



The University of the State of New York
The State Education Department
State Review Officer

No. 07-042

Application of a CHILD SUSPECTED OF HAVING 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 City School District of the City of Fulton

Appearances:

Ronald L. Van Norstrand, Esq., attorney for petitioners

Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C., attorney for respondent, Susan T. Johns, Esq., of counsel

DECISION

Petitioners appeal from the decision of an impartial hearing officer which upheld the determination of respondent's Committee on Special Education (CSE) that petitioners' son not be classified as a student with a disability for the 2006-07 school year. Respondent cross-appeals from that part of the impartial hearing officer's decision ordering it to, among other things, develop counseling goals and objectives, communicate formally with petitioners, improve its documentation of the student's behaviors and social interactions, and provide certain services to the student. The appeal must be sustained in part. The cross-appeal must be sustained.

Preliminarily I will address a procedural issue. Petitioners attach to their petition an April 2007 referral of their son by his teachers to the intervention team at the elementary school he attended, an October 2006 auditory processing evaluation, and a February 2007 "Section 504 Accommodation Plan," and request that they be made part of the record. Respondent objects. Generally, documentary evidence not presented at a hearing may be considered in an appeal from an impartial hearing officer's decision if such additional evidence could not have been offered at the time of the hearing and the evidence is necessary to enable the State Review Officer to render a decision (Application of a Child with a Disability, Appeal No. 06-058; Application of a Child with a Disability, Appeal No. 05-020). The April 2007 referral could not have been offered at the time of the impartial hearing, however, it is not necessary for my review and I decline to accept it. With respect to the October 2006 auditory processing evaluation, I note that petitioners offered the evaluation at the impartial hearing, but withdrew it "because the school district claimed that it had not had an opportunity to review the evaluation" (Pet. ¶ 29; Tr. pp. 12-13). The auditory processing evaluation was conducted in October 2006, after the July 2006 CSE and September 2006 CSE

made their determinations not to classify the student. It is not necessary for my review and I decline to accept it. Similarly, the February 2007 "Section 504 Accommodation Plan," is not necessary for my review and I decline to accept it.

Petitioners' son was ten years old and in the fifth grade at one of respondent's elementary schools when the impartial hearing began in January 2007. He has average cognitive skills and his reading, math and writing skills are within expectations given his age, grade and ability (Dist. Ex. 11 at p. 7). The student has a history of difficulties in the areas of attention and impulse control, and he lacks understanding of the rules and "nuances" of socially appropriate behavior (Dist. Ex. 64 at pp. 1-2). He also has difficulties with processing sensory information, working memory, planning and organizing, and monitoring his responses and behaviors (Dist. Ex. 13 at pp. 2, 5). In addition, anxiety prevents the student from handling change and transition (id. at p. 1). The student also displays obsessive focusing on particular interests and exhibits some "tic-like" behavior (id.; Parent Ex. 64 at p. 1). In 2006, the student was diagnosed as having an Autism Spectrum Disorder, specifically Asperger's Syndrome (Dist. Exs. 9 at p. 2; 13 at p. 1).

The student began receiving special education and related services when he was in preschool (Parent Ex. 70). For kindergarten, he was classified as having a speech or language impairment and received group speech-language therapy (id. at p. 3). He continued to receive group speech-language therapy in first and second grade (Parent Exs. 68; 69). Also during first and second grade, he received academic intervention services for English language arts (Parent Ex. 57). In May 2004 at the end of the student's second grade year, the CSE determined that the student be declassified and recommended that he receive declassification support services to begin September 2004 (Dist. Ex. 3). The CSE noted that the student's speech had improved, but that he should receive speech services "under speech improvement" in a small group setting (id.). For third grade during the 2004-05 school year, the student attended regular education classes (Dist. Ex. 45). He continued to receive academic intervention services for English language arts and speech improvement services (Dist. Ex. 12; Parent Ex. 56).

