudent is to attend school" (id.).

On September 28, 2010, when the student was nine years old, the district conducted a psychoeducational evaluation (Parent Ex. C at p. 1). The evaluation consisted of administration of the Wechsler Individual Achievement Test–Second Edition (WIAT–II), clinical interview, and review of records (id.). The psychoeducational evaluation report indicated that the purpose of the evaluation was to assess the student's academic functioning while awaiting a school placement (id.). The evaluator noted that behaviorally, the student was cooperative throughout the course of the assessment (id.). Furthermore, the evaluator indicated that although the student willingly complied with all directives presented; he put his head down on the testing table several times, appeared distracted during paper and pencil tasks and tended to play with the paper and pencil presented, displayed low frustration tolerance as tasks became increasingly challenging and was quick to respond, "I don't know" for those items (id.). However, the evaluator also noted that the student was easily redirected (id.). Administration of the WIAT–II yielded subtest standard scores (and percentile ranks) of 73 (4) in word reading, 69 (2) in reading comprehension, 82 (12) in numerical operations, 80 (9) in math reasoning, 78 (7) in spelling, and 75 (5) in listening comprehension (id. at pp. 2-3). The psychoeducational evaluation report indicated that, based upon current academic testing, the student's abilities ranged from low average to extremely low when compared to a sample of same age peers (id. at pp. 2, 4). The report further noted that the student performed best on tests assessing mathematic ability, scored below grade level expectations on spelling and listening comprehension, and his weakest area was in decoding and reading comprehension (id. at p. 4).

In an undated letter "to whom this may concern," the student's home instruction teacher described the student as a "happy, well cared for[,] unmedicated" nine year old (Parent Ex. A).

¹⁶ A "Nickerson letter" is a letter from the district authorizing a parent to place a student in a State approved NPS at no cost to the parent (see Jose P. v. Ambach, No. 79 Civ. 270 [E.D.N.Y. Jan. 5, 1982], 553 IDELR 298). The remedy of a "Nickerson letter" is intended to address the situation in which a student has not been evaluated or placed in a timely manner (see Application of the Dep't of Educ., Appeal No. 09-114; Application of a Student with a Disability, Appeal No. 08-020; Application of the Bd. of Educ., Appeal No. 03-110; Application of a Child with a Disability, Appeal No. 02-075; Application of a Child with a Disability, Appeal No. 00-092).

Among other things, the teacher indicated that the student had a short attention span, was easily distracted, and that the student was in need of speech therapy (*id.*).¹⁷

In a September 29, 2010 e-mail correspondence to the school psychologist who had conducted the student's September 28, 2010 psychoeducational evaluation, the student's home instruction teacher indicated that the student presented as "enthusiastic" and as "LD not MR" (Parent Ex. B).¹⁸ The teacher indicated that although the student seemed to enjoy sharing his interests in computers, movies, and cartoons, the student was "frustrated by his speech" (*id.*). The teacher also stated that the student had a diagnosis of an ADD and that it was difficult to get him to stay on task (*id.*). The student tended to put his head down and became emotional if "pushed" but behaved well and cooperated if a new activity was presented (*id.*). According to the home instruction teacher, the student had a few "minor meltdowns" but was not disrespectful to the teacher (*id.*). Additionally, the teacher described the student as having a great deal of difficulty in reading and writing but displaying some basic math skills, and indicated that the student scored a "2" on the CTB (ELA) exam and a "3" on the TEM Math test in August 2009 (*id.*).¹⁹

The hearing record reflects that the district scheduled a psychiatric evaluation for the student on October 16, 2010, but that the parent cancelled the appointment due to a family medical concern (Tr. pp. 89-95).

