



The University of the State of New York

The State Education Department State Review Officer

No. 07-069

Application of the BOARD OF EDUCATION OF THE SACHEM SCHOOL DISTRICT for review of a determination of a hearing officer relating to the provision of educational services to a child with a disability

Appearances:

Ingerman, Smith, LLP, attorney for petitioner, Christopher Venator, Esq., of counsel

Long Island Advocacy Center, attorney for respondent, Wendy Gildin, Esq., of counsel

DECISION

Petitioner, the Board of Education of Sachem Central School District, appeals from a decision of an impartial hearing officer, which determined that the educational program recommended by its Committee on Special Education (CSE) for respondent's son for the 2006-07 school year was inappropriate. The appeal must be dismissed.

The student was 16 years old at the time of the commencement of the impartial hearing in March 2007 (Tr. p. 17). By court order, he was attending a residential drug rehabilitation program at Outreach House in Brentwood, New York and through petitioner's district, he was receiving two hours of home instruction per day provided by Islip Tutoring Service (Islip Tutoring) (Tr. pp. 21-22, 30, 75, 109, 111-12).¹ The student's classification and eligibility for special education services as a student with an other health impairment (OHI) are not in dispute in this appeal (IHO Decision at p. 4; Tr. pp. 27, 208; see 8 NYCRR 200.1[zz][10]).

The record describes the student as "a great kid [and] a nice young man" (Tr. p. 135). He has diagnoses of an attention deficit disorder (ADD), a depressive disorder as well as a "developmental language delay in [a] specific area" (Tr. p. 214; Parent Ex. D at p. 3). His cognitive ability is reported to be in the average range and he is reported to be on or above grade level in

¹ Although the record refers to the home instruction as home tutoring or tutorial services, for purposes of this decision and in accordance with federal and state regulations, I will refer to the individual tutoring services as home instruction (see 34 C.F.R. § 300.115[b]; 8 NYCRR 200.6[h]).

reading, written expression, and oral language (Tr. p. 62; Dist. Ex. 14 at p. 2).² The student has exhibited strengths in reading and listening comprehension, but reportedly has a weakness in mathematics (Dist. Ex. 14 at p. 2). He also has difficulties with organizational skills as well as study skills, and has trouble planning long-term assignments (*id.*). The student has also reportedly abused marijuana and cocaine (Tr. pp. 214, 217; Parent Ex. D at p. 3).

The student began receiving special education services through early intervention when he was one year old, to address a speech-language delay (Tr. p. 206; IHO Ex. 1 at p. 2). For preschool, the student attended Just Kids, where he received speech-language therapy in addition to occupational therapy (OT) (*id.*). Although he has been receiving special education services through petitioner's district since an early age, the student's classification has changed a number of times throughout his school career (Tr. p. 207; *see* Parent Exs. Q; R; T; W; V; X).³ In kindergarten, he was enrolled in a 15:1+1 classroom and he remained in a 15:1+1 classroom until third grade (Tr. p. 207). At age seven the student was diagnosed as having an attention deficit disorder (ADD) (Tr. pp. 206, 209). The student remained an average student from the third through the ninth grade (IHO Ex. 1 at p. 3).

The student reportedly enjoys sports, and upon entering high school, he joined a number of sports teams (Tr. p. 210; IHO Ex. 1 at p. 3). However, in 2005, when the student was in the tenth grade, after family disruptions, petitioner noticed a change in her son's behavior (Tr. p. 211). Consequently, respondent observed that the student was "pulling away from his sports, withdrawing," that he became depressed, refused to take his ADD medication and began using drugs (Tr. p. 212; IHO Ex. 1 at p. 3).

On October 14 and 18, 2005, petitioner's school psychologist conducted a psychological re-evaluation of the student that consisted of a review of records, parent/staff consultation, and the High School Response Sheet (H.S.R.S.) (Parent Ex. E at p. 1; Dist Ex. 5 at p. 1). The evaluation report indicated that a January 2003 administration of the Wechsler Intelligence Scale for Children - III (WISC-III) yielded a verbal IQ score of 100, a performance IQ score of 110, and a full scale IQ score of 105, all within the average range of intellectual capacity (Parent Ex. E at p. 2; Dist. Ex. 5 at p. 2). The report noted that the student was classified as OHI (Parent Ex. E at p. 3; Dist Ex. 5 at p. 3). He was enrolled in collaborative classes, and although he found "reteach[ing]" helpful, the student did not always complete homework assignments (Parent Ex. E at p. 1; Dist. Ex. 5 at p. 1). The evaluator described the student's functioning as commensurate with his intellectual capability (Parent Ex. E at p. 2; Dist. Ex. 5 at p. 2). She also described the student as "a reserved individual," who used sports as a healthy outlet to repress his anger (*id.*). The evaluator

² I note that the record contains multiple duplicative exhibits. I remind the impartial hearing officer it is her responsibility to exclude evidence that she determines to be irrelevant, immaterial, unreliable or unduly repetitious (8 NYCRR 200.5[i][3][xii][c]).