The student attended regular education classes in fourth grade during the 2005-06 school year (Dist. Ex. 46). At the student's mother's request, the school psychologist prepared a letter dated March 23, 2006 regarding her son's progress in fourth grade (Dist. Ex. 65 at p. 1). The school psychologist indicated that the student's behavior in and out of the classroom had become increasingly problematic (id.). He further indicated that the student had difficulties with self-control and had received several discipline referrals for arguing and fighting with peers, pushing others in line, using derogatory comments toward other students, talking out in class, arguing with adults, and getting out of his seat repeatedly (id.). He also indicated that the student often interrupted others, put his hands on others, and positioned himself too close to peers when talking, and noted that such behaviors "did little to put [the student] in 'good social standing' with his peers" (id.). The school psychologist also noted that the student had ongoing social difficulties with several peers and complained of being teased (id.). He further noted that the student exhibited tic-like behaviors including coughing and throat clearing, and he described the student as "idiosyncratic" (id.). He indicated that results of the Behavior Assessment System for Children (BASC) completed by the student's teacher and mother showed hyperactivity, depression, attention and withdrawal as problem areas for the student (id.).

On May 3, 2006, toward the end of the student's fourth grade year, the student's mother requested a psychological evaluation of her son (Dist. Ex. 5). She provided consent for referral to the CSE and for her son to be evaluated, and completed a social history on May 12, 2006 (Dist. Exs. 7; 8).

In a letter dated May 3, 2006, the school psychologist updated his March 23, 2006 letter to include results of an Asperger's rating scale completed by the student's mother (Parent Ex. 64 at p. 1). The following behaviors were noted as frequently occurring: child lacks understanding of unwritten rules of social play; child avoids social contact with other children during free time; child needs excessive amounts of reassurance, especially if things are changed or go wrong; child shows emotion out of proportion with the situation; child lacks precision in expression of emotion; when talking to the child, he appears uninterested in speaker's side of the conversation; child has an exceptional long term memory for events and facts; child becomes unduly upset by changes in routines or expectations; and child has poor motor coordination (*id.* at pp. 1-2). Additional notable behaviors included an "unusual fear or distress due to wearing particular items of clothing, noisy, crowded places and unexpected noises;" a tendency to flap or rock when excited or distressed; and unusual facial grimaces or tics including coughing and throat clearing (*id.*).

By letter dated June 2, 2006, the student's mother advised respondent's director of special instructional programs and pupil services (SIPPS) that her son had been diagnosed with an Autism Spectrum Disorder and an obsessive compulsive disorder (Dist. Ex. 9).

In a June 8, 2006 observation of the student during recess, the observer indicated that the student actively played on playground equipment, but "kept largely to himself" or "near" other children who played with each other (Dist. Ex. 77). When the whistle blew indicating recess was over, the student immediately ran to line up (*id.*). The student also was observed during a group language arts lesson in June 2006 (Dist. Ex. 76). The observer completed a chart marking the adaptive and problem behaviors that occurred (*id.*). The observer noted that the student completed his work quickly and that he was mildly inattentive (*id.*).

The school psychologist conducted a psychological evaluation of the student on June 15 and 16, 2006 (Dist. Ex. 11). Results of administration of the Kaufman Test of Educational Achievement - Second Edition (KTEA-2) indicated the student's performance across skill areas fell solidly in the average to above average range (*id.* at pp. 1, 4, 6). The student's decoding and comprehension skills for reading were noted as similar to children his age and were described as "not discrepant" from his cognitive scores (*id.* at p. 6). The school psychologist reported that the student tended to get confused with word problems that contained a great deal of information as it seemed that he did not know where to start, he took significant amounts of time to solve problems, he engaged in a great deal of self-talk to solve problems, and he responded impulsively (*id.*). Regarding written language, the student demonstrated a "more than adequate grasp" of the rules of punctuation, capitalization, paragraph formation, and writing a cohesive story (*id.*). His written products were described as "easy to read, sufficiently detailed and sequential" (*id.*).

The school psychologist reported the results of the BASC parent and teacher rating scales (Dist. Ex. 11 at p. 6). The BASC student self-report indicated that the student felt he had little control over things in his life and that he often was blamed for things that he did not do (*id.* at p. 7). In addition, the student reportedly believed that "things go wrong for him even when he tries

hard" (id.). The school psychologist noted that the student's self-report was indicative of the student's anxiety, as well as his perception that other children hate to be with him and that they almost always make fun of him (id.).

