



The University of the State of New York

The State Education Department

State Review Officer

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No. 11-074

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

Appearances:

Arthur J. Golder III, attorney for petitioners

Frazer & Feldman, LLP, attorneys for respondent, Laura A. Ferrugiari, Esq., of counsel

DECISION

Petitioners (the parents) appeal from that portion of a decision of an impartial hearing officer which determined that respondent (the district) was required to allow their privately retained psychologist to observe their son in his district classroom within 30 days from the impartial hearing officer's decision. The district cross-appeals from that portion of the impartial hearing officer's decision which found that it was required to allow the private psychologist to observe the student in his district classroom. The appeal must be dismissed. The cross-appeal must be dismissed.

Background

At the time of the impartial hearing, the student was attending the district's middle school in a sixth grade program and was receiving special education and related services (Tr. pp. 237-38; Parent Exs. D at p. 1; J; see Dist. Exs. 4; 5). The student has received diagnoses of an autism spectrum disorder and an attention deficit hyperactivity disorder, and he reportedly experiences anxiety (Tr. pp. 55-56, 172; Dist. Ex. 3; Parent Exs. A; B; C; D). His eligibility for special education and related services as a student with autism is not in dispute in this appeal (see 34 C.F.R. § 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

On July 26, 2010, the Committee on Special Education (CSE) convened to develop the student's individualized education program for the 2010-11 school year (Parent Ex. J). The CSE determined to conduct a functional behavioral assessment (FBA) of the student and develop a behavioral intervention plan for review in September 2010 (id. at p. 1). Due to concerns raised by the student's treating psychologist at the July 2010 CSE meeting regarding the qualifications of district personnel, the district decided to retain an evaluator who was not employed by the district to conduct the observation necessary for the FBA (Tr. pp. 92-94, 169-70; Parent Ex. D).

Sometime after the July 2010 CSE meeting, the parents retained a psychologist to evaluate the student (the private psychologist). In early September 2010, the private psychologist contacted the district seeking to conduct a classroom observation of the student (Tr. pp. 206, 340). In accord with district practice, the district's director of special education (the director) informed the private psychologist that the district did not permit outside evaluators to conduct observations, but offered to arrange for him to meet with district staff to discuss the student, provide teacher reports, and forward the student's educational records (Tr. pp. 206, 340, 342).

Due Process Complaint Notice and Response

In a due process complaint notice dated December 2, 2010, the parents asserted that the district had wrongfully prevented the private psychologist from conducting a classroom observation of the student (Joint Ex. A at pp. 1-4). Specifically, the parents asserted that both State and federal law permit the parents to have an independent educational evaluation (IEE) conducted at their expense and to participate in the evaluation process, and that the district's refusal to permit the private psychologist to observe the student in his classroom violated these rights (id. at pp. 3-4). The parents argued that the private psychologist required an observation of the student in the classroom in order to fully evaluate the student's needs (id. at p. 3). The parents also asserted that the district applied its practice against permitting outside evaluators to conduct observations inequitably, as it permitted outside evaluators with whom it had contracted to conduct classroom observations (id. at pp. 2-3). The parents requested that the district be ordered "to permit an observation of the [student] in his current classroom learning environment . . . no later than 30 days from the date of the order . . . , and that no conditions be placed on the evaluation that would prevent [the private psychologist] from making the observations needed to complete his evaluation" (id. at p. 4).

In its response, dated December 23, 2010, the district denied all material allegations of the parents' due process complaint notice (Joint Ex. B at pp. 1-10). The district also affirmatively alleged that it had offered the private psychologist the opportunity to meet with the student's teachers and related service providers, to collect data on the private psychologist's behalf, and to provide him with any other information he required; and that the parents had failed to cooperate with the district on each of those offers, despite the private psychologist never indicating that the offered accommodations would not suffice (id. at pp. 2-3, 5). The district further asserted that an observation was not necessary or required to complete an IEE (id. at pp. 2-3). The district maintained that its practice of prohibiting observations by outside evaluators was necessary "to safeguard against classroom disruptions and to protect the privacy of its students" (id. at p. 4). The district admitted, however, that "under certain circumstances" it

would contract with outside agencies and allow them to conduct classroom observations (id. at pp. 5-7). The district also asserted that the standards which apply to evaluations conducted by a CSE as part of the initial evaluation of a student with a disability do not apply to IEEs (id. at p. 8).

