



# The University of the State of New York

## The State Education Department State Review Officer

No. 07-102

### **Application of the BOARD OF EDUCATION OF THE ARLINGTON CENTRAL 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:**

Kuntz, Spagnuolo & Murphy, P.C., attorney for petitioner, Vanessa Gronbach, Esq., of counsel

#### **DECISION**

Petitioner, the Board of Education of the Arlington Central School District, appeals from that portion of 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 not appropriate. The appeal must be sustained in part.

Preliminarily, I will address a procedural issue. Respondent attaches to his answer a letter dated August 30, 2007 from petitioner to the Office of State Review and a psychiatric evaluation dated August 30, 2007. Petitioner in its reply objects to respondent's attempt to introduce additional evidence attached to the answer. Generally, documentary evidence not presented at a hearing may be considered in an appeal from an impartial hearing officer's decision if such additional evidence could not have been offered at the time of the hearing and the evidence is necessary to enable a State Review Officer to render a decision (Application of a Child Suspected of Having a Disability, Appeal No. 07-042; Application of a Child with a Disability, Appeal No. 06-058; Application of a Child with a Disability, Appeal No. 05-020). While the August 2007 exhibits could not have been offered at the time of the impartial hearing, they are not necessary for my review and I decline to accept them.

During the impartial hearing, the student attended petitioner's school and was temporarily placed on homebound instruction based upon medical need (Tr. pp. 369, 371, 863-64, 884, 1041-43, 1064; IHO Exs. 6 at p. 1; 17). The student was described as a pleasant, friendly young man who exhibited global deficits and significant difficulty with attention and memory (Dist. Exs. 7 at pp. 4, 6; 36 at p. 9). The most recent assessment of his cognitive skills revealed a full scale IQ score of 76 (5th percentile) in the borderline range of functioning, with reading comprehension, written language and mathematic skills below the level of his full scale IQ (Dist. Ex. 7 at p. 20).

He was diagnosed with an attention deficit hyperactivity disorder (ADHD) and exhibited difficulty with organization and self-regulation (*id.* at p. 21). Socially, the student had difficulty making friends and needed assistance with social skills (*id.* at p. 25). The student's eligibility for special education services as a student with an other health impairment (OHI) (*see* 8 NYCRR 200.1[zz][10]) is not in dispute in this appeal.

The student received speech-language therapy services in preschool and petitioner's CSE found him eligible for special education services as a student with a speech or language impairment from kindergarten through fourth grade (Dist. Ex. 36 at pp. 1-2; *see* 8 NYCRR 200.1[zz][11]). At the end of fourth grade in June 2002, the student was "declassified" from special education because the CSE determined that he was performing "at or above his expected cognitive level" (Parent Ex. S). During fifth grade, he received remedial math and reading services and also testing accommodations in a regular education program (Tr. p. 1544; Parent Exs. I at p. 2; S). In January 2003, he sustained a concussion (Dist. Ex. 40). During the 2002-03 school year, the student reportedly became increasingly inattentive and frustrated by his difficulties and struggled to keep pace academically (Dist. Ex. 36 at pp. 2-3).

In August 2003, the CSE found that the student was eligible for special education services as a student with a speech or language impairment for his sixth grade year (Tr. p. 151; Dist. Ex. 36 at p. 2). On November 21, 2003, a private psychologist conducted a neuropsychological evaluation of the student (Dist. Ex. 36). Administration of the Wechsler Intelligence Test for Children-Fourth Edition (WISC-IV) yielded a verbal comprehension composite standard score (SS) of 77 (2nd percentile), a perceptual reasoning composite SS of 75 (5th percentile), a working memory composite SS of 77 (6th percentile), a processing speed composite SS of 65 (1st percentile) and a full scale IQ score of 68 (2nd percentile) (*id.* at p. 15). The private psychologist reported that, "[a]s in previous evaluations, overall intellectual levels are poorly developed and estimated to be in the borderline range, with no significant discrepancy between overall verbal and visuospatial abilities, which are both in the borderline range" (*id.* at p. 8). Administration of achievement assessments yielded reading decoding scores in the average to low average range, spelling scores in the low average range and arithmetic scores in the borderline to deficient range (*id.* at pp. 4-5). The student's writing skills were characterized as "emerging" and although he could write simple sentences, he had difficulty with handwriting and letter spacing (*id.* at p. 4). His basic language skills were in the low average to severely impaired range with difficulty in expressive language skills noted (*id.* at p. 8). The student exhibited difficulty with visuospatial, self-modulatory (attention) learning and memory skills (*id.* at p. 9). He was described as having minimal adaptive and emotional coping skills (*id.*). The private psychologist reported that the student's profile was indicative of global deficits and significant attentional and memory problems (*id.*). She suggested that the student's head injury sustained in January 2003 may have exacerbated pre-morbid learning difficulties, based on the difficulties he exhibited since he was a young child in combination with variability in his cognitive and academic achievement (*id.*). The private psychologist diagnosed the student with a learning disability, late effects of traumatic brain injury and an attention deficit disorder, primarily inattentive type. Her recommendations included a program with "consistent feedback within a structured familiar context, where the student could receive maximal support and supervision" (*id.* at p. 11). She opined that, with collaboration among staff, the student could be placed in an inclusion setting for subjects such as Language Arts, but that he would require small group remediation in academic areas such as Math (*id.*).