The school psychologist concluded that the student's average cognitive skills in conjunction with his reading, math, and writing skills that were all within age, grade, and ability expectations "casts doubt" on the existence of an educational disability (Dist. 11 at p. 7). He noted that the frequency and intensity of the student's social and behavior difficulties "seem to be strongly correlated with when [the student] started taking medication" (id.). The school psychologist further indicated that it was unclear if the student's behaviors were the result of autism or if the behaviors were exacerbated by his medication, which, he noted, could have side effects of anxiety, irritability, hostility, impulsivity, and restlessness (id. at pp. 7-8).

The school psychologist recommended that the student not be designated as a child with an educational disability, but that he might be eligible for a plan pursuant to Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. §§ 701-796[*l*] [1998]) (Section 504) (Dist. Ex. 11 at p. 8). He recommended numerous interventions and supports to be incorporated into a Section 504 accommodation plan including providing the student with reassurance and encouragement rather than correction and criticism at the rate of 4:1; seating the student away from distractions; standing next to the student when giving directions or presenting lessons; checking the student for understanding of oral directions; providing and checking an agenda; sending positive notes home when the student had a good day or made good choices; cuing the student to stay on task; ignoring call-outs and reinforcing hand-raising; emphasizing and promoting within the classroom a "no put-downs" policy for all children; allowing the student to improve his social standing by assuming the role of "reinforcer" where he would provide class incentives to students who are doing the "right thing;" breaking assignments, particularly math, into smaller chunks for multistep tasks or assignments; checking with the student to make sure that he was breaking things down into manageable steps; keeping a visual schedule on the student's desk to help him know what materials he needed for each part of the day; providing assistance with organization, especially at the end of the day; and when the student seemed overwhelmed or nervous, providing him with activities he prefers (id. at pp. 8-9). Additional recommendations included supportive counseling to assist the student with social skills and problem solving that involved peers, role playing and chances to "practice" skills and get feedback within the classroom, consultation with the student's doctor and other specialists, and consultation with an adolescent psychiatrist to "tease" out the interaction of the student's medication and his social/behavioral problems (id. at p. 9).

The student and his parents met with a private psychologist who conducted an initial diagnostic evaluation on May 4, 2006 (Dist. Ex. 13 at p. 1). The private psychologist described the student as "high functioning," based on the student's high intelligence and pattern of deficits and strengths (id.). He indicated that the student presented deficits in the areas of qualitative abnormalities in reciprocal social interactions, qualitative abnormalities in communication, and restricted, repetitive and stereotyped patterns of behavior (id.). He further indicated that such deficits were observed on a daily basis when the student's lack of understanding social interactions impact his time with peers (id.). The private psychologist noted that the student's communication patterns lacked reciprocity and pointed to the student's problems with language for social purposes (id.). He further noted that the child displayed obsessive focusing on particular interests, and a high level of anxiety that prevented him from handling change and transitions (id.). The private

psychologist concluded that the child met the criteria for Asperger's Syndrome as set forth in the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition Text Revision (DSM-IV-TR).

The private psychologist recommended a sensory integration evaluation conducted by an occupational therapist, adapting teaching strategies to assist the student in processing verbal information, repeating lessons in condensed form on different days to address the student's tendency to forget information over time, providing a social skills group in conjunction with pragmatic language intervention by a speech therapist, and recognition of the student's deficits in executive functioning, specifically deficits in inhibiting his behaviors, shifting from one task to another, and with emotional control (Dist. Ex. 13 at p. 2). The private psychologist opined that the student's difficulties with working memory, planning, organizing, and monitoring his responses and behaviors in combination with sensory deficits accounted for or contributed to the decline in the student's compliant behaviors at school (id. at p. 1).

During fourth grade, the student took part in the New York State Testing Program for English language arts (ELA) and mathematics (Dist. Ex. 33). On the ELA examination, the student performed within Level 3, demonstrating an understanding of the ELA knowledge and skills expected at the fourth grade level (Dist. Ex. 47 at p. 10). On the mathematics examination, the student performed within Level 2, requiring referral for academic intervention services (Dist. Ex. 33; Parent Ex. 53).