Impartial Hearing and Decision

An impartial hearing was convened on January 31, 2011 and concluded on April 6, 2011, after five days of testimony (Tr. pp. 1-792). During the impartial hearing, the district clarified that its position was "that no outside evaluators are permitted to conduct classroom observations" (Tr. pp. 383-84). A focus of the impartial hearing was the ethical and practical considerations regarding the impact of a classroom observation, not only on the student being observed, but on the teacher and other students in the class (see, e.g., Tr. pp. 23, 28, 52-54, 157-60, 172, 209-10, 214-16, 218, 222, 320-23, 331, 360-63, 403-04, 442, 633-37, 650-51, 674-77, 693, 717-18, 726, 747-48; Parent Exs. M; N; P; Q; R; S; T).

In a decision dated May 19, 2011, the impartial hearing officer held that the parents had the right to have the private psychologist observe the student in his district classroom (IHO Decision at p. 26). Specifically, the impartial hearing officer found that when "parents choose to obtain and pay for an evaluation of their own choosing, they may arrange for any assessments they choose" (id. at p. 10). The impartial hearing officer noted that the private psychologist testified that a classroom observation was necessary to conduct a complete evaluation of whether the student's educational needs were being met in his current placement and found that "in the instant case, an evaluation would be incomplete without" a classroom observation (id. at p. 25). She further found that, while federal regulations specify that an IEE must meet district criteria for an evaluation only when the IEE is sought at public expense, the comments to the regulations "logically apply to all [IEEs], regardless of whether they are obtained at public or private expense" (id. at pp. 12-13) and so the impartial hearing officer saw "no reason to impose any different rule" when the IEE was to be at private expense (id. at p. 20). Accordingly, the impartial hearing officer found that it was impermissible for the district to require a private evaluator to rely on observations conducted by district personnel, if a district evaluator would be permitted to conduct an observation (id. at pp. 12-13). The impartial hearing officer noted the private psychologist's "particular expertise" and found that "an observation by someone with the credentials and experience of [the private psychologist] can not be replaced by an observation by a classroom teacher or a psychologist with a different set of credentials" (id. at pp. 13-14). She also noted that as classroom observations could be intrusive, it was reasonable to think that a district could preclude parents from having multiple observations conducted for a single IEE (id. at p. 20). However, while the district had the right to adopt policies restricting visitors to its schools, it could not enact a blanket prohibition on classroom observations by private evaluators retained by parents asserting their right to an IEE (id. at pp. 22-23). The impartial hearing officer noted that this right extended only to private evaluators hired by parents to evaluate a student, rather than the student's program, and that the district could limit "the frequency and duration" of such observations (id. at pp. 25-26). The impartial hearing officer also found that the privacy concerns raised by the district could be obviated by requiring the private psychologist to agree to maintain confidentiality and instructing teachers to be aware of the need to protect confidential information while an outside observer was in the classroom (id. at pp. 20-21). As the district's

policies permitted classroom observations, the parents were entitled to an observation as part of the IEE (*id.* at pp. 23-24). The impartial hearing officer directed the district to permit a classroom observation of the student by the private psychologist within 30 days of the date of decision (*id.* at p. 26).

Appeal for State-Level Review

The parents appeal, asserting that the impartial hearing officer's decision should be upheld in all respects except insofar as it restricted the district's obligation to permit the private psychologist to observe the student to within 30 days of the date of the impartial hearing officer's decision.

The district answers and cross-appeals, arguing that the impartial hearing officer erred in directing it to permit the private psychologist to conduct an observation of the student in his district classroom.¹ In addition to matters also raised in its cross-appeal, the district asserts that the impartial hearing officer was biased and improperly credited the testimony of the private psychologist over that of district witnesses. In its cross-appeal, the district further argues that (1) the Individuals with Disabilities Education Act (IDEA) does not provide parents with the right to an observation of their children by a private evaluator; (2) even if the parents had such a right, the denial of their request did not constitute a procedural violation that precluded them from meaningfully participating in the student's education; (3) the private psychologist was biased and incredible; (4) the observation sought was not an IEE; (5) an observation was not necessary for the evaluation; (6) the impartial hearing officer erred in placing no limits on the observation; and (7) the observation would violate the privacy rights of other students in the classroom.