³ The student's individualized education plans (IEPs) from previous school years contained in the record indicate that he has previously been deemed eligible for special education supports and services as a student with a learning disability (LD) (Parent Exs. Q; R; V; X). Although she did not specify the school years, respondent also stated that her son had previously also been found eligible for special education services as a student with a speech-language impairment and as student with an emotional disturbance (ED) (Tr. p. 207).

also noted that the student was unable to complete the H.S.R.S. and opined that this was due to his difficulty expressing emotion (id.).

The student's November 23, 2005 report card for the first marking period of the 2005-06 school year showed that he earned the following grades: English 10, 60; global 10, 81; collaborative geometry, 85; living environment, 71; Spanish-1, 75; and physical education, 86 (Dist. Ex. 3 at p. 7). Teacher comments reflected that the student needed to put forth more effort, his homework was seldom done or was missing, his notes were poorly organized, and he needed more vocabulary study (id.). However, in physical education, the student was described as an active and positive participant (id.).

In a December 10, 2005 progress report, teacher comments indicated that the student should put forth additional effort and that he was missing homework assignments in global 10 and in his living environment course (id. at p. 8). His global 10 teacher commented that the student was inattentive in class (id.). The student's geometry teacher stated that the student was making acceptable progress and described the quality of his work as "commendable" (id.). Although his Spanish-1 teacher noted that the student needed more study at home, she described him as a pleasure to have in class (id.). Lastly, the student's English 10 teacher observed that his behavior and performance had improved (id.).

In January 2006, petitioner conducted an educational evaluation (Parent Exs. C at p. 1; G at p. 1). Administration of the Wechsler Individual Achievement Test II (WIAT-II) resulted in a reading composite standard scores (SS) of 104, a math composite SS of 82, a written language composite SS of 98 and an oral language composite SS of 104 (id.).

In February 2006, the student was referred for a psychiatric evaluation because he was failing most of his subjects despite the academic ability to pass his courses (Parent Ex. D at p. 1). The evaluation report stated that at that time the student had been paying less attention to his school work, participating less and less in sports, smoking marijuana two to three times per week, coming home late or not at all on weekends and generally acting disobedient towards his mother (id.). The evaluating physician observed that the student seemed to have lost all motivation and interest in everything except "hanging out" with his friends (id.). The evaluation report also indicated that the student refused to see his counselor and stopped taking his medication for ADD (id.). The evaluating physician listed his diagnostic impressions of the student as: 1) ADD, 2) Depressive disorder, 3) Marijuana abuse with amotivation, and 4) "Developmental language delay in [a] specific area" (id. at p. 3). Recommendations included intensive counseling, preferably with a male counselor, consultation with a psychiatrist for an anti-depressant medication and ADD medication, educationally related and general support services in speech and language, and specific counseling for drug abuse (id.).

On February 10, 2006, petitioner's sub-CSE met to discuss the student's re-evaluation and to develop his program for the 2006-07 school year (Parent Ex. W at p. 1). The February 2006 sub-CSE determined that the student was eligible to receive special education services as a student with an OHI (id.). The results of the January 2003 administration of the WISC-III and the January 2006 administration of the WIAT-II (see Parent Ex. E at p. 2; Dist. Ex. 5 at p. 2; Parent Exs. C at p. 1; G at p. 1) were included in the resultant IEP (Parent Ex. W at p. 2). Academically, the February 2006 IEP identified the student's strengths in reading and listening comprehension (id.).

Weakness was noted in mathematics (*id.*). The February 2006 IEP also stated that the sub-CSE was "individualizing [the student's] educational program because of his unique needs related to his disability in the areas of organizational and study skills" (*id.*). The February 2006 IEP indicated that the student was able to use a student planner, but often chose not to do so, which caused him to miss homework assignments (*id.*). The February 2006 IEP noted that the student also had difficulty planning for long-term assignments (*id.*). The February 2006 IEP also stated that, despite his motivation to do well, the student could not select the best method for studying content area material (*id.*). Petitioner's February 2006 sub-CSE determined that the student needed instruction in the development of organizational and study skills, and that he had a multi-sensory learning style (*id.*).