The student's fourth grade fourth quarter progress report showed that with the exception of a C in mathematics, the student earned As and Bs (Dist. Ex. 46). In the Responsibilities of the Learner section of the student's progress report, the student was rated as having weaknesses in the areas of: accepts and follows rules and routines; follows directions; respects the rights, feelings and properties of others; participates cooperatively in group activities; and accepts responsibility for own actions (id.). The student received five disciplinary referrals during his fourth grade year for various behaviors including fighting and physical aggression, and teasing and taunting (Dist. Ex. 30).

Respondent's CSE met on July 25, 2007 (Dist. Ex. 15). The CSE noted that the student had a medical diagnosis of Asperger's Syndrome and discussed the student's difficulties with social interaction at school (id.). The CSE also discussed the student's assessments, noting that the student's cognitive skills were in the average range, that his reading, math, and writing skills were within the expectations for his age, grade and abilities, and that his grades and classroom performance remained in the average to above average range (id.). The student's mother identified the services that she believed should be included on an individualized education program (IEP) (Tr. pp. 45, 413). The CSE determined that the student was not eligible for special education services, but because of his medical diagnosis and need for "environmental accommodations," it recommended that a Section 504 accommodation plan be developed to address the student's needs (id.).

On July 28, 2006, the student's mother met with respondent's superintendent of schools and executive director of instruction and assessment to discuss her concerns regarding the CSE's July 26, 2006 determination not to classify her son and her son's education program for the 2006-07 school year (Dist. Ex. 16). She requested that the CSE review her son's program again (id.).

On August 21, 2006, respondent's director of SIPPS advised petitioners that their son had been referred to the CSE for an initial evaluation (Dist. Ex. 18). On August 31, 2006, a planning meeting was held (Dist. Ex. 20). The meeting was attended by the student's mother, a friend of the parents, an educational advocate, a representative of the Special Education Training and Resource Center (SETRC), respondent's director of SIPPS, the school principal and the school psychologist (*id.*). The meeting participants discussed creating a plan to include a parent advocate to assist in communication between home and school in an attempt to "eliminate the animosity that [the student] may be feelings (sic) about school" (*id.*). The school psychologist suggested that the school continue to directly call the student's mother for good communication (*id.*). The plan also called for an occupational therapy evaluation, and if recommended, a sensory diet would be put in place by October 2006 (*id.*). In addition, the plan included a speech evaluation to address pragmatic concerns and a behavior assessment with the school psychologist serving as a point person (*id.*). The school principal indicated that he would develop a plan for training staff to have an "awareness of Asperger's and its behaviors" and would assign a support person in the cafeteria by September 21, 2006 (*id.* at p. 2). A plan to address bullying by other students was discussed (*id.*). The school social worker would work with the student on his social skills and with the students who were bullying (*id.*). A meeting was scheduled for September 5, 2006 to review the plan with the student's teachers, get their input and share basic information about Asperger's Syndrome with the core teaching team (*id.*). A CSE meeting was scheduled for September 28, 2006 to review the evaluations and plans (*id.*).

The student began attending fifth grade in September 2006. At the beginning of the year, the teaching assistant in the student's classroom contacted the student's mother on a daily basis to discuss the student's day at school (Dist. Exs. 16 at p. 1; 32).

One of respondent's school psychologists observed the student on various days in a variety of settings in September 2006 to collect information to prepare a functional behavior assessment (FBA) (Tr. p. 307; Dist. Ex. 28). The student was observed transitioning to class from recess, during recess, in physical education class, in the locker area, at lunch, in the classroom, and outside before school began (*id.*). The observer noted the student's behavior and social interactions (*id.*). She also obtained input from the student's teachers (Dist. Ex. 10).

Also in September 2006, respondent's speech-language pathologist conducted an evaluation of the student due to concerns regarding his pragmatic language abilities (Dist. Ex. 23). Results of the Test of Language Development - Intermediate Third Edition (TOLD-I:3) indicated that the student's receptive and expressive language skills were in the average range (*id.* at p. 2). Administration of the Pragmatics Profile of the Clinical Evaluation of Language Fundamentals - 4 (CELF - 4) yielded a raw score of 147 which was described as indicative of the student exhibiting adequate social communication skills (*id.*). In addition, in order to assess the student's pragmatic skills with peers and adults, the student was observed in his physical education class and during recess (*id.* at pp. 2-3). Articulation was informally assessed during connected speech and noted to be characterized by errors for [r] and [l] for all positions in words (*id.* at p. 1). Based on the results of the TOLD-I:3, the Pragmatics Profile of the CELF-4, the observations, and discussions with classroom teachers, the speech-language pathologist did not recommend therapy for social language, but did recommended that the student receive speech improvement services to address his articulation errors with the [r] and [l] sounds (*id.* at p. 3).