The parents answer the cross-appeal with general denials and affirmatively allege, among other things, that (1) the evaluation by the private psychologist meets the definition of an IEE under federal regulations; and (2) although the impartial hearing officer did not limit the scope of the observation, it would of necessity be "a cooperative process" between the district and the private psychologist.²

¹ In its answer, the district objects to the parents' submission of an affidavit from the private psychologist. 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. 11-041; *Application of a Student with a Disability*, Appeal No. 11-027; *Application of a Student with a Disability*, Appeal No. 11-017; *Application of the Bd. of Educ.*, Appeal No. 10-111). As I do not reach the merits of the parents' appeal for the reasons stated below, the affidavit is not necessary in order to render a decision and has not been considered.

² As State regulations do not authorize the filing of a pleading other than a petition, answer, or a reply in limited circumstances, I decline to consider the parents' August 10, 2011 letter and the district's July 25, 2011 letter that were submitted to the Office of State Review (8 NYCRR 279.6). Furthermore, I will not consider the portion of the parents' reply denominated "a reply to the answer" because it is not "a reply to any procedural defenses interposed by respondent or to any additional documentary evidence served with the answer" (*id.*); that portion of the reply which answers the district's cross-appeal has been considered.

Procedural Matters—Aggrieved Party

Initially, I note that "[g]enerally, the party who has successfully obtained a judgment or order in his favor is not aggrieved by it, and, consequently, has no need and, in fact, no right to appeal" (Parochial Bus Sys., Inc. v. Bd. of Educ., 60 N.Y.2d 539, 544 [1983]; 34 C.F.R. § 300.514[b][1]; see Cosgrove v. Bd. of Educ., 175 F. Supp. 2d 375, 385 [N.D.N.Y. 2001] [holding that "(t)he administrative appeal process is available only to a party which is 'aggrieved' by an IHO's determination"]). In this instance, the relief granted by the impartial hearing officer almost precisely mirrored that sought by the parents in their due process complaint notice (compare Joint Ex. A at p. 4, with IHO Decision at p. 26). It is unfortunate for the parents that their chosen evaluator was unable to perform the observation within the timeframe requested and granted, but that does not make the parents an aggrieved party. Nonetheless, as the district has cross-appealed the impartial hearing officer's decision, and pursuant to my authority to order a district to comply with the procedural requirements of the IDEA (Application of a Student with a Disability, Appeal No. 11-002; Application of a Student with a Disability, Appeal No. 09-080; see 20 U.S.C. § 1415[f][3][E][iii]; 34 C.F.R. § 300.513[a][3]; 8 NYCRR 200.5[j][4][ii]), I reach the issue of whether the district was required to permit the parents' private evaluator to observe the student in his district classroom.

Discussion

Preliminary Matters—Allegations of Impartial Hearing Officer and Witness Bias

Addressing first the district's allegations of bias on the part of the impartial hearing officer, it is well settled that an impartial hearing officer must be fair and impartial and must avoid even the appearance of impropriety or prejudice (see Application of the Bd. of Educ., Appeal No. 10-097; Application of a Student with a Disability, Appeal No. 10-018; Application of a Student with a Disability, Appeal No. 09-084; Application of the Bd. of Educ., Appeal No. 09-057; Application of a Student with a Disability, Appeal No. 09-052; Application of a Student with a Disability, Appeal No. 08-090), and must render a decision based on the hearing record (see Application of a Student with a Disability, Appeal No. 09-058; Application of a Student with a Disability, Appeal No. 08-036). An impartial hearing officer, like a judge, must be patient, dignified and courteous in dealings with litigants and others with whom the impartial hearing officer interacts in an official capacity and must perform all duties without bias or prejudice against or in favor of any person, and shall not, by words or conduct, manifest bias or prejudice, according each party the right to be heard (Application of a Child with a Disability, Appeal No. 07-090; Application of a Child with a Disability, Appeal No. 07-075; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child Suspected of Having a Disability, Appeal No. 01-021).