On April 26, 2005, petitioner's CSE subcommittee met for the student's program review (Dist. Ex. 2 at p. 2). The present levels of performance in the student's individualized education program (IEP) indicated that the student's cognitive and language delays affected his progress in the regular education setting and that he exhibited significant difficulty with comprehension and critical thinking (*id.* at p. 4). The student's diagnosis of ADHD was noted to affect his ability to consistently attend to the curriculum (*id.*). He reportedly required assistance to develop a social network in school and was described as "friendly" but with no real peer attachments (*id.* at p. 5). The CSE subcommittee determined that the student was eligible for special education services as a student with an OHI (*id.* at p. 2). Annual goals and short-term objectives were recommended in the areas of study skills, reading, writing, math, speech-language, social/emotional/behavioral and motor skills (*id.* at pp. 6-8). The CSE subcommittee indicated that the student required special instruction in an environment with a small student-to-teacher ratio and minimal distractions in order to progress and, therefore, did not recommend participation in regular education for primary academic subjects (*id.* at p. 3). The April 2005 IEP recommended placement in a 12:1+1 special class with the exception of 15:1 reading instruction, individual counseling one time per month, group counseling two times bi-weekly, one session per week of group occupational therapy (OT) and one session per month of speech-language therapy consultation at one of petitioner's middle schools (*id.* at p. 2). The CSE subcommittee's recommendation for an extended school year (ESY) program consisted of three sessions per week of group special education teacher support services (*id.* at p. 3). Program modifications of refocusing/redirection and use of an assignment pad were recommended for the student (*id.*). The CSE subcommittee recommended testing accommodations, including extended time, directions explained, questions read and explained, and special location (*id.*). The CSE subcommittee further recommended that the student receive adapted physical education instruction and determined that he was exempt from foreign language instruction (*id.*).

Due to a change in demographics, the student attended a different middle school during the 2005-06 school year than he had previously (Dist. Ex. 3 at p. 5). The CSE subcommittee met on October 20, 2005 and November 10, 2005 to review the student's program and progress (Dist. Exs. 3; 4). The November 2005 CSE subcommittee determined that the student's program was appropriate and approved completion of an assistive technology evaluation (Dist. Ex. 4 at p. 5). The student's teachers reported that he made a good transition to the new middle school (*id.*).

On January 30, 2006, petitioner's occupational therapist conducted an OT evaluation of the student (Dist. Ex. 25). The occupational therapist reported that the student demonstrated "slow, steady" progress in keyboarding skills and that he exhibited delays in visual perceptual skills (*id.* at p. 2). She recommended that the student receive OT consultation services (*id.*).

In February and March 2006, petitioner's speech-language pathologist conducted an evaluation of the student (Dist. Ex. 19 at pp. 20-21). An assessment of the student's language skills yielded a SS of 73 (4th percentile) (*id.* at p. 20). The student's receptive vocabulary skills were reportedly at the 25th percentile (*id.*). The speech-language pathologist reported that the student demonstrated small steady gains toward his goals and that pragmatic language and problem solving skills were an area of focus (*id.* at p. 21). The speech-language pathologist recommended that the student receive consultation services one time per month (*id.*). On March 13, 2006 petitioner's school psychologist administered the Wechsler Abbreviated Scales of Intelligence (WASI) to the student which yielded a verbal scale IQ score of 88 (21st percentile), a performance scale IQ score of 80 (9th percentile) and a full scale IQ score of 83 (13th percentile) (*id.* at p. 19).

On March 21, 2006, an occupational therapist conducted an assistive technology evaluation with the student (Dist. Ex. 24). The evaluator discussed the student with his current special education teacher, occupational therapist and also the special education teacher of the "Life Skills" class at petitioner's high school (id. at p. 1). Following assessment with a variety of assistive technology devices and software programs, the evaluator concluded that the student's handwriting was legible and that he demonstrated age-appropriate writing speed (id. at pp. 2-4). In light of the student's writing skills and due to the focus of his current and possible upcoming school year program, assistive technology was not recommended (id. at p. 4).

