The University of the State of New York

The State Education Department
State Review Officer

No. 07-053

Application of a CHILD WITH A DISABILITY, by his parent, for review of a determination of a hearing officer relating to the provision of educational services by the Board of Education of the Mahopac Central School District

Appearances:

Raymond G. Kruse, P.C., attorneys for petitioner, Raymond G. Kruse, Esq., of counsel

Ingerman Smith, L.L.P., attorneys for respondent, Ralph DeMarco, Esq., of counsel

DECISION

Petitioner appeals from the decision of an impartial hearing officer which denied her requests to be reimbursed for her son's residential tuition costs at the Storm King School (Storm King) for a portion of the 2006-07 school year and for a private neuropsychological evaluation. The Board of Education cross-appeals from the impartial hearing officer's determination that it failed to demonstrate that it had offered an appropriate educational program to the student for the 2006-07 school year. The appeal must be dismissed. The cross-appeal must be sustained in part.

Preliminarily, I will address a procedural issue raised in this appeal. A petition for review by a State Review Officer must comply with the timelines specified in the Regulations of the Commissioner of Education (see 8 NYCRR 279.2; Grenon v. Taconic Hills Cent. Sch. Dist., 2006 WL 3751450, at *5-*6 [N.D.N.Y. Dec. 19, 2006]). Respondent asserts in its answer that petitioner failed to commence this appeal within the time period set forth in Part 279 of the regulations (8 NYCRR 279.2[b]). Part 279 requires that a petition for review of an impartial hearing officer's decision shall be served upon the school district within 35 days from the date of the decision sought to be reviewed (8 NYCRR 279.2[b]). If the decision has been served by mail upon petitioner, the date of mailing and the four days subsequent thereto shall be excluded in computing the 25- or 35-day period (id.). A State Review Officer may excuse a failure to timely seek review within the time specified for good cause shown (8 NYCRR 279.13). The reasons for such failure shall be set forth in the petition (id.; Application of a Child with a Disability, Appeal No. 05-098; Application of a Child with a Disability, Appeal No. 05-026; Application of a Child with a Disability, Appeal No. 04-111; Application of a Child with a Disability, Appeal No. 04-103).

The impartial hearing officer's decision is dated March 26, 2007 (IHO Decision at p. 39). Assuming the decision was mailed, the last day to timely serve the petition was May 7, 2007.[1] However, petitioner's affidavit of service indicates that the petition was not served upon respondent until May 11, 2007. The petition is, therefore, untimely. In the petition, counsel offers an explanation for his delay in serving his client's petition, and requests that I excuse the untimely initiation of the appeal. In its answer, respondent asserts that petitioner had ample time to have initiated the appeal. I have considered both petitioner's and respondent's arguments and I find that, as set forth in the petition, petitioner's counsel has shown good cause for his delay. Accordingly, I will exercise my discretion and deem this appeal timely (Application of a Child with a Disability, Appeal No. 03-096).

At the time the impartial hearing commenced on August 1, 2006, petitioner's son was 15 years old and about to enter tenth grade at Storm King (Tr. pp. 926, 928-29; Dist. Ex. 1). Storm King is a private boarding and day school located in New York State (Tr. p. 925; Parent Ex. B at p. 2) and has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7]). The student was enrolled in Storm King on August 27, 2006 as a residential student and was dismissed from the school on October 2, 2006 (Tr. pp. 929, 934, 937; Parent Ex. G). He subsequently enrolled in another school for the 2006-07 school year (Tr. p. 1131). Petitioner seeks tuition reimbursement in the instant case only for the brief period her son attended Storm King during the 2006-07 school year. The student's eligibility for special education services and classification as a student having an other health-impairment (34 C.F.R. 300.8[c][9]; 8 NYCRR 200.1[zz][10]) are not in dispute in this appeal.

Petitioner's son has been receiving private psychiatric care since October 2001 (Dist. Ex. 9 at p. 1). He has met the criteria for diagnoses of an attention deficit hyperactivity disorder (ADHD), oppositional defiant disorder (ODD) and learning disorder NOS (not otherwise specified) (id. at p. 2).

Respondent's school social worker reported that in seventh grade during the 2003-04 school year, petitioner's son received grades ranging from 70 to 80 for three quarters, but failed English and home and careers for the fourth quarter of the school year (Dist. Ex. 8 at p. 1). Petitioner's son also received eight disciplinary referrals in seventh grade (id.). The student's teachers monitored or accompanied the student in the hallway to assist him with difficulties that he would have with his peers while passing classes (id. at p. 3). The school social worker noted that the student was advised that he could enter classrooms along the way to avoid conflicts (id.). She reported that when petitioner's son missed class due to detentions or in-school suspensions, his organizational and academic difficulties made it even more difficult for him to complete missed class work (id.). Detentions were assigned during lunch or after school rather than in-school suspension during class time (id.).

In eighth grade during the 2004-05 school year, petitioner's son received three disciplinary referrals for: failing to dress for gym, missing a detention to leave for an after school job, and bringing a box cutter to school, which resulted in a superintendent's conference and an out-of-

[1] Calculating 35 days from the date of the decision, excluding the date of mailing and subsequent 4 days thereto, results in a May 5, 2007 service due date. However, because May 5, 2007 was a Saturday, service on Monday, May 7, 2007 would have been permitted as the final day for timely service (8 NYCRR 279.11).

school suspension (Dist. Ex. 8 at pp. 1, 4). In a private psychiatric report dated March 21, 2005, the student's psychiatrist reported, among other things, inappropriate behaviors exhibited by petitioner's son during 2004 and 2005 (Dist. Ex. 9). The private psychiatrist stated that petitioner's son was not a child who carried a weapon with the intent to assault or steal to enrich himself (Dist. Ex. 9 at p. 2). Rather, he characterized petitioner's son as a youngster who was "handicapped" by ADHD, and had significant visual motor problems, a possible expressive language problem, and a striking discrepancy between his verbal and performance IQ scores (id.). He also indicated that the student's behaviors were consistent with a diagnosis of ODD (id.). The private psychiatrist stated that petitioner's son was not dangerous, but was immature, mindless, and deficient in social judgment (id.). After stating that suspending petitioner's son for the rest of the school year would not make the school safer, but would impede the student's social learning, the private psychiatrist recommended that respondent provide the student with a program that would meet his developmental needs (id.).

In respondent's social history update dated April 1, 2005, the school social worker reported that during his eighth grade year, the student failed Spanish the first semester and passed mathematics and social studies with a grade of 65 for the second quarter (Dist. Ex. 8 at p. 1). In addition to noting the student's impulsivity, the school social worker noted his poor organizational, handwriting, and social judgment skills (id.). The school social worker also reported that an intervention prevention coordinator frequently met with the student to provide support (id. at p. 4).