After reviewing the entire hearing record, I do not find the impartial hearing officer's crediting of the testimony of the private psychologist over that of the district's director and school psychologist to be evidence of bias. I find that the evidence does not support the district's contention that the impartial hearing officer was not impartial or acted in a manner that was inconsistent with the requirements of due process (34 C.F.R. § 300.510[b][2]; see Educ. Law

§ 4404[2]). To the extent that the district argues that the impartial hearing officer evidenced her bias by requesting the district to clarify its legal position (Dist. Ex. 6), I note that impartial hearing officers are specifically granted the authority "to ask questions of counsel or witnesses for the purpose of clarification or completeness of the record" (8 NYCRR 200.5[j][3][vii]; see 8 NYCRR 200.5[j][3][xi][a]). Although I agree with the district that the impartial hearing officer improperly equated the evaluation to be conducted by the private psychologist to an FBA when the private psychologist specifically testified that he was not seeking to conduct an FBA, an honest error of law is not evidence of bias (Application of a Student with a Disability, Appeal No. 10-004; Application of a Child with a Disability, Appeal No. 00-074). Under the circumstances in this case, while the district disagrees with the credibility findings and the conclusions of law reached by the impartial hearing officer, its disagreement does not provide a basis for finding that the impartial hearing officer acted with bias (Application of a Student with a Disability, Appeal Nos. 11-059 & 11-061; Application of a Student with a Disability, Appeal No. 10-018; Application of a Student with a Disability, Appeal No. 09-084; Application of a Student with a Disability, Appeal No. 09-058; Application of a Student with a Disability, Appeal No. 08-158; Application of a Student Suspected of Having a Disability, Appeal No. 08-100).

Next, I will address the district's cross-appeal requesting a reversal of the impartial hearing officer's decision to the extent that she found that the private psychologist testified credibly. In particular, the district asserts that a review of the hearing record reveals that the private psychologist provided testimony that was incredulous, irrelevant, and lacking in probative value, therefore, his testimony should be stricken from the hearing or given diminished weight. I decline to do so. A State Review Officer gives due deference to the credibility findings of the impartial hearing officer, unless the hearing record read in its entirety would compel a contrary conclusion (see Carlisle Area School v. Scott P., 62 F. 3d 520, 524 [3d Cir. 1995]; Application of a Student with a Disability, Appeal No. 11-064; Application of a Student with a Disability, Appeal No. 10-018; Application of the Bd. of Educ., Appeal No. 09-087; Application of a Student with a Disability, Appeal No. 08-157; Application of the Dep't of Educ., Appeal No. 08-105; Application of a Student Suspected of Having a Disability, Appeal No. 08-100; Application of the Bd. of Educ., Appeal No. 08-085; Application of the Bd. of Educ., Appeal No. 08-074; Application of the Dep't of Educ., Appeal No. 08-037). Here, a review of the complete hearing record does not compel a contrary conclusion as I find the district's assertions of bias unpersuasive and I therefore decline to modify the impartial hearing officer's credibility determinations.³ The overall impression created by the private psychologist's testimony was that of a professional, and I see no reason to discount the impartial hearing officer's crediting of his testimony regarding the need to conduct an observation (IHO Decision at pp. 19-20).

³ The district asserts that the private psychologist "is not certified in New York as a school psychologist or anything else;" however, the hearing record establishes that the private psychologist is licensed as a psychologist in New York State (Tr. pp. 272-73; Parent Ex. O).

Independent Educational Evaluation (IEE)

It is well established that "[t]he core of the [IDEA] is the cooperative process that it establishes between parents and schools" (Schaffer v. Weast, 546 U.S. 49, 53 [2005]). In accord with the IDEA's general requirement that parents participate in determining the educational placement of their children (see 20 U.S.C. §§ 1414[e]; 1415[b][1]; 34 C.F.R. §§ 300.116, 300.327, 300.501[c]; see also Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 368 [1985] ["the Act emphasizes the participation of the parents in developing the child's educational program and assessing its effectiveness"]; Bd. of Educ. v. Rowley, 458 U.S. 176, 182 n.6 [1982] [Congress sought "to maximize parental involvement in the education of each handicapped child"]), districts are specifically required to permit parents to participate in the evaluation process, including considering information provided by the parent about the student (see 34 C.F.R. § 300.304[b][1]).