In a September 2006 occupational therapy evaluation of the student, the occupational therapist identified areas of concern including sensory processing difficulties, below average scores on visual perceptual testing, postural control and auditory processing (Dist. Ex. 24). She recommended group occupational therapy (id. at p. 4).

On September 27, 2006, the school psychologists who were working with the student drafted an FBA that consisted of at least six target behaviors that the student exhibited, the antecedent, function, and consequence of each behavior, and an intervention to address each behavior (Dist. Ex. 25). The student's targeted behaviors included calling out or shouting out in class, difficulty initiating social interaction in a 1:1 or group situation without adult support, being a less active participant in large group activities, engaging in immature behaviors and immature topics, distancing himself from peers or attempts to initiate interactions in an inappropriate manner in social situations, and relying on teachers/adults to problem solve for him (id. at pp. 1-2).

The CSE met again on September 28, 2006 (Dist. Ex. 26). The CSE Chairperson read a report from the SETRC representative that indicated that the student appeared to react and interact appropriately and that she would continue to monitor the student's activities at school (id.). It was noted that the student's teachers and school psychologist reviewed the draft FBA and recommended changes (id.). The student's classroom teacher reported that the student was doing well academically, but needed to work on organization and sometimes had difficulties with "the structure of behavior in classroom," which she indicated should be covered by the FBA (id.). The speech-language pathologist reported that the student performed well on speech testing and was appropriate in his behavior (id.). She recommended that the student receive speech improvement services "under Part 100, [of the Regulations of the Commissioner of Education] not under IDEA" (id.). The occupational therapist reviewed her evaluation and reported that the student was distracted by loud noises and during transition (id.). She recommended that the student receive group occupational therapy to address sensory issues (id.). The school social worker indicated she had observed the student as he interacted with other students and had been working with him on social appropriateness (id.). The CSE determined that the student did not meet the criteria to be classified as a student with a disability (Dist. Ex. 31).

On November 14, 2006, petitioners filed a due process complaint notice challenging the CSE's determination that their son was not eligible for special education services (Dist. Ex. 1). On November 16, 2006, respondent's Section 504 Committee met and developed an accommodation plan for the student (Dist. Ex. 39). On December 4, 2006, respondent filed a response to petitioners' due process complaint denying that the student met the criteria for classification as a student with a disability (Dist. Ex. 2).

The impartial hearing began on January 21, 2007 and concluded on February 14, 2007 after four days of testimony. The impartial hearing officer rendered her decision on March 21, 2007. She found that petitioners did not prove that their son's educational performance was adversely impacted and upheld the CSE's determination that he was not eligible for special education. In addition, the impartial hearing officer denied petitioners' request for an independent educational evaluation (IEE). However, "in connection with the school district's obligation to remediate," the impartial hearing officer ordered it to document the academic intervention services and/or the Section 504 services it provided to and for the student and to communicate with petitioners about such services including working with petitioners to establish counseling goals and objectives and

reporting on the student's progress, convening monthly or more frequent meetings with petitioners and those charged with developing or implementing the FBA and behavior intervention plan (BIP), and identifying and implementing teaching strategies from which the student would benefit. She further ordered the building principal, school psychologist, school social worker and regular education teacher to meet and discuss with petitioners the advantages and disadvantages of hiring a behavior specialist to assist in the development of the FBA and BIP, and to discuss assigning an aide to the student in order to assist the student's teachers in monitoring the student, keeping him on task and implementing his BIP. In addition, the impartial hearing officer ordered respondent to improve its documentation of the student's behaviors and social interactions and to fully comply with 8 NYCRR 200.13.¹