In April 2005, petitioner's son began individual and group therapy at a community services program (Dist. Ex. 19). The student's parents also had referred their son to respondent's CSE for evaluation pertaining to his present levels of cognitive, academic, and social/emotional functioning (Dist. Ex. 7 at p. 1). At the time of the resultant April 11, 2005 psychoeducational evaluation by the school psychologist, petitioner's son was receiving individualized home instruction for two hours per day (id.).

The school psychologist's administration of the Wechsler Intelligence Scale for Children - Fourth Edition (WISC-IV) on April 11, 2005 yielded a full scale IQ score of 95, which is in the average range of intellectual functioning (Dist. Ex. 7 at p. 2). The student's composite test scores on the WISC-IV were in the average range, with a low average standard score of 84 (14th percentile) on the perceptual reasoning index (id.). On the Woodcock-Johnson III Tests of Achievement (WJ-III) administered on that same date, the student achieved scores in the average range, with the exception of a standard score of 68 (2nd percentile) in written expression, which was based in part on a writing fluency standard score of 60 (0.4 percentile), both in the very low range (id.). The school psychologist indicated that petitioner's son had a history of attention problems, organization problems and self-regulation difficulties (id. at p. 6). She also noted that the student showed signs of poor judgment, disregarded potential consequences of his behaviors, preferred immediate gratification, and demonstrated poor impulse control (id.).

To assess the student's social and emotional development, respondent's school psychologist administered the Connors' Parent Ratings Scale and a scale identified in the record as the "Behavior Evaluation Scale - 2," conducted parent and staff interviews, and reviewed student records and observations (Dist. Ex. 7 at pp. 1, 4). She noted that, since middle school, petitioner's son had experienced several detentions and in-school suspensions (id. at p. 4). Respondent's school psychologist also indicated that the student had a history of attention, organization, and self-regulation difficulties (id. at pp. 1, 4). She characterized the student as oppositional and impulsive,

and stated that he demonstrated poor judgment by disregarding the potential consequences of his behavior, sought immediate gratification, and demonstrated poor impulse control at times (id. at p. 4). Respondent's school psychologist opined that the student's attentional difficulties may explain his impulsive behaviors (id.). In addition, she noted that petitioner's son demonstrated inconsistent study habits, carelessness, irresponsibility, disorganization, and interpersonal difficulties (id.). Respondent's school psychologist stated that petitioner's son may make inappropriate comments to adults, but was not physically aggressive (id.). Her report included input which described the student's inappropriate behaviors as including his refusal to accept parental decisions and directions, and blaming others for his mistakes in order to avoid responsibility (id.).

On April 14, 2005, the homebound instructor conducted an observation of petitioner's son (Dist. Ex. 6). In the observation report, the student's teacher indicated that the student had difficulty isolating facts within the passage he had just read and had difficulty organizing himself and his notes (id.). She also stated that petitioner's son exhibited confusion with respect to differentiating work to keep from work to discard (id.). The teacher noted that petitioner's son had difficulty maintaining his focus while reading an assignment and organizing his thoughts to draft a written assignment (id.). The teacher also reported that the student was very slow completing any written work he was assigned, and noted that he talked to himself while writing and demonstrated slow handwriting skill (id.).

On April 15, 2005, respondent's CSE met as a result of an initial referral for petitioner's son (Dist. Ex. 15 at p. 4). At the time of the CSE meeting, petitioner's son was returning to school after a 45-day suspension (id.). The student's parents participated in the meeting and expressed concern with their son's writing and organization skills, as well as his over processing of information, ability to meet test taking time constraints, and distractibility (id.). The student's regular education teacher acknowledged the student's organizational difficulties, and the special education teacher, who had seen the student in several classrooms, characterized him as distracted (id.). The April 15, 2005 CSE reviewed the student's social history and testing record, and recommended that he be classified as a student having an other health-impairment (id.). Study skills (organizational), writing, and social-emotional goals which could be met in a resource room setting were recommended, as well as counseling and various testing and program modifications (id. at pp. 4-5). The April 15, 2005 IEP recommended one resource room session in a small group setting daily and individualized and small group counseling, each for thirty-minute sessions, once a week (id. at p. 1). Refocusing and redirecting the student throughout the day was also recommended (id.).

During the student's ninth grade year, respondent's CSE met on September 22, 2005 for a program review to discuss the student's test accommodations and counseling (Dist. Ex. 14 at p. 4). Because petitioner's son was viewed as easily distracted, testing accommodations of special location and reading and explaining of directions were added to his September 22, 2005 IEP (id.). Although the student was entitled to two counseling sessions per week, the September 22, 2005 CSE afforded respondent's counselor the option of reducing the student's counseling sessions to one thirty-minute session per week, if circumstances so warranted and the student's parents agreed, for the duration of the IEP (id.).

The record includes an unsigned behavior "improvement contract" dated November 17, 2005, based upon input from petitioner's son, his teachers, counselor, and school psychologist

(Dist. Ex. 4).[2] The contract addressed the student's attendance, bathroom privileges, class preparedness, recording of homework assignments, and required after school help (id.). In addition, it specified procedures regarding teacher documentation of the student's contract compliance, progress statements, coordination of homework monitoring, parent contact, and rewards for the student's compliance with the contract requirements (id.).

In addition to earlier incidences of disruptive and defiant behavior, from December 6, 2005 to February 2, 2006, petitioner's son was accused of four behavioral episodes: dangerous conduct, smoking, assaulting a minor, and intimidation (Dist. Ex. 17 at p. 3; Parent Ex. R at p. 1). As a consequence of the four incidents, the student received: a half day in-school suspension, a one day in-school suspension, a five day out-of-school suspension, and a one day out-of-school suspension (id.). The student was suspended three more times in February 2006 (Dist. Ex. 17 at p. 3; Parent Ex. S at p. 2). The behavior for which the last suspension was assigned resulted in a superintendent's hearing and a manifestation determination (Dist. Ex. 17 at p. 3).

The superintendent's suspension hearing was held on an unidentified date prior to the March 8, 2006 manifestation determination meeting (Tr. p. 50; Dist. Ex. 5 at p. 4; Parent Ex. L at p. 1). At the superintendent's hearing, petitioner's son was found guilty of the behavior for which he was suspended (Dist. Ex. 5 at p. 4). Subsequently, his behavior was found to be a manifestation of his disability (id. at p. 5). The March 8, 2006 committee meeting information indicates that the student's problems occurred during "down times" (for example, passing classes, and waiting for the bus) without adult presence (id.). The March 8, 2006 CSE reviewed "prevention" interventions already in place, and recommended additional support in unstructured situations to ensure prompt class attendance, monitoring peer interactions, and intervening to prevent incidents (id.). After determining that the student's social/emotional goals were adequate, the March 8, 2006 CSE recommended counseling increased to two times weekly, the completion of a functional behavioral assessment (FBA) and behavioral intervention plan, a 1:1 monitor to shadow the student while passing classes and at bus time, the continuation of resource room, and the current partnership class schedule, co-taught by a regular education teacher and a special education teacher (Tr. p. 53; Dist. Ex. 5 at p. 5).