One component of parental participation rights is the right to obtain an IEE (see 20 U.S.C. § 1415[b][1]; 34 C.F.R. § 300.502; 8 NYCRR 200.5[g]). Federal regulations define an IEE as "an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question" (34 C.F.R. § 300.502[a][3][i]; see 8 NYCRR 200.1[z]). An evaluation is defined in federal regulations as the "procedures used in accordance with [34 C.F.R.] §§ 300.304 through 300.311 to determine whether a child has a disability and the nature and extent of the special education and related services that the child needs" (34 C.F.R. § 300.15). An evaluator is required to review existing evaluative data and identify what further data is necessary to determine the student's educational and developmental needs for special education and related services (34 C.F.R. § 300.305[a]). If further data is necessary, the evaluator is required to gather relevant information about the student to make such a determination of the student's needs (34 C.F.R. § 300.304[b][1]; see Educ. Law § 4402[3][a]). In gathering such information, the evaluator is required to use multiple assessments to determine the scope of the student's needs and assess the student in all areas of disability in a sufficiently comprehensive manner "to identify all of the student's special education and related services needs" (34 C.F.R. § 300.304[b][2]; [c][4], [6]; see 34 C.F.R. § 300.306[c][1]).

In addition to the generalized right to an IEE, under certain circumstances parents may have the right to have the IEE conducted at public expense (34 C.F.R. § 300.502[b]). If the IEE is to be at public expense, the IEE must be obtained under the same criteria—including location of the evaluation and evaluator qualifications—as those used by the district when it evaluates a student (34 C.F.R. § 300.502[e][1]). Furthermore, when a parent obtains an IEE at private expense, the district must consider the results of the evaluation in making decisions with respect to the student's educational placement only if the evaluation meets district criteria for an evaluation (34 C.F.R. § 300.502[c]; 8 NYCRR 200.5[g][1][vi][a]). The United States Department of Education (DOE), in its Analysis of Comments and Changes to the federal regulations, noted that as the regulations require the district to "use a variety of assessment tools and strategies" to gather information about the student, those requirements similarly apply to IEEs conducted by private evaluators, "since these requirements will be a part of the [district's] criteria" (Independent Educational Evaluation, 71 Fed. Reg. 46,690 [Aug. 14, 2006]). Furthermore, as "the purpose of an evaluation under the Act is to determine . . . the educational

needs of the child[, i]t would be inconsistent with the Act for a public agency to limit the scope of an IEE in a way that would prevent an independent evaluator from fulfilling these purposes" (*id.*).

The district argues that the evaluation to be conducted here is not an IEE because an IEE is defined as an evaluation at public expense. Although the regulations refer to certain requirements in order for parents to have an IEE paid for at public expense (34 C.F.R. § 300.502[b]; 8 NYCRR 200.5[g][1]), as noted above an IEE is broadly defined to include any evaluation by a qualified examiner who is not employed by the public agency responsible for the education of the child in question (*see* 34 C.F.R. § 300.502[a][3][i]; 8 NYCRR 200.1[z]). Moreover, regulations expressly contemplate that an IEE may be obtained at private expense (34 C.F.R. § 300.502[c]; 8 NYCRR 200.5[g][1][vi][a]). Accordingly, the impartial hearing officer did not err in referring to the private psychologist's proposed evaluation as an IEE.

Classroom Observation by a Privately-Retained Evaluator

The district further argues that the impartial hearing officer erred in granting the relief sought because there is no statutory authority to allow parents or their private evaluator to conduct a classroom observation.

The DOE's Office of Special Education Programs (OSEP) has noted that, although neither the IDEA nor its implementing regulations give parents a general right to observe their children in a district classroom, "there may be circumstances in which access may need to be provided. For example, if parents invoke their right to an IEE of their child, and the evaluation requires observing the child in the educational placement, the evaluator may need to be provided access to the placement (Letter to Mamas, 41 IDELR 10 [OSEP 2004]; *see* Application of a Child with a Disability, Appeal No. 07-013). Additionally, although in the context of an IEE at public expense, OSEP has also stated that if the district's "assessment procedures make it permissible to have in-class observation of a child, the independent evaluator has the right to do so" (Letter to Wessels, 16 IDELR 735 [OSEP 1990]).