In the social development domain, the February 2006 IEP described the student as pleasant and able to maintain adequate peer relations (*id.*). However, he was also described as withdrawn and unmotivated, and the February 2006 sub-CSE found that he exerted minimal effort in completing his class work and homework assignments (*id.*). Counseling was recommended and the February 2006 IEP suggested that the student might have been having a difficult time coping with daily life stressors at that time (*id.*). Physically, the February 2006 IEP indicated the student's medical diagnosis of an attention deficit disorder/attention deficit disorder with hyperactivity (ADD/ADHD) affected his learning (*id.* at pp. 1, 3). The student was also noted to wear glasses/contact lenses, and described as able to participate in all school activities (*id.*). The February 2006 IEP noted that the student took medication (*id.* at p. 1).⁴ In the management domain, the February 2006 IEP stated that he "performs best in a classroom with a structured environment and clearly established routines," and benefits from "additional personnel in the classroom and the re-teaching of concepts" (*id.* at p. 3). Projected post-school outcomes listed in the February 2006 IEP indicated that the student planned to enter competitive employment, enter a college program, and live independently (*id.*). Annual goals and objectives included in the February 2006 IEP addressed the student's organizational and study skills, identification of education, career and vocational options and community leisure and recreational options, and his expression of feelings and attitudes regarding school related problems (*id.* at pp. 3-4).

The February 2006 IEP noted that the sub-CSE reviewed the student's psychiatric evaluation report and determined that he needed the additional support of group and individual counseling (*id.* at p. 8).⁵ A speech-language evaluation of the student was recommended, the results of which would be reviewed at a subsequent CSE meeting (*id.*). The February 2006 sub-CSE recommended that the student attend general education classes and all activities in petitioner's high school, and receive related services consisting of small group (5:1) counseling one time per week for 42 minutes, nursing services one time per day, and regular physical education 2.5 times

⁴ Although the February 2006 IEP noted that the student was prescribed medication, the resultant IEP did not indicate the type of medication that the student was taking at that time or why he was taking the medication (Parent Ex. W. at p. 1).

⁵ The February 2006 IEP does not indicate the date of the psychiatric evaluation report (Parent Ex. W). The sub-CSE meeting convened on February 10, 2006 (*id.* at p. 1). The psychiatric evaluation report was dated February 14, 2006 four days after the sub-CSE meeting took place (Parent Ex. D at p. 1).

per week for 42 minutes per session (id. at pp. 5-6).⁶ The student was not recommended for exemption from the foreign language requirement and was recommended to participate in all State or local assignments administered to general education students (id. at p. 6). With regard to program modifications, accommodations, and supplementary aids and services, the February 2006 IEP indicated that the student would learn through a multi-sensory approach (id. at p. 5). Additional recommendations included provision of information about the student's specific disability and the implications for instruction by his primary service provider to the student's school staff for 30 minutes with each new IEP (id.). Recommended test accommodations of extended time (25 percent) and all tests to be administered in a classroom location with minimal distractions were also included on the February 2006 IEP (id. at p. 6).

The February 2006 sub-CSE considered a variety of least restrictive environment (LRE) placement options for the student and determined that he needed additional supports in the mainstream to meet his academic and social needs (Parent Ex. K at p. 1). The sub-CSE determined that the student's LRE consisted of a "special class 15:1 Integrated/Collaborative," because this setting would provide him with the appropriate level of service to meet his academic and social needs (id.).

On March 1, 2006, petitioner's sub-CSE reconvened per respondent's request because her son was not doing well in school (Parent Exs. M at p. 3; S). The March 2006 IEP carried over the program recommendations contained in the February 2006 IEP and included an explanation that the student demonstrated weakness in mathematics on the WIAT-II because he did not have the use of a calculator at the time of testing (Parent Ex. S at p. 2). The March 2006 sub-CSE also added specific recommendations to the student's program including that he would attend a special collaborative class (15:1) located within the general education environment, five times per week for 330 minutes per session and also receive 1:1 counseling one time per week for 42 minutes, and that the student would have use of a calculator for all tests in the classroom (id. at pp. 4-6). In addition, the March 2006 sub-CSE specified that petitioner would provide grade level academic instruction to the student, related services as noted on the IEP, and activities to help the student live independently, as part of his coordinated set of transition activities (id. at p. 7).

By letter dated March 15, 2006, petitioner's coordinator of the Office of Student Services advised respondent of the CSE's determination regarding special education services for the student, and of petitioner's board of education March 14, 2006 review of those recommendations (Parent Ex. Y at p. 1). The letter also noted the need for a speech-language evaluation of the student and that petitioner's CSE would reconvene to review the evaluation results (id. at p. 2).