In a third decision dated October 21, 2010, after three days of proceedings, the impartial hearing officer found that the April 14, 2010 IEP, which assigned the student to NPS 1 (instead of NPS 2) provided the student with a free appropriate public education (FAPE) for the 2010-11 school year (IHO Decision at pp. 2, 6). In addition, the impartial hearing officer found that during the 2009-10 school year, the student's attendance at school was inconsistent; that the parent unilaterally removed the student from school in spring 2010; that the parent failed to place the student in another public or private school; and that the parent did not provide the student with consistent psychiatric treatment (*id.* at p. 6). The impartial hearing officer further determined that the parent's actions violated the Education Law and ordered the district "to take appropriate legal steps to bring this family into Family Court for investigation into possible educational and/or medical neglect" of the student (*id.* at pp. 6-7).²⁰

The parent appeals and in her petition, asserts that the impartial hearing officer erred by finding that the student's April 14, 2010 IEP (with placement at NPS 1) provided the student with a FAPE for the 2010-11 school year. The parent further asserts that the impartial hearing officer exceeded her authority by making findings that were outside the scope of the due process

¹⁷ Although some of the typewritten information of the exhibit is missing, it appears that the teacher indicated that the student had been doing some second and third grade math, displayed no behavioral problems or outbursts, and had good attendance (Parent Ex. A).

¹⁸ Presumably, "LD not MR" means learning disabled not mentally retarded.

¹⁹ Presumably, "2" on the CTB (ELA) exam and a "3" on the TEM Math test in August 2009 (Parent Ex. B) refer to standardized testing administered by the district and scores related to levels the student reached relative to district and/or State standards.

²⁰ The impartial hearing officer referred allegations of physical abuse to the district's Impartial Hearing Office (IHO decision at p. 6).

complaint notice, and which were made without adequate support in the hearing record or sufficient notice to the parent. In addition, the parent asserts that the impartial hearing officer exceeded her authority by ordering the district to "take appropriate legal steps to bring this family into Family Court for investigation into possible educational and/or medical neglect" of the student (see IHO Decision at p. 7). The parent further asserts, among other things, that the district failed to meet its burden of proof; that the district did not produce any evidence regarding the specific class at NPS 1 or the specific age, academic and developmental functioning, and behavioral needs of the other students in the class, and failed to provide sufficient evidence to make a finding that a placement at NPS 1 would meet the student's needs and provide the student with mandated services. In addition, the parent asserts that the distance and travel time for the student to NPS 1 were important concerns in determining whether the placement was appropriate. In addition, the parent asserts, among other things, that the district failed to complete a formal educational evaluation, that there was no evidence in the hearing record that the district performed OT or speech evaluations, and that no evidence was presented at the hearing as to the reason for terminating the student's 1:1 crisis management paraprofessional. Other assertions by the parent include that the district did not adequately update the goals on the student's April 2010 IEP and that the district had not updated the student's BIP since 2008. As relief, the parent seeks an order to strike and annul that part of the decision that ordered the district to bring a family court action and to find that the impartial hearing officer lacked such authority. In addition, the parent seeks to annul and reverse that portion of the decision which finds that NPS 1 was an appropriate placement and that the April 2010 IEP with placement at NPS 1 offered the student a FAPE for the 2010-11 school year. In addition, the parent seeks to annul and reverse those portions of the decision which found that the parent did not provide the student with consistent education and consistent psychiatric treatment.

In an answer, the district asserts that the impartial hearing officer properly determined that NPS 1 was an appropriate placement. In support of its position, the district first asserts that neither party addressed information regarding the specific class placement at NPS 1 and whether students in the proposed class would be appropriately grouped, and that since such issues were not in the due process complaint notice, they should not be considered on appeal. Next, the district asserts that the parent's objections to NPS 1 do not provide a sufficient basis for the parent to reject the school. In addition, the district asserts that NPS 1 is appropriate because it is a school for students who are emotionally disturbed or with learning disabilities; NPS 1 offers counseling and speech therapy; and NPS 1 has 12:1+1 and 8:1+1 classes. The district notes that the student is classified as a student with an emotional disturbance and that the parent emphasized at the impartial hearing that she wanted the student at a school with speech therapy and counseling, resulting in a conclusion that NPS 1 is an appropriate school. In addition, the district asserts that even if the district did not meet its burden of proof that NPS 1 was a proper placement, the appropriate remedy is to remand the matter to the impartial hearing officer for further development of the hearing record, and that should the matter be remanded, the district requests an order appointing a guardian ad litem for the hearing. Moreover, the district asserts that the impartial hearing officer properly determined that the parent failed to provide the student with consistent education and psychiatric treatment and did not exceed her authority in referring the parent to family court. In addition, the district asserts that the issue of referral to family court is moot because the district had already referred the issue to the Administration for Children's Services (ACS) prior to the impartial hearing officer's order. Next, the district asserts that neither the due process complaint notice nor the hearing record of the impartial hearing addressed the issues of evaluations, IEP goals or a 1:1 crisis management paraprofessional, and