It is important to note that this right is not unqualified. The right to an IEE "consists of an evaluation of the child's educational needs, not an evaluation of the District's placement, or its educational programs" (Matter of B.L., 31 IDELR 42 [SEA OR 1999], *available at* <http://www.ode.state.or.us/services/disputeresolution/dueprocess/1999orders/DP-99-102.pdf>; *see* In re: Student with a Disability, 43 IDELR 214 [LEA NV 2005]). However, if a classroom observation is necessary in order to properly evaluate the student's needs, the district must permit the outside evaluator to observe the student, so long as the evaluator meets the district's criteria and is subject to the restrictions which the district places on its own evaluators (*see* Sch. Bd. v. L.H., 2009 WL 3231914 [M.D. Fla. Sept. 30, 2009]; Manatee County Sch. Bd., 51 IDELR 289 [SEA FL 2008], Washoe County Sch. Dist., 106 LRP 11741 [SEA NV 2005]; *see also* Letter to Mamas, 41 IDELR 10).

During the impartial hearing, a district school psychologist and the director testified that classroom observations should only be conducted if the psychologist was "part of the treating team" (Tr. pp. 23, 28, 212-14). They further opined that a classroom observation is not an

essential component of a clinical psychological evaluation, as there are more effective ways to receive information about the student's behaviors, such as teacher interviews and behavior observation checklists (Tr. pp. 33-34, 49-51, 173-74, 178-80, 204-05, 217). The school psychologist testified that a classroom observation should only be conducted at the behest of the student's school or district (Tr. p. 61). The school psychologist further testified that an observation is an unreliable method of determining behaviors, especially with the student in this case, whose disabilities caused him to exhibit different behaviors on different days and at different times (Tr. pp. 139-41). In any event, according to the school psychologist, an observation conducted outside of the classroom would still permit a psychologist to determine the relationship between the student's functioning and his environment, if properly supplemented by providing the student's teachers with a behavioral observation checklist (Tr. pp. 62-63, 65).

To the contrary, the private psychologist testified that a classroom observation could be necessary depending on the student's needs and the reason for which the student was referred to him for an evaluation (Tr. p. 289). In this case, the referral question "was for a determination of the comprehensive educational needs across environments," including the appropriateness of the educational curriculum procedures used in the classroom (Tr. pp. 294-95, 471, 583-84, 722, 761). The private psychologist testified that an observation was "essential" in this instance, so that he could obtain information regarding the student's functioning with respect to his environment, specifically the suitability and effectiveness of educational interactions and the procedures used to teach him, as well as to make specific recommendations regarding such interactions in the future (Tr. pp. 296-97, 362, 405-06, 761). While the private psychologist noted that he would be evaluating the performance of the student's teachers, he clarified that he would evaluate the teachers' interactions with the student, rather than their effectiveness as educators (Tr. pp. 628-30, 676-77, 680, 723, 768-70).

The private psychologist further testified that providing the student's teachers with checklists would not suffice, as they could not provide the level of detail about the context of the student's interactions with others in the classroom that the private psychologist required (Tr. pp. 296-97, 300, 336-38, 355-57). However, he would utilize such instruments, in addition to structured interviews with the student's teachers, as a component of his evaluation (Tr. pp. 542-48). Because the private psychologist had been asked to evaluate the student's educational functioning and his needs, an observation was necessary to recommend specific interventions (Tr. pp. 467-68). Additionally, a direct observation permitted the private psychologist to immediately record behaviors, so as to minimize errors and to identify the functions of the student's behaviors, rather than relying on descriptive accounts from teacher reports (Tr. pp. 416-17, 450-52). Furthermore, the private psychologist noted that, based on his training and experience, he may be able to make connections between the student's behaviors and the environment that would not be noticed by the student's teachers (Tr. pp. 343-44). Specifically, teacher reports would be inadequate inasmuch as they could not convey the manner in which interventions were carried out, and because it was important to have an objective view of the interactions taking place in the classroom (Tr. pp. 669-70, 704-05). The private psychologist also testified that he would be as unobtrusive as reasonably possible, so as not to distract the students and interrupt the instructional process (Tr. pp. 320-23, 360-63).