On April 24, 2006, respondent reviewed his son's special education file and requested an "emergency" CSE meeting to discuss his program (Dist. Ex. 22). Petitioner's supervisor of special education informed respondent that a CSE meeting was scheduled for May 24, 2006 and his current and future program would be discussed at that time (id.).

In May 2006, petitioner's school psychologist recommended that the student continue to receive special education services as a student with an OHI (Dist. Ex. 19 at p. 17). She indicated that the decision regarding the student's diploma type was "TBD" (to be determined) based upon his cognitive/academic abilities and state requirements (id.). Academic update information indicated that the student's grades in English, Social Studies, Math and Science ranged from the 70's to 90's based on a modified program, and although capable of doing the work, he did not always choose to complete homework, which decreased his grades (id. at p. 14; see Dist. Ex. 20). Related service recommendations included speech-language consultation one time per month, group OT one time per week, group counseling twice bi-weekly, and individual counseling one time per month (id. at p. 17). The student's social history, reported by respondent, indicated his concern regarding his son's ability to make friends and his lack of self-confidence (id. at p. 5). Information compiled for the May 2006 CSE meeting indicated that the student's interaction with peers needed improvement and his self-concept was inconsistent (id. at pp. 15-16).

On May 24, 2006, the CSE met for the student's annual review and reevaluation meeting (Dist. Ex. 5 at p. 1). The May 2006 CSE meeting notations indicate that it reviewed the student's speech-language, OT, assistive technology, academic and cognitive evaluation results, and his academic progress (Dist. Exs. 1 at p. 6; 5 at p. 1). The school psychologist reportedly discussed that the student's March 2006 abbreviated cognitive assessment results were higher than previous full-battery cognitive assessment administrations (Dist. Ex. 1 at p. 6). She also indicated that prior nonabbreviated cognitive test results revealed that the student's performance was consistently in the below average to deficient range and significant visual motor and visual perceptual weaknesses affected his learning (id.). It was reported that the student's academic test results placed his performance in the low average to below average range "across most domains," with basic reading skills at the low end of the average range (id.). The May 2006 CSE reported that the student exhibited difficulty with comprehension skills, reasoning tasks, abstract concepts, expressive language abilities and lacked prerequisite skills for the use of sophisticated assistive technology devices (id.). The May 2006 CSE determined that the student was appropriately classified as OHI, approved 2006 ESY services, and reportedly discussed program and related service options for the upcoming 2006-07 school year (id. at pp. 6-7). Respondent's advocate requested that the student undergo an independent neuropsychological evaluation at public expense before a program was recommended (Dist. Exs. 1 at p. 7; 5 at p. 1; see Dist. Ex. 10 at p. 1). The May 2006 CSE agreed to approve the independent neuropsychological evaluation and reconvene to review the results before drafting an IEP and finalizing the student's program (Dist. Exs. 1 at p. 7; 17 at p. 1).

By letter dated June 18, 2006, the CSE requested that the independent neuropsychologist conduct an evaluation of the student (Dist. Ex. 17 at p. 1). Progress notes from the summer 2006 ESY service provider indicated that the student had "come a long way socially" (Dist. Ex. 16 at p. 2). The ESY service provider reported that the student's reading fluency improved and that he demonstrated the ability to complete math problems without a calculator (id.).

On August 29, 2006, the CSE subcommittee reconvened to finalize the student's program and develop an IEP (Dist. Ex. 1). The parties had not received the results of the student's independent neuropsychological evaluation and respondent opted not to attend the meeting (id. at p. 6). The August 2006 CSE subcommittee determined that it had sufficient evaluative data upon which to make the student's 2006-07 program recommendation (Dist. Ex. 10 at p. 2). The resultant IEP indicated that the student's delays in cognitive, social, reading, math, and written language skills affect his progress in the regular education setting and that he benefits from a structured learning environment (Dist. Ex. 1 at p. 3). The August 2006 IEP stated that the student's academic skills were below grade expectations, and although recent cognitive test results were higher than previously documented, a full battery had not been administered (id.). The student was described as a "hands on" learner who preferred concrete tasks over abstract learning and needed to learn at his own pace (id.). The August 2006 CSE subcommittee determined that the student required a small class environment where he could learn practical and vocational skills and participate in experiential activities (id.). Socially, the August 2006 CSE found that the student needed to improve social skill interactions with peers (id. at p. 5). The August 2006 IEP described the student's manuscript writing as legible and noted that monitoring of his fine motor and attentional difficulties was necessary (id. at p. 6).