On April 24, 2006, petitioner conducted a speech-language evaluation of the student (Parent Ex. F at p. 1; Dist. Ex. 11 at p. 1). Administration of the Comprehensive Receptive and Expressive Vocabulary Test (CREVT) yielded results indicating basic vocabulary in the average range (Parent Ex. F at p. 2; Dist. Ex. 11 at p. 2). Administration of the Clinical Evaluation of Language Fundamentals- 4 (CELF-4) yielded language abilities in the average range (Parent Ex.

⁶ No specific individual counseling related frequency was listed on the student's February 2006 IEP (Parent Ex. W at p. 5).

F at pp. 1-2; Dist. Ex. 11 at pp. 1-2). Speech-language therapy services were not recommended for the student at that time (Parent Ex. F at p. 2; Dist. Ex. 11 at p. 2).

By letter dated May 12, 2006, the principal of Sachem High School North and the dean of students notified respondent that the student had not complied with school regulations regarding attendance, and as a result he was being denied credit for the living environment course (Parent Ex. L at p. 4). As a result, the student would receive a "DCA" on his permanent transcript for the course (id.).⁷ The "DCA" resulted in the following consequences: the student was required to attend a mandated study hall in place of the class and he could not attend any school social events such as the prom and all banquets (id.). In addition, he was no longer allowed to participate in school clubs or on teams (id.). The student was also denied access to school parking privileges (id.). The student's eligibility for enrollment in the class during the summer was also jeopardized due to the "DCA" (id.). Lastly, the student would not be eligible for participation in any Board of Cooperative Educational Services (BOCES) vocational program in the future (id.).

On May 12, 2006, the assistant principal of the student's high school advised respondent that the student would be allowed to audit the living environment course, but he would not receive credit for it towards graduation (id. at pp. 5, 7). The student was expected to meet all of the responsibilities of those enrolled in a credit-bearing situation, including attendance, homework, class work, exams, projects, and papers (id.). The assistant principal also indicated that the student might earn enough "seat time" to be eligible to repeat the course in summer school (id.).

During the period of September 7, 2005 and May 23, 2006, the student had 23 notations regarding attendance (Parent Ex. L at pp. 1, 3). These included seven legal absences, six illegal tardy notations, seven dismissals during the school day, one in-school suspension, and one late arrival to school listed as "educational" (id.).

Assorted undated teacher comments collected from the 2005-06 school year included remarks from his living environment teacher such as "[the student] needs a more serious attitude toward school and that he NEVER completes his homework, which has a negative impact on his grade" (Parent Ex. C at p. 7). His English 10 teacher stated that "[the student] would do extremely well in the class - if he applied himself" (id. at p. 8). The student's global 10 teacher noted that, "[he] has had a difficult time being prepared lately ... he seems like he is trying but has other things occupying his mind ... he needs more individual guidance" (id. at p. 9). In another progress note, his global 10 teacher indicated that the student had the potential to do well when focused and motivated, but that he was failing due to missing homework assignments, and that focusing on a task was a problem (id. at p. 13). His collaborative geometry teacher described the student's daily work habits as "inconsistent" (id. at p. 10). The collaborative geometry teacher further commented that sometimes the student completed tasks and sometimes he significantly delayed in his attempts to do so (id.). In a separate report, the same teacher also indicated that the student enjoyed mathematics because he was skilled in it, and answered questions when called on, but frequently came to class without a pen or pencil, or a calculator, and that he completed homework during the reteach sessions (id. at p. 14). The student's physical education teacher noted that the student had missed some classes and his grade had gone down quickly (id. at p. 11). The teacher suggested

⁷ "DCA" is defined in the record as denied credit-audit (Parent Ex. L at p. 5).

that the student make up classes either before or after school before the end of the quarter (*id.*). His Spanish teacher commented that the student "need[ed] a lot of improvement in his class work" (*id.* at p. 12). She also described him as "polite," but she noted that he needed to engage and participate more (*id.*). In another report, the student's Spanish teacher indicated that he was frequently absent, did not attend extra help sessions, and was not doing well on writing or speaking tasks (*id.* at p. 20).

On June 7, 2006, petitioner's sub-CSE reconvened to develop the student's program for the 2006-07 school year (eleventh grade) (Parent Ex. P). Respondent did not attend the meeting, but the resultant IEP noted that she was "informed with communication via phone with both teachers" (*id.* at p. 9). Current formal testing results were included on the June 2006 IEP (*id.* at p. 2). The June 2006 IEP noted that the student earned 7.50 diploma credits and he passed the earth science Regents, the math Regents, the math Regents Competency Test (RCT), and the science RCT (*id.*). The student was expected at that time to earn a Regents diploma (*id.*). Recommendations and goals and objectives were generally the same as those listed in the March 2006 IEP (compare Parent Ex. S, with Parent Ex. P). The June 2006 IEP indicated that the student had been denied credit for the living environment course as well as for English 10 due to attendance concerns (Parent Ex. P at p. 9).