Petitioners appeal from the impartial hearing officer's decision. They assert that the impartial hearing officer erred in finding that they did not prove that their son's educational performance was adversely impacted by his "Autism/Asperger's syndrome." They request that an SRO overturn the impartial hearing officer's decision and order respondent to identify their son as a child with a disability and prepare and implement an IEP for him. They also seek an IEE to include the development of an FBA and BIP including staff training regarding the BIP. Respondent cross-appeals from that part of the impartial hearing officer's decision ordering it to establish counseling goals and objectives, to report to petitioners on their son's progress toward his goals and objectives, to convene monthly or more frequently with petitioners to develop or implement the FBA and BIP, and to identify and implement teaching strategies from which petitioners' son might benefit. In addition, it asserts that the impartial hearing officer lacked authority to order district staff to meet with petitioners to discuss the advantage of hiring an outside agency to assist in the FBA and BIP process and to discuss whether an aide should be assigned to the student. Respondent also asserts that the impartial hearing officer exceeded her authority in ordering it to improve its documentation of the student's behaviors and social interactions and that she erred in ordering it to comply with 8 NYCRR 200.13.

I will address petitioners' appeal first. Petitioners assert that their son should be identified as a child with a disability, who by reason thereof, needs special education and related services. There is no dispute that the student is diagnosed as having Asperger's Syndrome, which is identified in the record as an Autism Spectrum Disorder (Dist. Exs. 9 at p. 2; 13 at p. 1). However, in order to be classified as a child with a disability, the student must not only have a specific disability, in this case autism, but the disability also must adversely affect the student's educational performance such that the child requires special services and programs (see Application of the Board of Educ., Appeal No. 06-120; Application of a Child Suspected of Having a Disability, Appeal No. 05-090; Application of a Child Suspected of Having a Disability, Appeal No. 01-107; Application of a Child Suspected of Having a Disability, Appeal No. 94-42; Application of a Child Suspected of Having a Disability, Appeal No. 94-36). The disability of autism is defined in federal regulation as "a developmental disability significantly affecting verbal and nonverbal

¹ 8 NYCRR 200.13 speaks to educational programs for children with autism.

communication and social interaction . . . that adversely affects a student's educational performance" (34 C.F.R. § 300.8[a],[c][1][i];² see 8 NYCRR 200.1[zz][1]).

As noted above, the impartial hearing officer found that petitioners did not prove that their son's educational performance was adversely affected by his disability and upheld the CSE's determination that he was not eligible for special education. The record shows that when the CSE met in July 2006, the student had completed fourth grade in regular education classes where he earned mostly As and Bs and was promoted to the fifth grade (Dist. Ex. 46). In addition, on the fourth grade ELA examination, the student demonstrated an understanding of the ELA knowledge and skills expected at the fourth grade level (Dist. Ex. 47 at p. 10). Further, testing administered as part of the June 2006 psychological evaluation conducted by the school psychologist showed that the student's reading, math and writing skills were within expectations given his age, grade and ability (Dist. Ex. 11 at p. 7).

The record also shows that during fourth grade, the student began to exhibit behavior difficulties and received several discipline referrals (Dist. Ex. 65 at p. 1). On his fourth quarter progress report, he was rated as having weaknesses in the areas of: accepts and follows rules and routines; follows directions; respects the rights, feelings and properties of others; participates cooperatively in group activities; and accepts responsibility for own actions (Dist. Ex. 46). The school psychologist noted that the student appeared to lack understanding of the nuances of socially appropriate behavior and began to exhibit "tic-like behaviors" (*id.*). Teachers of special areas, such as physical education and library and computer, noted that the student struggled socially, would speak out or interrupt, did not follow directions, was easily distracted and required redirection (Dist. Ex. 11 at pp. 2-3).

The school social worker testified that she observed the student on one occasion during the 2005-06 school year and that he was very appropriate in the structured instructional setting (Tr. p. 214). She stated that the student sometimes needed reminders to stay on task, but no more than his typical fourth grade peers (*id.*). The school social worker also testified that she worked with the student approximately four times during the 2005-06 school year, specifically on social skills and that he responded very positively during those sessions (Tr. pp. 213-14). She further testified that during the 2005-06 school year, she worked with the student on a few occasions to help him develop social skills in reaction to some peer conflicts that occurred mostly during recess (Tr. p. 206). She stated that the student participated in peer conflict resolution, which she described as very structured, and indicated that the student was able to identify strategies to avoid conflict, take turns appropriately and respect the personal space of other students (Tr. pp. 209-12).