The August 2006 IEP included annual goals in the areas of reading, writing, mathematics, speech-language, social/emotional/behavioral, motor, basic cognitive/daily living skills, and career/vocational/transition (Dist. Ex. 1 at pp. 7-10). Program modifications and testing accommodations in the August 2006 IEP were essentially retained from the student's 2005-06 IEP (compare Dist. Ex. 1 at p. 2, with Dist. Ex. 2 at p. 3). The CSE subcommittee recommended that for the 2006-07 school year, the student attend petitioner's high school in a 12:1+1 special class for English, Math, Science, and Social Studies (Dist. Ex. 1 at p. 1). He would participate in a regular education career elective course two times per week for two hours and also receive counseling, speech-language and OT consult services one time per month (Tr. p. 373; Dist. Ex. 1 at pp. 1-2). A shared aide was recommended to provide support to the student in his mainstream classes (Dist. Ex. 1 at p. 2). The August 2006 CSE subcommittee meeting notes indicated that the proposed high school program for the student was similar to his current middle school program and balanced academics with vocational services (id. at p. 6). The CSE subcommittee agreed to reconvene after receipt of the independent neuropsychological evaluation in order to review its findings in relation to the student's program (Dist. Exs. 1 at p. 6; 10 at p. 2).

By letter dated September 5, 2006, respondent alleged that the CSE subcommittee caused an undue delay in authorizing the independent neuropsychological evaluation, and as a result, the evaluation report was not completed by the commencement of the school year (Dist. Ex. 12A at p. 2). Respondent also alleged that the CSE subcommittee made determinations and recommendations regarding the student without pertinent information (id. at p. 1). Respondent requested that the student be placed on homebound instruction until the independent neuropsychological evaluation report was reviewed by the CSE and a recommendation for the 2006-07 school year was made (Dist. Ex. 12A).

By letter dated September 7, 2006, petitioner's staff informed respondent that the August 2006 CSE subcommittee possessed sufficient evaluative data to make program recommendations for the student for the upcoming school year (Dist. Ex. 10). By letter dated September 11, 2006, petitioner denied respondent's request for the student to receive homebound instruction, based on lack of evidence that the student had a physical, mental or emotional condition that would prevent his regular attendance at school (Dist. Ex. 9).

Petitioner received the independent neuropsychological evaluation report on September 18, 2006 (Dist. Ex. 7; IHO Ex. 4 at p. 2). Administration of the WISC-IV yielded a verbal comprehension composite SS of 93 (32nd percentile), a perceptual reasoning composite SS of 84 (14th percentile), a working memory composite SS of 68 (2nd percentile), a processing speed composite SS of 75 (5th percentile) and a full scale IQ score of 76 (5th percentile, borderline) (Dist. Ex. 7 at pp. 7, 20). Measures of the student's academic achievement revealed deficits in reading (SS 85, 16th percentile), mathematics (SS 65, 1st percentile), writing (SS 69, 2nd percentile) and language (SS 85, 16th percentile) (*id.* at p. 9). The independent neuropsychologist reported that, although the student's performance on the verbal and visuospatial portions of the WISC-IV were in the low average to average range, his slow information processing speed and difficulties with verbal and nonverbal processing, attention, working memory and memory affected his performance at school (*id.* at p. 20). The student's performance in reading comprehension, written language, and mathematics were all below the level of his full scale IQ (*id.*). The independent neuropsychological evaluation report described the student's difficulty with attention, organization, self-regulation, and memory (*id.* at pp. 21-22). Socially, the independent neuropsychologist opined that the student may miss social cues and his difficulties with attention and "control" may have affected his sense of confidence (*id.* at p. 23). The presence of "low-level" everyday sadness and anxiety was not ruled out (*id.*).

The independent neuropsychologist stated that the student required a "highly structured, feedback-rich environment" and one that stressed "control, routine, scheduling, discipline, and calm," which provided predictability and modeled self-control to help his attention and learning problems (Dist. Ex. 7 at pp. 23-24, 27). She also recommended multi-modal presentation and hands-on contexts to support the learning of new verbal and nonverbal information (*id.* at p. 24). The student required assistance with attention, study skills, organization of materials to be learned, social skills and establishing motivation for academic work (*id.* at pp. 25-26). The independent neuropsychologist recommended strategies that included the use of short, simple instructions, a keyboard for writing assignments, extra time allowance for tests and assignments, an extra set of textbooks and assistance with transitions and supply organization (*id.* at pp. 24-26).