On March 26, a Board of Cooperative Education Services (BOCES) child study center developed an FBA, which also included a behavior plan for the student (Dist. Ex. 3). Data used in the report included interviews with several teachers, the assistant principal, and the school psychologist (Dist. Ex. 3 at p. 1). Direct observation of petitioner's son in various school environments was undertaken (id.). The BOCES evaluator also reviewed, among other things, discipline reports, the student's IEP, respondent's psychoeducational evaluation report dated April 11, 2005, and the psychiatric report dated March 21, 2005 (id.). The BOCES evaluator reported that two areas of concern were noted during observation and voiced by the student's teachers, psychologist, and assistant principal: off task behavior and aggressive behavior (id.). Off task behaviors were defined as the student's lack of orientation to task as directed by the instructor, being late to or absent from class, and failing to perform class assignments and to bring necessary materials to class (id. at pp. 1-2). Aggressive behaviors included cursing, aggressive comments or overtures toward others, and hitting, pushing or "yelling" at others (id. at p. 2).

[2] During the impartial hearing, petitioner testified that the behavior improvement contract included in the record is unsigned because her son lost the original copy of the contract (Tr. p. 1083).

The BOCES evaluator determined that it was not one specific antecedent or consequence that controlled the student's behavior, but rather a constellation of distinct influences coupled with poor role models that influenced and maintained the student's behavior (Dist. Ex. 3 at p. 3). She reported that the student's aggressive behavior was triggered by a real or perceived hostility and or a misunderstanding with peers or adults, and was maintained by the student's positive reinforcement for increased feelings of power, control or fulfillment of an impulse or thought, and negative reinforcement (id.). The BOCES evaluator noted that the student's off task behaviors were maintained by avoidance and escape from tasks or environments (id.). The FBA listed strategies to predict the student's negative and interfering behaviors in order to isolate and control his behaviors (id. at pp. 3-8). Other recommendations included a daily report card to target the student's behaviors and the student's discussion of progress in a positive manner with one trusted faculty member (id. at pp. 5-6). The plan targeted the entire school day in classrooms, in transition, and during dismissal at the end of the day (id. at pp. 5-8). It also incorporated contingencies to be utilized when serious negative behavior occurred, and required training for all staff who worked with the student (id. at pp. 6-8).

Petitioner testified that various forms of harassment by other students continued (Tr. pp. 1068-76). By letter dated March 28, 2006, petitioner requested that a specific program to address her concern about harassment by fellow students be formulated in her son's IEP, and the designation of an independent educational evaluator to determine whether her son could succeed in his current setting or should be in a more appropriate placement (Parent Ex. L at pp. 1, 3-5).

By letter dated May 4, 2006, petitioner requested that respondent's house principal[3] keep her informed of respondent's response to incidents of harassment regarding her son (Parent Ex. M). Among other things, petitioner stated that her son was now being physically attacked and that his self-esteem and self-worth were "at an all time low" (id.).

On May 9 and 13, 2006, petitioner's son was privately evaluated by a neuropsychologist due to his difficulties in school for the prior several years (Dist. Ex. 2 at p. 1). In her report, the private neuropsychologist noted that petitioner informed her that when the student entered middle school he was fighting more, cutting classes, was more oppositional, was somewhat more aggressive an impulsive, and showed poor judgment and poor impulse control (id. at p. 2).

Administration of the WISC-IV by the private neuropsychologist yielded a full scale IQ score of 99, which placed him in the average range of intellectual functioning (Dist. Ex. 2 at p. 4). The student's verbal comprehension index was 112 (high average), his perceptual reasoning index was 90 (average), his working memory index was 113 (high average), and his processing speed index was 75 (borderline) (id. at p. 4). The results from the May 2006 administration of the WISC-IV were similar to and consistent with the results from the April 2005 administration of the WISC-IV (Dist. Exs. 2 at p. 4; 7 at p. 2). The private neuropsychologist testified that the student's IQ score and component scores were "solidly average" (Tr. p. 180), but that there was a significant difference between the student's verbal skills and nonverbal processing, with the verbal skills being significantly higher (Tr. p. 180; Dist. Ex. 2 at p. 4). The private neuropsychologist concluded that the student did not show any significant delays in the basic skills of reading, writing, mathematics, and spelling (Dist. Ex. 2 at p. 6). She reported that the student appeared to be functioning at least

[3] In the hearing record, respondent's house principal also refers to himself as an assistant principal (Tr. p. 1404).

within the average to high average levels in all of his core subjects, but demonstrated strengths in oral expression and mathematics (id.). The private neuropsychologist opined that due to his ADHD, the student's ability to work quickly and efficiently was compromised (Tr. p. 181).

As part of the private neuropsychological evaluation, petitioner's son was also administered the Wide Range Assessment of Memory and Learning - Second Edition (WRAML - 2) (Dist. Ex. 2 at pp. 13-14). The student's performance yielded standard scores (ss) in the low average range in the areas of verbal memory (ss 80), attention/concentration (ss 85), and visual recognition (ss 84), and standard scores in borderline range in the areas of visual memory (ss 76), general memory (ss 74), verbal recognition (ss 79), and general recognition (ss 76) (id. at p. 14). The private neuropsychologist reported that the student's overall memory for verbal and nonverbal information was significantly lower than would have been expected based on his intellectual functioning (id. at p. 7). She determined that petitioner's son did not initially attend to information in an appropriate manner and, therefore, his retrieval and recognition were both significantly hampered (id.).

In a May 17, 2006 annual review summary report, respondent's resource room teacher indicated that petitioner's son earned "borderline" grades in most of his academic classes, and that his grades appeared to reflect his failure to follow through with assignments rather than to reflect his test grades (Dist. Ex. 18 at p. 1). The resource room teacher reported that the student received a grade equivalent score of 7.8 on the Stanford Diagnostic Reading test, and a grade equivalent score of 9.0 on the Stanford Diagnostic Mathematics Test (id. at pp. 2-3). The resource room teacher stated that the student was quick to learn new topics and, when focused, could remain on task for up to thirty minutes (id. at p. 1). He reported that the assignment of a monitor for the student appeared to have helped eliminate problems during passing times, and the behavior improvement contract improved the student's performance regarding timely arrival to class and class behavior (id.). Areas which needed to be addressed included class preparedness, test preparation, and homework assignment completion (id.). The resource room teacher recommended increasing the student's resource room sessions to two sessions per day, such that one session would take place during a lunch period, and the other session would take place at the end of the day (id.). He also recommended academic, organizational, and study skill goals, in addition to social goals that would be monitored by the school psychologist (id.).