The school psychologist and director each testified that the district had a longstanding unwritten practice of not permitting classroom observations by independent evaluators retained by parents (Tr. pp. 47-48, 56, 105-06, 178-79, 207-08).⁴ The reasons given for this practice were that the district was trying to protect the confidentiality of its students and avoid disruption to their education (Tr. pp. 48-49). The school psychologist testified that certain of the other students in the student's class, as well as the student himself, "show signs of distractibility [such] that it could be detrimental if there is another person in the room" (Tr. pp. 53-56; see Tr. p. 218). The private psychologist, however, testified that he had no concern that he would harm the students in any manner simply by conducting an observation (Tr. pp. 331, 442, 575, 633-37, 650-51, 726). The director testified that a classroom observation would generally only be conducted for initial evaluations and to conduct an FBA (Tr. p. 169). However, the school psychologist and director admitted that the district did not prohibit outside evaluators with whom the district had contracted from conducting classroom observations, as those evaluators would "be a part of the team" and approved by the district, rather than in the classroom solely to observe the student on one occasion (Tr. pp. 88-90, 208-11). This approval by the district obviated concerns regarding confidentiality, as "the privacy concerns only pertain to people who are not school personnel" (Tr. pp. 150-51). The director testified that the district would contract with outside evaluators "only when we don't have somebody in-house that has the skill or expertise" (Tr. pp. 167-68).

I find that, under the circumstances of this case, the parents have the right to have the evaluator of their choice, for whose services they have not sought reimbursement from the district, observe the student in his district classroom (see Manatee County Sch. Bd., 51 IDELR 289 [finding that the parents' right to an IEE includes the right for their evaluator to conduct reasonable in-school observations of their child]), aff'd Sch. Bd. v. L.H., 2009 WL 3231914, at *3). I further find that, under the circumstances of this case, the private psychologist credibly testified that a classroom observation was necessary for him to conduct a complete educational evaluation of the student. To the extent that the district argues that the impartial hearing officer erred in not limiting the duration of the observation, I note that the district adduced no evidence regarding its practices or policies when conducting observations, precluding the impartial hearing officer from making a reasoned judgment on that basis. While the district argues that permitting the observation would violate the "privacy and confidentiality rights" of other students in the classroom, I note that the Family Educational Rights and Privacy Act of 1974 (FERPA) does not preclude classroom observations by parents or professionals because FERPA prohibits teachers from disclosing information from an educational record to other students or observers (Letter to Mamas, 106 LRP 15971 [Family Policy Compliance Office 2003]). Although I understand the district's concerns about permitting outside observers in its classrooms (Tr. pp. 48-49, 53-54, 149-52, 154-60, 172, 209-10, 214-16, 218, 221-22), I encourage the district to develop a comprehensive policy governing the conduct of classroom observations, which it could then apply to private evaluators as well as district evaluators.

Conclusion

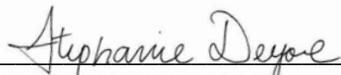
⁴ I note that in its memorandum of law, the district asserts that Parent Ex. I—which is apparently its policy governing the admission of visitors to district schools (Tr. pp. 183-85)—"is irrelevant to the instant situation." As the exhibit was never entered into evidence, and accordingly is not a part of the hearing record, I agree.

The impartial hearing officer properly found that the parents were entitled to have their privately-retained evaluator conduct an observation of the student in his district classroom. As the parents were not aggrieved by this ruling, I can issue them no affirmative relief in this proceeding other than directing the district to comply with its procedural obligations; however, I encourage the district to cooperate with the parents' private evaluator in arranging for an observation of the student in his district classroom during the coming school year. Reasonable limitations may be placed on the private evaluator, consistent with the district's policies, if any, governing limitations on observations conducted by district evaluators. Finally, I emphasize that the purpose of this observation is to evaluate the student's needs, not the district program in which the student is placed.

THE APPEAL IS DISMISSED

THE CROSS-APPEAL IS DISMISSED

**Dated: Albany, New York
August 24, 2011**


STEPHANIE DEYOE
STATE REVIEW OFFICER