The CSE subcommittee reconvened on September 20, 2006 (Tr. p. 173; Dist. Ex. 6). The record reflects that the independent neuropsychologist's evaluation report was presented by petitioner's school psychologist and included a review of the testing results, the student's cognitive functioning, as well as the student's areas of weakness and his needs (Tr. pp. 173, 314-15). The student's ninth grade special education teacher also provided a description of her program and other programs available to special education students at the high school (Tr. pp. 176-77, 319, 321-23, 332-33). Respondent and his advocate disagreed with petitioner's assessment of the student's needs and the program recommended by the August 2006 CSE (Tr. pp. 174-75). Respondent and his advocate also identified and presented three residential programs that they deemed more

appropriate for the student (Tr. pp. 323-27).<sup>1</sup> The September 2006 CSE subcommittee did not modify the August 2006 IEP (Tr. p. 173).

On October 11, 2006, respondent filed a due process complaint notice alleging that the student's educational programs during the 2005-06 and 2006-07 school years were inappropriate (IHO Ex. 1 at pp. 3-4).<sup>2</sup> Regarding the 2006-07 school year, respondent alleged that: 1) the CSE developed the student's August 2006 IEP without receipt of the independent neuropsychological evaluation report contrary to the request of respondent's advocate to adjourn the meeting until completion of the evaluation report; 2) petitioner unduly delayed the contract with the independent neuropsychologist; 3) the September 2006 CSE did not conduct a "complete review" of the independent neuropsychological evaluation report and make changes to the student's IEP accordingly; 4) the CSE Chairperson refused to accommodate respondent's September 5, 2006 request for homebound instruction; and 5) the September 2006 CSE refused to consider the advocate's recommendation of three language-based, integrated out-of-district placements for the student (id. at pp. 5-8).

The impartial hearing commenced on October 25, 2006 to determine the student's pendency for the 2006-07 school year.<sup>3</sup> The impartial hearing continued on the merits on December 11, 2006 and concluded on May 31, 2007, after 14 additional days of testimony. On March 30, 2007, respondent filed a second due process complaint notice (IHO Exs. 6; 15) and the impartial hearing regarding respondent's March 2007 claims was held in April 2007 (Application of a Child with a Disability, Appeal No. 07-062). Respondent's appeal from the impartial hearing officer's determination of his March 2007 claims was decided in Application of a Child with a Disability, Appeal No. 07-062.

By decision dated July 24, 2007, the impartial hearing officer found that petitioner was obligated to have an IEP in place prior to the start of the 2006-07 school year; respondent's decision not to attend the August 2006 CSE meeting did not vitiate the CSE's action on that date; petitioner did not unduly delay the contract with the independent neuropsychologist; two neuropsychologists (2003 and 2006) concluded that the student's cognitive impairment was his primary deficit and that his language deficits were secondary; the student's deficits do not require a language-based program as the primary means of addressing the student's many needs; and a special class placement for the student was appropriate (IHO Decision at pp. 20-23, 34).

However, the impartial hearing officer also found that the August 2006 IEP should be annulled because of procedural deficiencies in its development and petitioner's failure to include

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<sup>1</sup> Although there is documentary evidence in the hearing record indicating that petitioner held a series of CSE subcommittee meetings, these meetings are referred to as CSE meetings in the transcripts and other documents in the hearing record. Thus, the terms are used interchangeably in this decision.

<sup>2</sup> An impartial hearing officer's decision is final and binding upon the parties unless appealed to a State Review Officer (34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[k]). Consequently, the impartial hearing officer's determination that respondent's claims regarding the 2005-06 school year were moot is final and binding (Application of a Child with a Disability, Appeal No. 07-026; Application of a Child Suspected of Having a Disability, Appeal No. 06-092; Application of a Child with a Disability, Appeal No. 06-085; Application of a Child with a Disability, Appeal No. 04-024; Application of a Child with a Disability, Appeal No. 03-108; Application of a Child with a Disability, Appeal No. 02-100; Application of a Child with a Disability, Appeal No. 02-073).

<sup>3</sup> The impartial hearing officer's pendency order is not in the hearing record and was not appealed by either party.

access to credit bearing courses (IHO Decision at pp. 35, 39). Specifically, the impartial hearing officer found that no goals were discussed at the August 2006 CSE meeting; the means used to measure the goals should have been more objective; the student was "shoehorned" into the placement based on the student's below average functioning and the sequence of programs from eighth to ninth grade; the August 2006 CSE decreased the student's levels of counseling and OT counter to the recommendations of the school psychologist to continue the present level of services; assistive technology was ruled out based on the student's current performance and his anticipated placement for the following year rather than the student's individual needs; and the special education teacher at the August 2006 CSE meeting was not the teacher of the student (*id.* at pp. 35-39). Furthermore, the impartial hearing officer found that petitioner's decision to "track" the student towards an IEP diploma was not addressed at the May, August and September 2006 CSE meetings; the August 2006 IEP did not identify that the student was taking non-credit bearing classes; the September 2006 CSE did not complete a meaningful review of the independent neuropsychologist's evaluation and did not provide written notice to the parent of its refusal to change the student's educational placement; and the August 2006 CSE failed to offer a free appropriate public education (FAPE) to the student in the August 2006 IEP and failed to do so again on September 20, 2006 (*id.* at pp. 26-27, 44-45).