During the impartial hearing, petitioner testified that, on an unspecified date prior to the May 23, 2006 CSE meeting, petitioner and the student's father decided not to send their son to respondent's high school and investigated other schools for him to attend (Tr. pp. 1118, 1131-32). On May 23, 2006, respondent convened another CSE meeting for petitioner's son (Tr. p. 26; Dist. Ex. 1 at p. 5). The CSE Chairperson testified that the May 23, 2006 CSE meeting was approximately 30 to 40 minutes in length (Tr. p. 25). Prior to completing the teacher reporting regarding the student's progress, the May 23, 2006 CSE meeting was tabled to review the private neuropsychological evaluation report and the request for an impartial hearing presented by the student's parents at the meeting (id.). Although not specifically referenced within the May 23, 2006 meeting minutes, during the impartial hearing petitioner testified that she handed the CSE a document indicating the names of two schools that she was considering but had not accepted for her son (Tr. pp. 1135-36). Respondent's CSE reconvened on June 21, 2006 for a meeting that was held for more than one hour (Tr. p. 26; Dist. Ex. 1 at pp. 1, 5). Respondent's CSE Chairperson testified that the June 21, 2006 CSE reviewed petitioner's private neuropsychological evaluation report and the student's grades (Tr. p. 28).

The student's June 21, 2006 IEP recommended that petitioner's son continue to be classified as a student having an other health-impairment (Dist. Ex. 1 at p. 1). The June 21, 2006 IEP for the 2006-07 school year recommended resource room services twice a day (id. at p. 1). Individualized counseling was recommended twice per week (id.). The June 21, 2006 IEP indicated that the student's IEP and FBA were to be reviewed at "staff meeting" and that the student performed best with teachers who implemented "high structure" (id.). For summer 2006, petitioner's son attended a wilderness/academic camp located in North Carolina (Dist. Ex. 19).

On an unspecified date, petitioner requested an impartial hearing (see Tr. pp. 3-4). Although the original due process complaint notice was not made a part of the record, the amended due process complaint dated July 27 was read into the record during the impartial hearing on August 1, 2006 (Tr. pp. 3-7). As recited into the record, petitioner asserted that the annual goals set forth in respondent's 2006-07 IEP were vague, indefinite, and contradictory, and did not enable the parents to monitor or participate in their son's progress in a meaningful way (Tr. p. 4). Based upon past performance, petitioner alleged that the recommended services would not be effectively or consistently delivered (id.). Petitioner also claimed that respondent had not developed an effective plan of action to address student harassment concerns and would allow the student to successfully participate in his assigned subjects (Tr. pp. 4-5). In addition, petitioner argued that respondent's proposed placement was not appropriate, and that petitioner's proposed placement, Storm King, was appropriate (Tr. pp. 5-6). Petitioner sought reimbursement for the neuropsychological examination report dated May 13, 2006 (Tr. p. 5), as well as reimbursement for residential tuition and expenses for their son's placement at Storm King (Tr. pp. 5-6).

The impartial hearing commenced on August 1, 2006. Approximately three weeks later, by letter dated August 21, 2006, petitioner informed the impartial hearing officer that the student had been "accepted into" Storm King (Parent Ex. F). During the period of time in which the first six impartial hearing sessions took place, petitioner's son committed various disciplinary infractions at Storm King (Parent Ex. K). By letter dated September 26, 2006, the Storm King Dean of Students informed petitioner that, after having been verbally harassed, her son had physically assaulted another student (id. at p. 1). Storm King's discipline committee noted that petitioner's son admitted to smoking marijuana, leaving campus without authorization, and deliberately hitting another student (id. at p. 2). The discipline committee expressed concern regarding the student's impulsive and aggressive behavior, and noted that the student lacked the ability to make proper judgments in all situations (id.). In a unanimous decision, the discipline committee recommended the student's dismissal from Storm King (id.). In a letter dated October 2, 2006, petitioner advised respondent that Storm King had dismissed the student because of conduct that appeared to warrant a reevaluation (Parent Ex. G). A list of state approved schools with therapeutic programs was also requested (id.). Petitioner's son subsequently continued his education at a second private school (Tr. p. 1131), which is not at issue this appeal.

The impartial hearing ended on December 20, 2006, after ten days of testimony. By decision dated March 26, 2007, the impartial hearing officer determined that the 2006-07 CSE meeting was improperly composed due to the absence of an additional parent member at the meeting, but found this absence to be a de minimus violation which did not invalidate the IEP (IHO Decision at p. 34). The impartial hearing officer found that the student's parents were full participants in the "IEP process" for the 2006-07 school year and assisted in the development of the 2006-07 IEP (IHO Decision at p. 34; Dist. Ex. 1). After noting that both parties agreed that petitioner's son had "significant issues" in the areas of social skills, organization, impulse control,

attention, and writing, the impartial hearing officer found that the 2006-07 IEP addressed each of these areas of delay (id.). He also found that the student's goals and objectives were appropriate and noted that they would assist the student in achieving his goals to complete high school and attend college (IHO Decision at p. 35). The impartial hearing officer found that the recommended IEP complied with the procedural requirements set forth in the Individuals with Disabilities Education Act (IDEA), was reasonably calculated to enable the student to receive educational benefits, and provided the student with a free appropriate public education (FAPE) (id.).

In addition, based on the testimony of petitioner's private neuropsychologist and the Storm King Dean of Academics, the impartial hearing officer found that Storm King could not address the social and emotional needs of the student, and that the student did not need a residential placement (IHO Decision at p. 36; Tr. pp. 298, 932). As such, the impartial hearing officer found that Storm King was not an appropriate placement for the student (IHO Decision at p. 36). With respect to equitable considerations, the impartial hearing officer found that the student's parents took an active role in their son's education and fully cooperated with respondent's CSE (id.). In addition, the impartial hearing officer determined that respondent's psychological evaluation was appropriate (IHO Decision at p. 38). Petitioner's requests for reimbursement of the private neuropsychological evaluation and Storm King tuition costs for the 2006-07 school year were denied (id.).

On appeal, petitioner asserts that respondent's recommended placement is not appropriate for her son. Petitioner alleges that respondent failed to recommend appropriate IEP goals and placement, and that respondent failed to provide petitioner's son with a FAPE. In addition, petitioner alleges that her son's placement at Storm King as a residential student was appropriate, and seeks reimbursement for the costs for tuition at Storm King for the 2006-07 school year and for a private neuropsychological evaluation.