During summer 2006, the student disappeared frequently, and reportedly became violent and abusive (Tr. p. 215). Respondent obtained an order of protection against her son, and for a period of three weeks during July 2006, he participated in a 30-day rehabilitation program (Tr. pp. 215, 253-54). On August 7, 2006, the student was placed under the supervision of the Suffolk County Department of Probation and the Suffolk County Juvenile Treatment Court (JTC) (Parent Ex. B). Pursuant to his probation agreement, the student agreed to abide by the terms of the agreement for a one-year period, in order to graduate from the JTC program (*id.*). The conditions of his probation agreement required the student to respect a curfew set by his mother, complete 30 hours of community service, write a 500-word essay, and submit to random drug and alcohol testing (*id.*). He also agreed to refrain from going to unlawful or disreputable places and from associating with individuals who were known to use illegal substances or possess illegal drug paraphernalia (*id.*).

At the beginning of the 2006-07 school year, respondent noted that her son's behavior improved slightly, but as the school year progressed, the student began cutting classes and disappearing (Tr. p. 216). During the period of September 6, 2006 and November 27, 2006, the student was noted to have 30 "illegal run away" episodes, two and a half days of in-school suspensions, one truant notation, one notation that he was illegally tardy, and two legal absences (Parent Ex. L at p. 2). On November 7, 2006, after testing positive for drug use, pursuant to a court order and the terms of his probation agreement, the student entered Outreach House (Tr. pp. 22, 109, 217).

On December 5, 2006, pursuant to respondent's request, petitioner's CSE convened (Parent Exs. O; AA).⁸ Respondent requested that her son be placed in the BOCES component to the Outreach House program provided by Eastern Suffolk BOCES to enable him to receive a free

⁸ Parent Ex. AA is an audio recording of the December 5, 2006 CSE meeting prepared by respondent's parent advocate who participated in the December 2006 CSE meeting (Tr. pp. 227-28).

appropriate public education (FAPE) (IHO Ex. 1 at p. 5; Parent Ex. AA). The December 2006 CSE denied respondent's request because it considered the student's problem a "drug problem," that it described as "sort of medically related" (Parent Ex. AA). The December 2006 CSE explained that when students cannot attend school within district, petitioner's CSE usually provides them with a 1:1 tutor so they can be academically successful (id.). The December 2006 CSE continued to recommend a special class collaborative (15:1) with related services of nursing and counseling (only small group counseling was listed), and the resultant IEP included previously recommended goals and objectives (Parent Ex. O at pp. 4-5). The December 2006 IEP further indicated that the "student [was] currently attending a residential rehabilitation program and will be provided with home teaching as per district policy with no related services" (id. at p. 9).

Respondent did not agree with the December 2006 CSE's recommendation of home instruction (id.). Rather, she requested that the student's IEP be implemented as written (Parent Ex. AA). Respondent indicated that her son has difficulty communicating and has a tendency to withdraw, but that he performed best in a structured environment (id.). She also stated that her son could become depressed and opined that he would receive more socialization in the BOCES program (id.). Although the student's teacher agreed that the home instruction program would deprive the student of opportunities for socialization, the teacher stated that the student had to answer questions, and the 1:1 situation was the best any teacher could give to a student (id.). Nevertheless, respondent commented that two hours of tutoring per day, five times per week was too restrictive for her son, as it would not address his social needs because he would be isolated by not being in a classroom with other students (id.). She also noted that the student was very sports oriented, and in the BOCES program, he could be involved with team sports (id.). Since the BOCES program was very structured and the student was not running away from Outreach House, respondent indicated that her son needed to participate within the mainstream population (id.). Respondent stated that the BOCES program mirrored the student's IEP in that he would be taking core academic subjects with electives, have access to certified special educators, and attend school for six hours per day (id.). Respondent also indicated that the student's IEP goal targeting his use of the resources of the group to assist in the resolution of daily problems could not be addressed with home instruction because of the restrictiveness of the 1:1 tutoring (id.).

By due process complaint notice dated January 2, 2007, respondent alleged that petitioner failed to offer her son a FAPE for the 2006-07 school year (IHO Ex. 1 at p. 6). Specifically, respondent maintained that the two hours of home instruction provided to her son by petitioner amounted to a denial of a FAPE (id. at p. 5). She requested that her son be allowed to participate in the academic program offered at Outreach House provided by BOCES (id. at p. 2). Respondent asserted that the educational program offered by BOCES at Outreach House most closely mirrored the program recommended in the student's IEP, and would also provide him with small classes, a highly structured environment, electives and opportunities for socialization, which she described as "all critical components of [his] IEP" (id. at p. 5).