accordingly should not be considered, and moreover, that the district did not need additional evaluations to properly address the student's needs. Moreover, the district asserts that the neuropsychological evaluation at district expense ordered by a prior impartial hearing officer is not the subject of the instant appeal. In addition, the district asserts that the parent's claim that the goals from the IEP are inadequate and that the student requires a 1:1 crisis management paraprofessional are speculative.

In a reply, the parent asserts, among other things, that the district's mootness argument lacks merit. The parent contends that the dispute is not moot because by ordering the district to "bring this family into Family Court," the impartial hearing officer established "an ongoing requirement that is not fixed." The parent also asserts that documentary evidence submitted by the district with the answer supports the parent's assertion that the district did not meet its burden at the impartial hearing.²¹

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

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

The IDEA directs that, in general, an impartial hearing officer's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20

²¹ The parents also make numerous other assertions, however, pursuant to State regulations, a reply is limited to any procedural defense interposed by a respondent or to any additional documentary evidence served with the answer (8 NYCRR 279.6). The other allegations in the parent's reply do not respond to the district's procedural defense or additional evidence submitted with the district's answer. Accordingly, such additional allegations of the reply are beyond the scope of the State regulations and will not be considered on appeal (see 8 NYCRR 279.6; Application of the Bd. of Educ., Appeal No. 10-036; Application of a Student with a Disability, Appeal No. 09-145).

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).

The burden of proof is on the school district during an impartial hearing, 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, I must first consider whether the impartial hearing officer improperly retained jurisdiction over this matter after issuing the first "interim" order on July 25, 2010. An impartial hearing officer must base his decision "solely upon the record of the proceeding before the impartial hearing officer" (8 NYCRR 200.5[j][5][v]). An impartial hearing officer's jurisdiction

is limited by statutory and regulatory law and there is no authority for an impartial hearing officer to reopen an impartial hearing, reconsider a prior decision, or retain jurisdiction to resolve future disputes between the parties. (see Application of the Dep't of Educ., Appeal No. 08-024; Application of a Child with a Disability, Appeal No. 06-021; Application of a Child with a Disability, Appeal No. 05-056; Application of the Bd. of Educ., Appeal No. 02-043; Application of the Bd. of Educ., Appeal No. 98-16).

Impartial hearing officers must be appointed by the board of education in accordance with a specific rotational selection process (Educ. Law § 4404[1]; 8 NYCRR 200.2[e][1], 200.5[j][3][i]). In this case, although the impartial hearing officer titled the first order an "interim" order, the impartial hearing officer made a determination on the merits of the parent's claim that NPS 2²² was inappropriate for the student in addition to other findings. The impartial hearing officer ordered that subsequent to her decision, the district was to contact three named schools and other schools to obtain an "immediate placement" for the student and that the impartial hearing would continue on the next scheduled date (see IHO Interim Order July 25, 2010). While it is permissible for an impartial hearing officer to order the district to obtain an appropriate placement for the student, it was not permissible for this impartial hearing officer to retain jurisdiction to monitor the district and resolve possible future disputes of the parties. Accordingly, I find that such retention was in contravention of the rotational selection process mandated by applicable State statute and regulations (see Educ. Law § 4404[1]; 8 NYCRR 200.5[j][3][i]; 8 NYCRR 200.2[e][1]; 8 NYCRR 200.2[b][9]).