In its answer, respondent asserts that: 1) the petition should be dismissed as untimely, and that petitioner has not shown good cause which would excuse her untimeliness; 2) the 2006-07 IEP is appropriate; 3) petitioner has not proven the appropriateness of the services that she obtained for her son at Storm King, and private residential placement of her son at Storm King was inappropriate; 4) equitable considerations do not support reimbursement; and 5) prior evaluations of the student were timely and appropriate, and petitioner is not entitled to reimbursement for the May 2006 private neuropsychological evaluation report. Respondent appeals the impartial hearing officer's decision to the extent that the impartial hearing officer found that the 2006-07 CSE meeting was held without the required parent member and that there would have been no basis in equity to deny reimbursement.

The central purpose of the IDEA (20 U.S.C. §§ 1400-1482)[4] is to ensure that students with disabilities have available to them a FAPE (20 U.S.C. § 1400[d][1][A]; Schaffer v. Weast, 126 S. Ct. 528, 531 [2005]; Bd. of Educ. v. Rowley, 458 U.S. 176, 179-81, 200-01 [1982]; Frank G. v. Bd. of Educ., 459 F.3d 356, 371 [2d Cir. 2006]). A FAPE includes special education and related services designed to meet the student's unique needs, provided in conformity with a written IEP

[4] On December 3, 2004, Congress amended the IDEA, however, the amendments did not take effect until July 1, 2005 (see Individuals with Disabilities Education Improvement Act of 2004 (IDEA 2004), Pub. L. No. 108-446, 118 Stat. 2647). The citations contained in this decision are to the newly amended statute, unless otherwise noted.

(20 U.S.C. § 1401[9][D]; 34 C.F.R. § 300.17; see 20 U.S.C. § 1414[d]; 34 C.F.R. § 300.22).[5,6] The burden of persuasion in an administrative hearing challenging an IEP is on the party seeking relief (see Schaffer, 126 S. Ct. at 532, 537 [finding it improper under the IDEA to assume that every IEP is invalid until the school district demonstrates that it is not]).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parent, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parent were appropriate, and equitable considerations support the parent's claim (Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359 [1985]; Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (Burlington, 471 U.S. at 370-71). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance had it developed a proper IEP" (Burlington, 471 U.S. at 370-71; see Gagliardo v. Arlington Cent. Sch. Dist., 2007 WL 1545988 [2d Cir. 2007]; Application of a Child with a Disability, Appeal No. 06-121; see 20 U.S.C. § 1412[a][10][C][ii]).

The first step in analyzing a tuition reimbursement claim is to determine whether the district offered to provide a FAPE to the student (see Mrs. C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]). 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, 427 F.3d at 192). While school districts are required to comply with all IDEA procedures, not all procedural errors render an IEP legally inadequate under the IDEA (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]). Pursuant to the IDEA, when procedural violations are alleged, an administrative officer may find that a child did not receive a FAPE only if the procedural inadequacies (a) impeded the child'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 child, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; see 34 C.F.R. § 300.513[a][2]; see also Matrejek v. Brewster Cent.

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[5] 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 relevant events occurred prior to the effective date of the new regulations. However, for convenience, and unless otherwise specified, citations herein refer to the regulations as amended because the regulations have been reorganized and renumbered.

[6] The term "free appropriate public education" means special education and related services that-

> (A) have been provided at public expense, under public supervision and direction, and without charge;
> (B) meet the standards of the State educational agency;
> (C) include an appropriate preschool, elementary, or secondary school education in the State involved; and
> (D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

(20 U.S.C. § 1401[9]).

Sch. Dist., 2007 WL 210093, at *2 [S.D.N.Y. Jan. 9, 2007]). Also, an impartial hearing officer is not precluded from ordering a school district to comply with IDEA procedural requirements (20 U.S.C. § 1415[f][3][E][iii]).

Both the Supreme Court and the Second Circuit have noted that the "IDEA does not itself, articulate any specific level of educational benefits that must be provided through an IEP" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 130 [2d Cir. 1998]; see Rowley, 458 U.S. at 189), although the Supreme Court has specifically rejected the contention that the "appropriate education" mandated by the IDEA requires states to maximize the potential of students with disabilities (Rowley, 458 U.S. at 197 n.21, 189, 199; see Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). What the statute guarantees is an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [internal quotation omitted]; see Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Thus, a school district satisfies the FAPE standard "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203).

The IDEA directs that, in general, a decision by an impartial hearing officer shall be made on substantive grounds based on a determination of whether or not the child received a FAPE (20 U.S.C. § 1415[f][3][E][i]). The Second Circuit has determined that "a school district fulfills its substantive obligations under the IDEA if it provides an IEP that is 'likely to produce progress not regression'," and if the IEP affords the student with an opportunity greater than mere "trivial advancement" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130; see also Perricelli, 2007 WL 465211, at *15), in other words, is likely to provide some "meaningful" benefit (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]). Objective factors, such as "the attainment of passing grades and regular advancement from grade to grade are generally accepted indicators of satisfactory progress" and one important factor in determining educational benefit (Viola v. Arlington Cent. Sch. Dist., 414 F. Supp. 2d 366, 382 [S.D.N.Y. 2006]; see Rowley, 458 U.S. at 203-04, 207 n.28; Walczak, 142 F.3d at 130). 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 200.6[a][1]; see Walczak, 142 F.3d at 132). The LRE is defined as "one that, to the greatest extent possible, satisfactorily educates disabled children together with children who are not disabled, in the same school the disabled child would attend if the child were not disabled" (Carlisle Area Sch. v. Scott P., 62 F.3d 520, 535 [3d Cir. 1995]).

Turning first to the procedural issue raised in the cross-appeal, respondent seeks review of the impartial hearing officer's decision to the extent that the impartial hearing officer found that the 2006-07 CSE meeting was held without the required additional parent member. I agree with the impartial hearing officer's finding of fact, but find that, for different reasons, the student was not denied a FAPE on procedural grounds.

Although not required by the IDEA (20 U.S.C. § 1414 [d][1][B]; see 34 C.F.R. § 300.344), New York State law requires the presence of an additional parent member on the committee that formulates a student's IEP (see Bd. of Educ. v. Mills, 2005 WL 1618765, at *5 [S.D.N.Y. July 11, 2005]; Bd. of Educ. v. R.R., 2006 WL 1441375, at *5 [S.D.N.Y. May 24, 2006]; Application of the Bd. of Educ., Appeal No. 05-058). New York law provides that membership of a CSE shall include an additional parent member of a student with a disability residing in the school district or a neighboring school district, provided that such parent is not a required member if the parents of

the student request that the additional parent member not participate in the meeting (Educ. Law § 4402[1][b][1][a]; 8 NYCRR 200.3[a][1][viii]). Moreover, any request by the parents of the student that the additional parent member not participate must be in writing (8 NYCRR 200.5[c][2][v]).