On March 6, 2007, an impartial hearing convened, and after two days of testimony, concluded on March 7, 2007. By decision dated May 14, 2007, the impartial hearing officer found that the home instruction offered to respondent's son was an overly restrictive setting that did not address his special education needs (IHO Decision at p. 8). She concluded that the home instruction program was neither appropriate for the student, nor was it necessary for him to receive an educational benefit (id.). The impartial hearing officer also determined that the home

instruction program was not assisting the student in working toward his IEP goals and objectives (*id.* at p. 9). On the other hand, the impartial hearing officer concluded that the BOCES program requested by respondent would meet the student's special education needs in the LRE (*id.* at p. 10). She stated that the 8:1+1 BOCES program would provide the student with instruction in an integrated setting similar to the collaborative teaching program as set forth in his IEP (*id.* at p. 9). The impartial hearing officer further found that the BOCES program would address the student's study and organizational goals, thereby enabling him to work toward fulfilling his high school Regents examination requirements (*id.*). In light of the foregoing, the impartial hearing officer ordered petitioner to immediately place the student in the BOCES program at Outreach House for the remainder of his stay there (*id.* at p. 11). Despite her finding that the BOCES program was appropriate to meet the student's special education needs, the impartial hearing officer noted that due to a lack of available teachers, BOCES did not offer foreign language instruction (*id.* at p. 10). As a result, she ordered petitioner to continue to provide the student with home instruction in Spanish through the end of the 2006-07 school year, because he was not exempt from the foreign language requirement (*id.* at pp. 10-11).⁹ Next, the impartial hearing officer denied respondent's request for compensatory education, finding that the procedural errors alleged by respondent did not warrant such an award (*id.* at p. 10). With regard to respondent's request for an award for compensatory education, the impartial hearing officer noted that, although petitioner did not meet the student's special education needs in the LRE, petitioner nevertheless provided him with educational services in the form of home instruction (*id.* at pp. 10-11).¹⁰ Lastly, the impartial hearing officer determined that respondent failed to establish that her son was likely to experience substantial regression, and accordingly, denied her request for extended school year (ESY) services (*id.* at p. 11).¹¹

This appeal ensued. Petitioner asserts that the impartial hearing officer erred in finding that home instruction program did not represent the LRE for the student. Petitioner further contends that the home instruction program is appropriate to meet the student's educational needs and is reasonably calculated to provide him with an opportunity to make meaningful progress. Next, petitioner maintains that the impartial hearing officer erred in finding that the home instruction provided to the student is not assisting him in working toward his IEP goals and objectives. With respect to the BOCES program recommended by respondent, petitioner argues that it is educationally inappropriate to meet the student's needs. Respondent submitted an answer, asserting that petitioner's appeal should be dismissed in its entirety.

⁹ Inasmuch as neither party appeals the impartial hearing officer's order with respect to the provision of home instruction in Spanish, that part of the decision is final and binding (34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[j][5][v]; see Application of a Child Suspected of Having a Disability, Appeal No. 05-128).

¹⁰ Inasmuch as neither party appeals the impartial hearing officer's finding with respect to compensatory education, that part of the decision is final and binding (34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[j][5][v]; see Application of a Child Suspected of Having a Disability, Appeal No. 05-128).

¹¹ Inasmuch as neither party appeals the impartial hearing officer's finding with respect to ESY services, that part of the decision is final and binding (34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[j][5][v]; see Application of a Child Suspected of Having a Disability, Appeal No. 05-128).

The central purpose of the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482)¹² is to ensure that students with disabilities have available to them a FAPE (20 U.S.C. § 1400[d][1][A]; see 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 (20 U.S.C. § 1401[9][D]; 34 C.F.R. § 300.17[d];¹³ see 20 U.S.C. § 1414[d]; 34 C.F.R. § 300.320).¹⁴

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

An appropriate educational program begins with an IEP that 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 Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a

¹² On December 3, 2004, Congress amended the IDEA, effective July 1, 2005 (see Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647 [2004]). Since the relevant events at issue in this appeal occurred after the effective date of the 2004 amendments, the new provisions of the IDEA apply and citations contained in this decision are to IDEA 2004, unless otherwise specified.

¹³ The Code of Federal Regulations (34 C.F.R. Parts 300 and 301) has been amended to implement changes made to the IDEA, as amended by the Individuals with Disabilities Education Improvement Act of 2004. The amended regulations became effective October 13, 2006. For convenience, citations herein refer to the regulations as amended because the regulations have been reorganized and renumbered.

¹⁴ 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 school, 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]).

Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

The IDEA directs that, in general, an impartial hearing officer's decision must be made on substantive grounds based on a determination of whether the child received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 130 [2d Cir. 1998]; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the 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]).