At the July 2006 meeting, in making its determination that the student was not eligible for special education services, the CSE reviewed the private psychological evaluation report and the school psychologist's report (Tr. pp. 42-43; Dist. Ex. 15). The school principal and the school

² The Code of Federal Regulations (34 C.F.R. Parts 300 and 301) has been amended to implement changes made to the Individuals with Disabilities Education Act, as amended by the Individuals with Disabilities Education Improvement Act of 2004. The amended regulations became effective October 13, 2006. In this case, none of the new provisions contained in the amended regulations are applicable because all the relevant events occurred prior to the effective date of the new regulations. However, citations herein refer to the regulations as amended because the regulations have been reorganized and renumbered.

social worker discussed their involvement with the student during the 2005-06 school year. The CSE noted that the student's grades and classroom performance remained in the average to above average range. It also noted the student's difficulties with social interaction at school. While the record shows that the student exhibited some behavior difficulties in less structured settings, there is insufficient information in the record to show that the student's needs resulting from his disability adversely affected his educational performance such that special education services were required. With the exception of the student's fourth grade progress report, the record does not include any other information from the student's fourth grade teacher about the student's educational performance. Moreover, the record shows that the student responded positively when working with the school social worker on social skills and participated appropriately in peer conflict resolution (Tr. pp. 209-12, 214). Based upon the information before me, I find that the CSE properly determined that the student was not eligible for special education services when it met in July 2006.

Similarly, I find that the CSE properly determined that the student was not eligible for special education services when it met in September 2006. As noted above, one of the school psychologists observed the student on various days in September 2006 (Dist. Ex. 28). In an observation conducted in class after recess, the student followed teacher directions appropriately, worked steadily and was quiet and attentive during lessons (*id.* at p. 1). During another classroom observation, the student required several prompts from the teacher to follow directions and to be polite to and respectful of his classmates (*id.* at pp. 3-4). In less structured settings such as lunch, recess and in the locker area, the school psychologist observed the student attempting to initiate social interaction and having positive exchanges with his peers, as well as having difficulty interacting with his peers or not interacting with his peers at all (*id.* at pp. 1-4).

The school psychologist also obtained input from the student's teachers in September 2006 (Dist. Ex. 10). The student's regular education classroom teacher advised the school psychologist that academics were not an issue for the student, but expressed concern about the student's failure to take responsibility for his actions (*id.* at p. 3). The special education teacher in the student's classroom indicated that the student's main difficulty was appropriately initiating social interaction (*id.* at pp. 1-2). The assistant teacher in the student's classroom indicated that the student did not require additional accommodations to be successful in the classroom, but expressed concern about the student's immature behavior and his difficulty initiating social interaction (*id.* at p. 2). Special area teachers noted that the student functioned better when interacting individually with other students rather than in a whole group and that the student called out answers or comments quite often and continued to need reminders to raise his hand (*id.* at p. 1).

The speech-language therapy and occupational therapy evaluations were also conducted in September 2006 (Dist. Exs. 23, 24). The speech-language therapy evaluation report indicated that the student exhibited adequate social communication skills (Dist. Ex. 23). Observations by the speech-language therapist showed that the student followed directions, used good eye contact with the teachers, sought out peers to interact with throughout the activities, played the games appropriately and transitioned well between activities (*id.*). Results of the occupational therapy evaluation indicated that the student had sensory processing deficits (Dist. Ex. 24).

At the September 2006 meeting, in making its determination that the student was not eligible for special education services, the CSE reviewed the draft FBA, observations of the student

and teacher input during the first weeks of school, the speech-language therapy and occupational therapy evaluations, as well as the report from the SETRC representative indicating that the student appeared to react and interact appropriately (Dist. Ex. 31). The student's classroom teacher reported that the student needed to work on organization and sometimes had difficulties with "the structure of behavior in the classroom," which she indicated should be covered by the FBA (id.). The school social worker indicated she had observed the student as he interacted with other students and had been working with him on social appropriateness (id.).