In the instant case, no additional parent member was identified as a CSE participant in the IEP committee meeting information section for either the May 23, 2006 or June 21, 2006 CSE meetings (Dist. Ex. 1 at p. 5). However, on May 23, 2006, the student's father signed a participation of parent representative waiver, in which he agreed to conduct the CSE meeting in the absence of the additional parent member (Dist. Ex. 24). Although not included as a part of the record, respondent's CSE Chairperson testified that the student's parents also provided written consent to hold the June 21, 2006 CSE meeting without the presence of the additional parent member (Tr. p. 24). As a result of the written waivers, the student's parents validly waived the additional parent member from participation in both CSE meetings (see R.R., 2006 WL 1441375 at *5). Respondent, therefore, complied with the federal CSE composition requirements and was properly excused from state CSE composition requirements.

With respect to the consequences of convening the June 21, 2006 CSE meeting without the additional parent member, the student's father testified that continuing the meeting without the presence of the additional parent member was prudent (Tr. p. 1377). During the impartial hearing, testimony was elicited which showed that petitioner had frequent contact with respondent during the 2005-06 school year. The resource room teacher testified that he contacted the student's parents on a weekly basis to report on their son's progress with the behavioral improvement contract issues (Tr. p. 107). He also shared teacher feedback based on weekly monitoring forms with the parents (Tr. p. 133) from approximately November 17, 2005 to June 10, 2006 (Tr. p. 121). During the impartial hearing, petitioner testified that in addition to speaking to the resource room teacher, the resource room teacher and she e-mailed each other regarding her son's homework, missing labs, and study lists for final examinations (Tr. pp. 1029-30). She further testified that the house principal contacted her every other week about behavioral concerns (Tr. p. 1041).

During the impartial hearing, respondent's school psychologist testified that prior to the beginning of the school year, she worked with petitioner and with respondent's guidance counselor in the selection of teachers who would be a "good match" for the student for his ninth grade year (Tr. pp. 715, 763-64; Dist. Ex. 1 at p. 5). She further testified that petitioner contacted her fairly often, ranging from twice a week to every other week, regarding concerns she had with her son at home or at school (Tr. pp. 434, 445, 459, 684-85, 691-92, 701, 727, 730). The school psychologist, resource room teacher, and petitioner worked together to formulate the behavior improvement contract, incorporating input from the student's teachers into the strategies that were developed (Tr. p. 809). After the superintendent's hearing, the school psychologist met with petitioner, petitioner's son, and the resource room teacher to discuss whether or not the student would return to respondent's district (Tr. pp. 725-26). Petitioner and the school psychologist also testified that that due to arguments between the student and his parents, respondent's resource room teacher facilitated the student's homework organization and scheduling (Tr. pp. 449-50, 699, 1031, 1032). Respondent also brought in the Children's Community Support Initiative (CCSI) team to discuss support services for the student and his family outside of the school day (Tr. pp. 429-30, 679-80).

Petitioner is familiar with the CSE process and knowledgeable about IEP development (Dist. Exs. 1; 5; 14; 15) and, as discussed above, has been actively collaborating with respondent in developing educational programming for her son. The record also reflects active and

meaningful parental participation through the incorporation of recommendations from the private neuropsychologist's evaluation report into the IEP during the development of the June 21, 2006 IEP (see 34 C.F.R. §§ 300.304[b][1], 300.305[a], 300.502[c][1]; 8 NYCRR 200.4[b][1], and [b][5], 200.5[g][1][v][a]; Dist. Ex. 1 at p. 5). There is no indication in the record that the absence of the additional parent member resulted in a loss of educational opportunity for the student or infringed on the parent's ability to participate in the CSE meeting (see Mills, 2005 WL 1618765 at *5).

Petitioner also asserts that she is entitled to reimbursement for the cost of a private neuropsychological evaluation dated May 16, 2006. (Dist. Ex. 2; Parent Ex. V). Respondent contends that it conducted a thorough battery of evaluations of petitioner's son as part of his initial review and classification in April 2005, and argues that petitioner is precluded from reimbursement of her May 2006 private neuropsychological evaluation due to the terms of a prior stipulation of settlement. Respondent also alleges that petitioner is barred from reimbursement because neither parent voiced any disagreement with respondent's evaluations or requested any reevaluations prior to obtaining the May 16, 2006 private neuropsychological evaluation.

A parent has a right to an independent educational evaluation (IEE) at public expense if the parent disagrees with an evaluation obtained by the school district (20 U.S.C. §§ 1415[b][1], [d][2][A]; 34 C.F.R. § 300.502[b][1]; 8 NYCRR 200.5[g][1]). An IEE is "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]). If a parent requests an IEE at public expense, the school district must, without unnecessary delay, ensure either an IEE is provided at public expense or initiate an impartial hearing to show that its evaluation is appropriate or that the evaluation obtained by the parent does not meet the school district criteria (20 U.S.C. §§ 1415[b][1], [d][2][A]; 34 C.F.R. § 300.502[b][2]; see 8 NYCRR 200.5[g][1][iv]).

The record shows that respondent evaluated petitioner's son on April 11, 2005 (Dist. Ex. 7). By letter dated March 28, 2006, petitioner requested a "designation by the District of an Independent Educational Evaluator for the purpose of addressing the question of whether [her son] is capable of succeeding in his current setting, or whether there is a more appropriate placement for [her son] that will enable him to succeed" (Parent Ex. L at p. 1). Respondent neither ensured that an IEE was provided at public expense, nor initiated an impartial hearing on the matter. Petitioner's private neuropsychologist examined petitioner's son on May 9 and 13, 2006. The resulting private neuropsychological examination report dated May 16, 2006 was submitted to respondent's CSE on May 23, 2006 (Dist. Ex. 2 at p. 1), the first day of two CSE meetings that were held to formulate the student's June 21, 2006 IEP (Dist. Ex. 1 at p. 5). Petitioner seeks reimbursement for the cost of the private neuropsychological evaluation dated May 16, 2006 (Dist. Ex. 2).