The impartial hearing officer ordered petitioner to provide the student with 200 hours of supplemental services in the form of tutoring, OT, speech-language therapy and counseling, delegating the allocation of the 200 hours to respondent's discretion (*id.* at pp. 48-49, 53-55). The impartial hearing officer also ordered the CSE to reconvene prior to the commencement of the 2007-08 school year to conduct a full discussion of the September 2006 neuropsychological evaluation report, to identify the student's present levels of performance and needs, and to develop measurable annual goals and a program which, in whole or in part, as determined by the CSE, gives the student appropriate access to credit-bearing course work toward a high school diploma during the 2007-08 school year (*id.* at pp. 52-53, 55).

Petitioner appeals and asserts that the program recommended for the student for the 2006-07 school year was appropriate to meet the student's needs and that any procedural irregularities did not deny the student a FAPE or deny respondent meaningful participation in the IEP process. Specifically, petitioner argues that the impartial hearing officer erred in finding that, despite the lack of changes to the August 2006 IEP at the September 2006 CSE meeting, it was obligated to provide written notice of the CSE's decision. Petitioner also contends that the impartial hearing officer erred by finding that the IEP was procedurally defective because the special education teacher at the August 2006 CSE meeting was not a teacher of the student. Further, petitioner alleges that the August 2006 CSE did not change the student's related services, but rather these services were changed during the May 2006 CSE meeting, where a full discussion of the student's needs, abilities and evaluations occurred. Petitioner asserts that the August 2006 CSE meeting merely formalized the recommendations from the May 2006 CSE meeting. Petitioner also contends that the impartial hearing officer erred in finding that the student had been tracked for an IEP diploma so early in his high school career. Petitioner asserts that the impartial hearing officer erred by finding that it had denied the student a FAPE because the August 2006 IEP was procedurally and substantively deficient. As relief, petitioner requests reversal of that portion of the impartial hearing officer's decision that determined that petitioner's recommended program for the 2006-07 school year was procedurally and substantively inappropriate and awarded respondent 200 hours of additional services.



In his answer, respondent requests that the impartial hearing officer's decision be upheld in its entirety.

The central purpose of the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) 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, 546 U.S. 49, 51 [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];<sup>4</sup> see 20 U.S.C. § 1414[d]; 34 C.F.R. § 300.320).<sup>5</sup>

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, 419 [S.D.N.Y. 2007]).

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

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<sup>4</sup> 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 in this decision refer to the regulations as amended because the regulations have been reorganized and renumbered.

<sup>5</sup> 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]).

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).

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

The burden of persuasion in an administrative hearing challenging an IEP is on the party seeking relief (see Schaffer, 546 U.S. at 59-62 [finding it improper under the IDEA to assume that every IEP is invalid until the school district demonstrates that it is not]).

Turning first to the procedural challenges to the student's August 2006 IEP, I concur with the impartial hearing officer that the evidence does not support the assertion that petitioner refused to discuss the findings of the independent neuropsychologist (IHO Ex. 1 at p. 5; IHO Decision at p. 26). A CSE is required to "consider" information about the child provided to, or by, the parents (8 NYCRR 200.4[f][1][iii]). Prior to the September 2006 CSE subcommittee meeting, respondent met with the independent neuropsychologist who spent hours reviewing the evaluation report with him (Tr. pp. 1845-46). Petitioner's staff reviewed the independent neuropsychological evaluation report either before or at the September 2006 CSE subcommittee meeting (Tr. pp. 173, 314-16). The hearing record reflects that portions of the 27-page neuropsychological evaluation report were raised by petitioner's school psychologist during the September 2006 CSE subcommittee meeting (Tr. pp. 173, 314-16, 1960). In light of the evidence discussed above, I disagree with the impartial hearing officer's conclusion that the September 2006 CSE subcommittee made a "non-decision" by not altering the student's August 2006 IEP after its review of the information contained in the independent neuropsychological evaluation report (IHO Decision at p. 27). As further detailed below, the hearing record reflects that the findings and recommendations of the independent neuropsychologist were consistent with the information before the May 2006 CSE subcommittee and contained in the student's August 2006 IEP.