In determining an appropriate placement in the LRE, the IDEA requires that children with disabilities be educated to the maximum extent appropriate with children who are not disabled and that special classes, separate schooling or other removal of children with disabilities from the regular educational environment may occur only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily (20 U.S.C. § 1412[a][5][A]; see 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.6[a][1]; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 144 [N.D.N.Y. 2004]; Mavis v. Sobel, 839 F. Supp. 968 at 982 [N.D.N.Y. 1993]). The placement of an individual student in the LRE shall "(1) provide the special education needed by the student; (2) provide for education of the student to the maximum extent appropriate to the needs of the student with other students who do not have disabilities; and (3) be as close as possible to the student's home" (8 NYCRR 200.1[cc]; see 34 C.F.R. § 300.116). Further, both state and federal regulations require that when considering a placement in the LRE, school districts place the child as close to his home as possible, unless the IEP requires some other arrangement (34 C.F.R. § 300.116[b][3],[c]; 8 NYCRR 200.4[d][4][ii][b]). Consideration is also given to any potential harmful effect on the child or on the quality of services that he or she needs (34 C.F.R. § 300.116[d]; 8 NYCRR 200.4[d][4][ii][c]). Federal and state regulations also require that school districts ensure that a continuum of alternative placements be available to meet the needs of children with disabilities for special education and related services (34 C.F.R. § 300.115; 8 NYCRR 200.6). The continuum of alternative placement includes instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions; and

the continuum makes provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement (34 C.F.R. § 300.115[b]).

The burden of persuasion in an administrative hearing challenging an IEP is on the party seeking relief (see Schaffer, 126 S. Ct. at 531, 536-37 [finding it improper under the IDEA to assume that every IEP is invalid until the school district demonstrates that it is not]).

As set forth in greater detail below, I find that the impartial hearing officer conducted the impartial hearing in an appropriate manner consistent with the requirements of due process. Her decision is thorough and well-reasoned. Specifically, I agree with the impartial hearing officer's conclusion that the home instruction provided by petitioner was overly restrictive and did not address the student's special education needs. I also concur with her finding that the home instruction did not assist the student in working toward the goals and objectives enumerated in his December 2006 IEP. Having conducted an independent review of the record, I further find that the impartial hearing officer also correctly determined that the BOCES program would meet the student's special education needs in the LRE.

Petitioner first contends that it offered the student an appropriate program tailored to the student's special education needs while he resided at Outreach House that allowed him to attain his goals and objectives. I disagree. The impartial hearing officer correctly concluded that the home instruction provided to the student did not address his special education needs in the least restrictive setting as prescribed by his December 2006 IEP, nor did it aid him in working towards his goals and objectives with respect to organizational and study skills. The record reflects that the student had a history of special education needs that were addressed by petitioner's CSE for several years (Parent Exs. O; P; Q; R; S; T; U; V; W) prior to his known involvement with drugs and the court order for him to live at Outreach House (IHO Ex. 1 at p. 4; Parent Ex. B). Annual goals and objectives included in the student's December 2006 IEP addressed the student's organization and study skills needs, identified education options, career and vocational options, and community leisure and recreational options (Parent Ex. O at p. 4). The December 2006 CSE noted on the student's IEP that it individualized his educational program because of his unique needs related to his disability in the areas of organization and study skills (*id.* at p. 2). Petitioner's psychologist who participated in the December 2006 CSE meeting (Tr. p. 137; Parent Ex. O at p. 9) testified that among the factors considered by the CSE in making its determination that the student would receive two hours per day of 1:1 tutoring included the student's classification of OHI (Tr. pp. 138-39). He also stated that the December 2006 CSE opined that individual tutoring would help the student with his attention, focus and study skills, and assist him with passing Regents examinations (Tr. p. 139). Contrasting testimony by the student's 1:1 occupational math tutor indicated that he was not preparing the student for the Regents examination and that the student's actual math instruction took place concurrently with a session for another student who also resided at Outreach House (Tr. pp. 114-16). However, the record reveals that the other student was taking math A, a course that the student in the instant case passed in June 2005 (Tr. pp. 60, 116; Parent Ex. C at p. 2). When the tutor worked with the other student in math A, the student in the instant case worked on assigned classwork rather than receiving direct instruction (Tr. pp. 127-28). The tutor testified that the actual amount of time of direct 1:1 instruction was "probably a little more than an hour," rather than the two hours allotted to the student (Tr. p. 128). In addition, the tutor stated that the student did not have any interaction with the other student and could be "moody," as his demeanor was "kind of up and down" (Tr. p. 129). The tutor also

indicated that he felt that there was no need for him to work on the IEP mandated organizational skills with the student such as note-taking or working on keeping track of homework assignments because the instruction was 1:1, he gave the student homework, and he said, "it's not like I have it on a board" (*id.*). Under the circumstances presented herein, the record demonstrates that the impartial hearing officer correctly determined that the home instruction program comprised of 1:1 tutoring did not appropriately address the student's special education needs in the areas of organization and study skills, nor did it assist him in achieving his goals and objectives related to those needs.