However, petitioner voluntarily and knowingly, with the assistance of counsel, entered into a stipulation of settlement on May 26, 2005 resolving, among other things, matters associated with her son's evaluations (Dist. Ex. 21 at pp. 3-5). Stipulations are favored by the courts as a means of settling disputes, and they may not lightly be set aside (Application of a Child with a Disability, Appeal No. 05-100; Application of a Child with a Disability, Appeal No. 03-044; Application of a Child with a Disability, Appeal No. 03-071). That is equally true with respect to a stipulation in an administrative proceeding such as this (Application of a Child with a Disability, Appeal No.

03-044; Application of a Child with a Disability, Appeal No. 93-27; Application of a Child with a Disability, Appeal No. 97-46; see also Hallock v. State of New York, 64 N.Y.2d 224, 230 [1984]). It has been noted that an appeal to a State Review Officer may not be used as a way to re-litigate a matter that the parties have previously resolved or to consider in the first instance additional claims that may arise as a settlement agreement is implemented (Application of a Child with a Disability, Appeal No. 03-044; Application of a Child with a Disability, Appeal No. 03-071). Although a stipulation may be vacated for cause including fraud, collusion, mistake, and accident, in this case, it is clear that no cause exists (Application of a Child with a Disability, Appeal No. 97-46; see also Matter of Frutiger, 29 N.Y.2d 143, 150 [1971]). Petitioner, therefore, is bound by the terms of the agreement (see Combier v. Biegelson, 2005 WL 477628 at *3 [S.D.N.Y. 2005]).

In the stipulation, petitioner released respondent from claims arising from, among other things, evaluations and independent educational evaluations prior to the date upon which the stipulation was signed (id. at p. 3). Respondent evaluated petitioner's son on April 11, 2005, approximately six weeks prior to the date petitioner entered into the stipulation with respondent (Dist. Exs. 7 at p. 1; 21 at p. 5). According to the terms of the stipulation, respondent was not obligated to provide an IEE at public expense. Under these circumstances, I find that petitioner's request for reimbursement for an IEE was properly denied by the impartial hearing officer.

With respect to the adequacy of the June 21, 2006 IEP, an appropriate educational program begins with an IEP which accurately reflects the results of evaluations to identify the student's needs, establishes annual goals related to those needs, and provides for the use of appropriate special education services (Application of the Bd. of Educ., Appeal No. 06-076; Application of a Child with a Disability, Appeal No. 06-059; Application of the Bd. of Educ., Appeal No. 06-029). An IEP must also include measurable annual goals, including academic and functional goals, designed to meet the child's needs arising from his or her disability to enable the child to be involved in and progress in the general curriculum, and meeting the child's other educational needs arising from the disability (20 U.S.C. § 1414[d][1][A][ii]; 34 C.F.R. § 300.320[a][2][i]); see 8 NYCRR 200.4[d][2][iii]). In addition, an IEP must describe how the child's progress towards the annual goals will be measured and when periodic reports on the child's progress toward meeting the annual goals will be provided (20 U.S.C. § 1414[d][1][A][iii]; 34 C.F.R. § 300.329[a][3]; 8 NYCRR 200.4[d][2][iii][b],[c]).

Petitioner's allegation that the annual goals set forth in her son's 2006-07 IEP are vague, indefinite, and contradictory, and do not enable the parents to monitor or to participate in their son's progress in a meaningful way is unsupported by the record. I find that the goals in the June 21, 2006 IEP are appropriate, specific, and individualized to address the student's needs.

In the instant case, the goals set forth in the June 21, 2006 IEP were specifically developed to address needs that were reported in the evaluations reviewed by respondent's teachers, and reviewed or created by respondent's school psychologist (Tr. pp. 66-67). The psychological evaluation reports dated April 11, 2005 and May 16, 2006, the FBA dated March 26, 2006, and teacher and parent concerns, among other things, were reviewed by the June 21, 2006 CSE (Dist. Exs. 1 at pp. 5-8; 2; 3; 7). Needs were articulated in the June 21, 2006 IEP in the areas of written expression, organization, study skills, social skills, self-regulation, impulse control, frustration tolerance, and oppositional behavior (Dist. Ex. 1 at pp. 3-4). In this regard, during the impartial hearing, the resource room teacher identified the student's needs to be in class on time; have the materials that he needed with him; complete homework; turn in homework; and remain on task in

class (Tr. p. 357). Study skills goals in the June 21, 2006 IEP included being on time and bringing appropriate materials to class, recording homework and class assignments, turning in homework on time, and being on task in class (Dist. Ex. 1 at pp. 6-7). The student's writing goal indicated that he would be able to develop a five paragraph essay that was coherent, sequential, and logical in its development (id. at p. 7). In the area of social, emotional, and behavioral goals, the June 21, 2006 IEP indicated that the student would identify and develop five strategies for dealing with his impulsive behavior; it also addressed how to cope with conflict, seek assistance under stressful conditions, and identify and learn decision-making strategies (id. at pp. 7-8). I find that the June 21, 2006 IEP accurately reflected the results of evaluations which identified the student's needs, established annual goals related to those needs, and offered appropriate special education services (Application of a Child with a Disability, Appeal No. 06-118).

With respect to respondent's plan to address the reported harassment of petitioner's son by fellow students and allow the student to successfully participate in assigned subjects, respondent addressed behavior related incidents as the events occurred and devised strategies to reduce or prevent these behaviors from recurring in the future (Tr. pp. 135-37, 1495, 1501, 1529). As discussed earlier, on November 17, 2005, respondent developed a behavior improvement contract to address the student's behavior and modified the contract, as needed (Tr. pp. 135-37, 722-23, 1501; Dist. Ex. 4). In cooperation with respondent, BOCES included a behavior plan within the very comprehensive FBA it conducted on behalf of respondent on March 26, 2006 (Tr. p. 721; Dist. Ex. 3). The behavior plan within the March 26, 2006 FBA included very specific distant, immediate, and consequence predictors (Dist. Ex. 3 at pp. 3-8). In addition to recommending cognitive based management intervention, the FBA recommended a management system which included: staff review of conflict resolution techniques and anger management procedures and the use of consistent language and strategies among staff involved with petitioner's son; a team meeting to discuss implementation of a monitoring system; and the assignment of a targeted person to continually monitor the efficacy of the plan (id. at p. 8).

Respondent's teaching staff also monitored the student's behavior and provided weekly written feedback to the resource room teacher who in turn updated the parents on a weekly basis (Tr. pp. 117-20, 131-32). In addition, respondent's teaching staff coordinated their efforts and made certain that they were aware of the student's location at all times during the school day (Tr. pp. 666-67, 677, 894-95). I note here that respondent also "hand picked" the student's teachers for the 2005-06 and 2006-07 school years (Tr. pp. 352, 764). Components of the student's June 21, 2006 IEP which addressed the student's behavior included scheduling the student's lunch period in the resource room to shield the student from potential behavior problems, the provision of a monitor to shadow the student in corridors and accompany him to the bus departure area (Tr. p. 138), and the provision of counseling, which included the development of alternative responses to negative situations (Dist. Ex. 1 at pp. 7-8). In addition, the June 21, 2006 IEP directed staff to provide the student with refocusing and redirecting throughout the school day and to be familiar with the student's behavior plan and follow through with its implementation (id. at pp. 1, 2).