Further, allowing an impartial hearing officer to render a subsequent decision would generally run afoul of the finality provisions set forth in the IDEA and its implementing regulations. An impartial hearing officer's decision is final unless appealed to a State Review Officer (20 U.S.C. § 1415[i][1][A]; 34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[j][5][v]). If there is an appeal to a State Review Officer, the independent decision on review is final; however, either party may seek judicial review of a State Review Officer's decision (20 U.S.C. §§ 1415[g], 1415[i]; 34 C.F.R. § 300.514[d]; 8 NYCRR 200.5[k][3]). Under the circumstances of this case, I find that the impartial hearing officer lacked authority to continue the impartial hearing after the July 25, 2010 "interim" order.^{23, 24}

²² At the time of the parent's April 23, 2010 due process complaint notice, NPS 2 had issued an April 14, 2010 acceptance letter (see Dist. Exs. 1 at p. 1; 16) and the CSE met on April 14, 2010 and added NPS 2 to the student's IEP (see Dist. Ex. 11).

²³ Regarding the parent's assertion that the impartial hearing officer erred in ordering (by decision dated October 21, 2010) the district to take action against the parent in family court, I first note that the October 21, 2010 decision and the specific order contained therein are null and void as a result of the above finding that the impartial hearing officer improperly retained jurisdiction after the July 25, 2010 "interim" order. Moreover, I find that the impartial hearing officer exceeded her jurisdiction by issuing an order that does not relate to the parent's due process complaint notice, the relief sought therein or the provision of FAPE. 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]) and the party requesting an impartial hearing determines the issues to be addressed by the impartial hearing officer in the due process complaint notice (see 20 U.S.C. § 1415[c][2][E], [f][3][B]; 34 C.F.R. §§ 300.508[d][3], 300.511[d]; 8 NYCRR 200.5 [i][7][i], [j][1][ii]). Upon review, I find that the impartial hearing officer exceeded her authority in this case by ordering the district to bring an action in family court, an order which does not relate to the identification, evaluation, educational placement or the provision of FAPE to the student (see 20 U.S.C. § 1415; 34 CFR § 300.507[a]; 8 NYCRR § 200.5[i][1]).

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

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the impartial hearing officer's second interim order dated August 17, 2010 and the impartial hearing officer's Findings of Fact and Decision dated October 21, 2010 are hereby annulled and vacated.

IT IS FURTHER ORDERED that the CSE reconvene to review all existing evaluation data, identify what additional data is needed, if any, and upon the completion of any necessary evaluations, recommend an appropriate program and placement for the student for the remainder of the 2010-11 school year within 30 days from the date of this decision.²⁵

Dated: **Albany, New York**
 March 7, 2011


JUSTYN P. BATES
STATE REVIEW OFFICER

²⁴ Although it is unnecessary to reach this issue, I note that the impartial hearing officer did not reference any support for her decision to assert jurisdiction to resolve a compulsory education law dispute in the context of an impartial hearing conducted pursuant to the IDEA (IHO Decision at p. 6), which is designed to address matters relating to the identification, evaluation or educational placement of a student with a disability, or a student suspected of having a disability, or the provision of a FAPE to such student (see 20 U.S.C. § 1415[b][6][A]; 34 C.F.R. § 300.507[a]; 8 NYCRR 200.5[i][1]).

²⁵ The parent's attorney has indicated that a neuropsychological evaluation, including academic testing, was in the process of being conducted as of February 1, 2011 (Reply ¶ 36). The CSE may also wish to consider the student's need for an in-depth speech-language evaluation with emphasis on language processing, an auditory processing evaluation conducted by an audiologist, and an OT evaluation with emphasis on sensory integration when determining what additional data, if any, is necessary in order to recommend an appropriate program and placement for the student.