With respect to the other goals and objectives listed in the student's December 2006 IEP, despite petitioner's contention that the impartial hearing officer erred in finding that home instruction did not assist the student in working toward his goals and objectives, the record fails to demonstrate if or how petitioner formally addressed the annual goals listed on the December 2006 IEP pertaining to the student's education options, career options, vocational strengths, weaknesses and interests,¹⁵ or his awareness and participation in community recreation and leisure programs (Parent Ex. O at p. 4).

I now turn to petitioner's contention that the impartial hearing officer erred in finding that the BOCES program offered at Outreach House was tailored to the student's special education needs. The record does not afford a basis for petitioner's argument. As explained in greater detail below, I agree with the impartial hearing officer's conclusion that the BOCES program provided the student with instruction in an integrated setting similar to the collaborative team teaching (CTT) program mandated by the student's IEP (IHO Decision at p. 9).

Evidence adduced at the impartial hearing revealed that the BOCES' Mission Statement reads as follows: "Eastern Suffolk BOCES at Outreach House, an educational and therapeutic community for adolescents, is to provide instruction based on New York State mandated curriculum. Students are educated within a highly structured environment so they can continue their academic progress as they experience successful lives free from drugs and alcohol" (Parent Ex. A at p. 1).

The record indicates that the purpose of Eastern Suffolk BOCES at Outreach House is to help students gain credits and pass statewide tests in order to receive New York State high school diplomas while they work on their recovery (*id.* at p. 2). Treatment usually spans nine to 12 months and residents enter the program through the court systems, by school referral or voluntarily (*id.* at p. 1). "The program meets the needs of the residents through a variety of components, [including] family therapy, individual and group therapy, recreation, vocation and education" (*id.*). The BOCES program functions separately, but in conjunction with, from Outreach House (*id.*). In order to maintain a good relationship with Outreach House, weekly meetings take place between BOCES and Outreach House staff (*id.*). Outreach House has seven teachers and seven assistants and maintains a ratio of 8:1+1 (*id.*). Approximately 40 percent of the students residing at Outreach House receive special education services (Tr. p. 180). All of the teachers employed by BOCES

¹⁵ Testimony by the math tutor reflected that he provided the student with an "introduction to accounting" based on a casual conversation regarding some of the student's relatives involved in a business in some capacity, and the tutor asked the student if he might be interested in "the business side" of things (Tr. p. 122).

are certified in special education (*id.*). The number of classes and teaching staff allows for flexibility in scheduling and grouping students (Parent Ex. A at p. 2).

Based on the record before me, the evidence shows that the impartial hearing officer correctly determined that the BOCES program at Outreach House addressed the student's special education needs in the LRE. A review of the record reveals that the CSE had minimal information about the BOCES program (Tr. p. 102). The record further reflects that the December 2006 CSE rejected the BOCES program based on its erroneous assumptions that the student would be placed exclusively with students with disabilities who had differing needs, and that it would not prepare him to take any of his Regents examinations (IHO Decision at p. 8; Tr. p. 104; Parent Ex. AA). Moreover, the impartial hearing officer correctly found that by providing the student with a full day of instruction, with classes in all subjects, the BOCES program closely paralleled the CTT program that the student attended at petitioner's high school (Tr. p. 198). The record reflects that the BOCES program would provide the student with a structured environment and a clearly established routine that, according to the December 2006 IEP, is the type of situation in which the student performs best (Parent Exs. A at p. 1; O at p. 3). The record also indicates that the BOCES program would provide the student with the framework for working on his IEP goals and objectives, as it would furnish him with an opportunity to complete nightly homework assignments, write papers and reports, and fulfill Regents examination requirements in an 8:1+1 integrated setting (IHO Decision at pp. 9-10; Tr. pp. 181-83; *see* Tr. pp. 188-89; Parent Ex. A). In light of the foregoing, the impartial hearing officer correctly determined that the BOCES program offered at Outreach House would appropriately meet the student's special education needs in the LRE.

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

THE APPEAL IS DISMISSED.

IT IS ORDERED that the student's placement shall be the program described above, unless the parties otherwise agree.

Dated: **Albany, New York**
 July 26, 2007

PAUL F. KELLY
STATE REVIEW OFFICER