While the record shows that the student exhibited some inappropriate classroom behavior and struggled socially, there is insufficient information in the record to show that the student's disability adversely affected his educational performance such that special education services were required. I note that the student's regular education classroom teacher testified about the strategies she used with the student to address shouting out behavior, which she noted were used with other students in the classroom, and indicated that the strategies were effective for the student, but that he needed constant reminders (Tr. pp. 448-49). The school social worker testified that she met with the student once per week individually to work on "pro social" skills, spatial awareness and recognizing emotions in others (Tr. p. 216). She indicated that there were fewer complaints from peers about spatial awareness issues and that the student had developed some very good strategies to recognize emotions in others (id.). The school social worker also testified that she provided social skills training to the student once per month in a typical setting such as recess, and that he was doing well in that setting (Tr. pp. 220-21). She further testified that the teaching staff was positive about the student's progress and adjustment to the fifth grade classroom and had indicated some improvement in the areas of maintaining personal space, keeping hands off other student's belongings and responding appropriately to peer feedback (Tr. p. 218). She also stated that during lunch, the student "pretty regularly" sat with a group of students (Tr. p. 217). With respect to the student's sensory processing difficulties, I note that a progress report for the first month of occupational therapy indicated that the student was progressing toward competence in his instructional objectives (Parent Ex. 62). Based upon the information before me, I agree with the impartial hearing officer that petitioners failed to show that their son's disability adversely affected his educational performance such that special education services were required. I note also that petitioners seek no additional services than those that are already being provided.

Petitioners also appeal from the impartial hearing officer's determination that they were not entitled to an IEE at public expense. In their due process complaint notice, petitioners suggested as a proposed solution that an IEE be conducted "to include a functional behavioral assessment and development of an appropriate behavioral intervention plan for implementation with [the student], including staff training regarding the behavior intervention plan" (Dist. Ex. 1 at p. 4). The impartial hearing officer found that petitioners were not entitled to an IEE, and though it was suggested as a proposed solution and was within her authority to do so, she did not request an IEE (34 C.F.R. § 300.502[d], 8 NYCRR 200.5[g][2]). I have no reason to disturb the impartial hearing officer's finding.

I will now consider respondent's cross-appeal. Despite upholding the CSE's determination that the student was not eligible for special education, the impartial hearing officer ordered respondent to, among other things, establish counseling goals and objectives and provide services to the student. I agree with respondent that the impartial hearing officer exceeded her authority. As petitioners have not established their son's eligibility for special education services, they are

not entitled to services required by the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) or Article 89 of the Education law (Application of a Child Suspected of Having a Disability, Appeal No. 94-41).

I have considered the parties' remaining contentions and I find them to be without merit.

Lastly, I note that an extended period of time has passed, including the passage of a full school year, since the CSE and petitioners last met to consider the student's eligibility under the IDEA. The record on appeal does not reflect how the student performed over the course of the 2006-07 school year, how the student is currently functioning, or if he has continued progressing, as the testimony demonstrated, in addressing his behavioral and social skills needs. In addition, a review of the record on appeal shows that respondent's CSE had not met and considered the following: 1) the October 2006 auditory processing evaluation; 2) an educational audiological evaluation recommended by the February 1, 2007 Section 504 Committee; 3) a report emanating from an October 16, 2006 classroom observation (Dist. Ex. 34); 4) a classroom teacher's report dated October 16, 2006 (Dist. Ex. 33); 5) progress reports pertaining to academic intervention services in math (Parent Ex. 52 at p. 2) and occupational therapy (Parent Ex. 62). The CSE should again convene to review eligibility for IDEA services.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS SUSTAINED.

IT IS ORDERED that the impartial hearing officer's decision is annulled to the extent that she ordered respondent to establish counseling goals and objectives, to report to petitioners on their son's progress toward his goals and objectives, to convene monthly or more frequently with petitioners to develop or implement the FBA and BIP, to identify and implement teaching strategies from which petitioners' son might benefit, to meet with petitioners to discuss the advantage of hiring an outside agency to assist in the FBA and BIP process and to discuss whether an aide should be assigned to the student, to improve its documentation of the student's behaviors and social interactions, and to comply with 8 NYCRR 200.13; and

IT IS FURTHER ORDERED that, unless the parties otherwise agree, a CSE shall convene within 30 days from the date of this decision to consider the student's eligibility for services under the IDEA.

Dated: **Albany, New York**
 June 28, 2007

PAUL F. KELLY
STATE REVIEW OFFICER