During the 2006-07 school year, respondent's school psychologist was also available to petitioner's son for weekly counseling and as needed (Tr. p. 132). Respondent's school psychologist, resource room teacher, and house principal were in frequent contact with the student's parents (Tr. pp. 107-08, 434, 459, 1404-05). Respondent's house principal testified that after behavior related incidents occurred, he worked with the students involved in order to end the harassment (Tr. p. 1425). Respondent's house principal also met with the student's outside

caseworker and, in a separate matter, contacted the student's parents regarding information leading him to believe that petitioner's son would be endangered were he to frequent a certain location outside of school premises (Tr. pp. 1404, 1529).

By the end of the school year, the incidence of behavior related problems involving the student had decreased (Tr. p. 1440). Based on the above, I find that at the time that the June 21, 2006 IEP was developed, respondent provided an appropriate program to address difficulties arising from the student's social and emotional deficits (see Application of a Child with a Disability, Appeal No. 06-118). Moreover, based on respondent's performance, the record does support petitioner's contention that that services would not be effectively and consistently delivered to her son.

With respect to the appropriateness of the program offered by respondent for the student's 2006-07 school year, the private neuropsychologist testified that the student did not need counseling support in school, nor did he need special education, as he had ADHD and did not have any serious developmental delays in his major core subjects (Tr. p. 277). However, she also testified that two periods of resource room with hand picked teachers who provided structure was not sufficient, and that respondent's high school was not appropriate for petitioner's son because it was too large (Tr. p. 303). The private neuropsychologist testified that she was concerned with what transpired between classes, after school, and before school, and stated that the setting was over stimulating (id.). In addition, she testified that petitioner's son needed a behavior plan to keep him in check and to monitor him (Tr. p. 270). She was concerned that the student did not have adequate behavioral structure in his life to maintain self-control, and opined that either the student needed help or the parents needed help setting limits (Tr. pp. 270-71).

In contrast, respondent's school psychologist testified that petitioner's son needed academic, behavioral, social, and emotional support, and that he could "absolutely not" attend a prep school without special education services (Tr. pp. 819-20). Respondent's school psychologist testified that, at the time of the June 21, 2006 CSE meeting, petitioner's son was capable of functioning at respondent's high school provided the proper supports were in place (Tr. pp. 754, 819). These supports included, among other things, the June 21, 2006 IEP, the March 26, 2006 FBA, teacher awareness of the student's needs, and teacher coordination with regard to assisting the student to enable him to function in the best possible manner (id.).

Respondent's house principal testified that the beginning and middle of the school year were "rocky," but by the end of the year the student had shown real progress and the house principal believed that the student could be successful at respondent's high school (Tr. p. 1440). He stated that after the last incident on March 28, 2006, there were no more detentions or suspensions in or out of school, and that the student finished the school year on a positive behavioral note (id.). Similarly, the resource room teacher testified that petitioner's son made significant progress, with emphasis on the progress he noted at the end of the school year (Tr. p. 359). The student's mathematics teacher also testified regarding the student's academic and organizational progress from the first quarter of the year when he was unorganized, unprepared, and had difficulty remembering material for one test, to the final quarter of the year when the student received a quarterly grade of 94 and a final grade of 75 based on his knowledge of subject material covered for the school year (Tr. pp. 508-09).

The director of special education testified that the student would make meaningful educational progress with the June 21, 2006 IEP because of the specificity that went into the IEP development by those staff members who worked with the student; the end of year progress the student made with the inception of the FBA; and the student's change in attitude toward work and his increased trust in staff (Tr. p. 71). She stated that the programming respondent's CSE recommended for him, which addressed the student's counseling, organizational study skills, and impulse control concerns, would lead to the student's success (Tr. p. 72). The record shows that at the time that it was formulated, the June 21, 2006 IEP was a comprehensively designed program of personalized instruction and support services that was likely to produce progress in the areas of the student's identified needs (see Weixel v. Bd. of Educ., 287 F.3d 138, 151 [2d Cir. 2002]; M.S. v. Bd. of Educ., 231 F.3d 96, 103 [2d Cir. 2000]; Walczak, 142 F.3d at 130).

A review of the June 21, 2006 IEP reveals that the IEP modifications made by the June 21, 2006 CSE were enhancements which resulted in an individualized program and placement for the student (Dist. Exs. 1; 5). After considering the June 21, 2006 CSE process to obtain information, respondent's response to new information which could affect IEP development, and its thorough and comprehensive review of all available information at the time of its meeting, I find that there is no basis to support petitioner's allegation that the IEP was inadequate, or that respondent failed to recommend an appropriate program for the 2006-07 school year.

Petitioner did not demonstrate that her son was not offered a FAPE for the 2006-07 school year. Based upon the information before me, I find that the program proposed in the June 21, 2006 IEP, at the time it was formulated, was reasonably calculated to enable the student to receive educational benefit (Viola, 414 F. Supp. 2d at 382 [citing to J.R. v. Bd. of Educ. of the City of Rye Sch. Dist., 345 F. Supp. 2d 386, 395 n.13 [S.D.N.Y. 2004]; see Cerra, 427 F.3d at 195; see also Mrs. B., 103 F.3d at 1120; Application of a Child with a Disability, Appeal No. 06-112; Application of a Child with a Disability, Appeal No. 06-071; Application of the Bd. of Educ., Appeal No. 06-010; Application of a Child with a Disability, Appeal No. 05-021). I concur with the impartial hearing officer for the reasons set forth above, and I find that respondent offered the student an appropriate program for the 2006-07 school year. I also concur with the impartial hearing officer that Storm King was not an appropriate placement for petitioner's son because Storm King did not address his social/emotional needs and because he did not require a residential setting. Petitioner's request for reimbursement of tuition costs for Storm King for the 2006-07 school year is denied. As discussed above, petitioner's request for reimbursement for the cost of an IEE is also denied. Based on events which transpired subsequent to the development of the student's June 21, 2006 IEP, if it has not already done so, respondent's CSE is reminded to meet and revise the student's IEP for the 2007-08 school year according to the student's current needs.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the impartial hearing officer's decision is annulled to the extent that it found that the improper composition of the June 21, 2006 CSE was a de minimus procedural violation.

Dated: **Albany, New York**
June 22, 2007

PAUL F. KELLY
STATE REVIEW OFFICER