I also disagree with the impartial hearing officer's conclusion that the August 2006 CSE subcommittee did not engage in sufficient review of the student's individual needs to prepare an IEP (IHO Decision at pp. 35-36). As noted by the impartial hearing officer, the May 2006 CSE subcommittee had an "extensive" discussion of the student and the record reflects that the August 2006 CSE subcommittee discussed the student's special education needs (Tr. pp. 292-93, 296, 314-16; IHO Decision at p. 36). Furthermore, the record does not indicate that the student's needs changed significantly from May to August 2006. In addition, the record reflects that the annual

goals contained in the August 2006 IEP were addressed during the May 2006 CSE meeting and continued to be appropriate to address the student's areas of deficit (Tr. pp. 311-12).

Turning to respondent's allegation that the CSE meetings were improperly comprised, federal and state regulations require that the CSE include at least one special education teacher of the child (34 C.F.R. § 300.321[a][3]; 8 NYCRR 200.3[a][1][iii]). I disagree with the impartial hearing officer's conclusion that the August 2006 IEP was procedurally invalid because a special education teacher of the student was not present at the August 2006 CSE meeting. The record reveals that a special education teacher of the student was present at both the May and September 2006 CSE meetings (Tr. pp. 369, 371, 594, 595-96; Dist. Exs. 1 at p. 6; 6; 18). During the May 2006 CSE meeting, the student's present levels of performance, goals, related services, and program for the 2006-07 school year were discussed (Tr. pp. 297, 302-03, 311-12; Dist. Exs. 1 at pp. 6-7; 5 at p. 1). The May 2006 CSE did not formulate an IEP at that time in order to accommodate respondent's request to consider the results of an independent neuropsychological evaluation (Tr. pp. 301, 303; Dist. Ex. 1 at p. 7). The evidence in the hearing record reveals that petitioner initiated the August 2006 CSE meeting in order to maintain compliance with its legal obligation to have an IEP in place for the student prior to the start of the 2006-07 school year (20 U.S.C. § 1414[d][2][A]; see also 34 C.F.R. § 300.323[a]), and the August 2006 IEP was generated based upon the information discussed and considered at the May 2006 CSE meeting (Tr. pp. 292-93; Dist. Exs. 1 at p. 6; 10). Additionally, respondent elected not to attend the August 2006 CSE meeting because the neuropsychological evaluation report had not yet been completed (Tr. pp. 1374-76, 1410-11, 1588-90; Dist. Ex. 1 at p. 6). I note that the special education teacher at the August 2006 CSE meeting was not the teacher of the recommended special education program that had been considered by the CSE prior to the August 2006 CSE meeting, but she was familiar with the special education programs at petitioner's high school (Tr. pp. 268-69, 295-97, 1414-15). While I concur with the impartial hearing officer that the failure to include a special education teacher of the student at the August 2006 CSE meeting was a procedural violation, I find that it does not warrant an annulment of the August 2006 IEP because it did not impede the student's right to a FAPE, impede respondent's opportunity to participate in the decision-making process at the meeting, or cause a deprivation of educational benefits to the student (20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]).

I concur with the impartial hearing officer's finding that petitioner violated the IDEA's procedural requirement to send prior written notice of the CSE's refusal to change the student's program after the September 2006 CSE meeting (34 C.F.R. § 300.503[a][2]; 8 NYCRR 200.1[oo], 200.5[a][1]). However, under the circumstances presented in this case, I find that respondent did not offer persuasive evidence that this procedural violation warrants annulment of the August 2006 IEP because it did not impede the student's right to a FAPE, significantly impede respondent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or cause a deprivation of educational benefits to the student (20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]). However, petitioner is cautioned to ensure that it complies with its obligation to provide prior written notices when required (34 C.F.R. § 300.503[a][2]; 8 NYCRR 200.1[oo], 200.5[a][1]).

Turning to the appropriateness of the recommended program, I concur with the impartial hearing officer's finding that the 2006-07 special class program discussed by the May 2006 and recommended by the August and September 2006 CSE subcommittees was appropriate (see IHO Decision at p. 35). As stated above, the August 2006 IEP described the student's deficits in

cognitive skills, reading, math and written language and contained academic and cognitive assessment information compiled for the May 2006 CSE subcommittee meeting (Dist. Exs. 1 at pp. 3-4; 19 at pp. 10, 16). These deficits are similar to those described in detail in the independent neuropsychological evaluation report (Dist. Ex. 7 at p. 6-11, 20-21). The August 2006 IEP characterized the student's academic skills as "below grade level expectations" and the independent neuropsychological evaluation report stated his performance in reading comprehension, written language and mathematics was below the level of his full scale IQ score (Dist. Exs. 1 at p. 3; 7 at p. 20). The student's eighth grade special education teacher testified that, although the student did not have difficulty with decoding, his reading comprehension skills were weak and he struggled with homework (Tr. pp. 606-07, 611, 615). The special education teacher who taught the student in summer 2006 testified that the student exhibited deficits in math reasoning, multiplication concepts, telling time, as well as reading comprehension (Tr. p. 569).

Socially, the August 2006 IEP and May 2006 reevaluation information indicated that the student's interactions with peers were not within age-appropriate expectations; he lacked conversation skills and self-confidence to initiate and maintain social interactions; and he did not always make good decisions (Dist. Exs. 1 at p. 5; 19 at p. 15). The independent neuropsychologist reported that the student may miss social cues and may have difficulty conversing with peers in less structured situations (Dist. Ex. 7 at p. 23). The student's ninth grade special education teacher testified that the student behaved like a much younger child, that he tended to gravitate to adults, and that he required coaching on how to "get along" with other children (Tr. p. 375).

The August 2006 IEP indicated that the student has a diagnosis of ADHD, his attentional difficulties require monitoring, and he requires some subjects taught in a class with a small student-to-teacher ratio with minimal distractions (Dist. Ex. 1 at pp. 5-6). The independent neuropsychological evaluation report indicated that the student's difficulties with attention, organization, and working memory for verbal and visual information and also difficulty with storage and retrieval of information might interfere with classroom learning (Dist. Ex. 7 at pp. 17, 21-22). The student's summer 2006 special education teacher testified that the student was only able to fully attend to a task for approximately ten to fifteen minutes and then he required a short break (Tr. pp. 580-81). His stepmother testified that the student had difficulty remembering what he had learned in school in order to do his homework even when provided with an example from the teacher (Tr. pp. 1320-23).

The August 2006 IEP was consistent with the independent neuropsychologist's evaluation report, recommending similar supports for the student including directions explained (kept short and simple), use of an assignment pad (folder system), provide refocusing and redirection (needs help with attention), and extended time (extra time on tests and assignments) (compare Dist. Ex. 1 at p. 3, with Dist. Ex. 7 at pp. 24-26).

The independent neuropsychologist testified that during her evaluation, the student exhibited impulsive behavior, did not understand directions, forgot directions, had difficulty expressing himself, and required "a lot" of refocusing to the task (Tr. pp. 1749, 1754-56). The student also exhibited difficulty with word finding, word order (syntax) and his ability to convey pertinent information to his listener (Tr. p. 1758). She reported that the result of the student's arithmetic assessment was largely comparable to previous testing in that it was significantly below his full scale IQ score of 76 (Tr. pp. 1759, 1766). The independent neuropsychologist characterized the student's reading comprehension skills as "poor" and stated that he did not

demonstrate much improvement from his 2003 assessment (Tr. p. 1770). She indicated that the student's written composition skills were not much better than his comprehension skills, in that he exhibited spelling and language errors and also poor organization (Tr. pp. 1772-73). He had "a real limitation" in his receptive vocabulary skills, difficulty with complex directions and sentences, and required a classroom setting that addressed his language deficits (Tr. pp. 1775-77). The student's writing speed was slow and the independent neuropsychologist opined that the student would have difficulty copying information from the blackboard in class (Tr. p. 1783). She concluded that her findings were not dissimilar from those of the 2003 neuropsychological evaluation, which reported the student's difficulty with attention, organization, lack of a "strategic approach," limited working memory, and difficulty with storage and retrieval of information, which she opined might interfere with classroom learning (Tr. p. 1793; Dist. Ex. 36).

The August 2006 IEP recommended a program that allowed the student to learn at his pace in a small class environment with hands-on, experiential activities to keep him motivated to learn (Dist. Ex. 1 at p. 3). The independent neuropsychologist recommended a highly structured, feedback-rich environment that utilizes multi-modal presentation in a hands-on context (Dist. Ex. 7 at p. 24). She indicated that it would be useful to the student to be exposed to skilled trades, as he appeared more comfortable and better at learning with his hands (id. at p. 27). She stated that "inclusion may be feasible" if sufficient special education and therapy were offered to compensate for the student's slow processing, language and math difficulties (id. at p. 24).

The student's ninth grade special education teacher described her program as teaching parallel concepts to what is taught in regular education ninth grade classes (Tr. pp. 371, 378-79, 437). She testified that she keeps math instruction at a "practical level" such as using a cooking class to teach fractions (Tr. p. 379). The special education teacher also testified that her class runs the school store and within the career elective, the students work with job coaches (Tr. pp. 379-80). Career elective courses involve on-location job training and "soft" skill job training, such as how to build a resume, appropriate attire for a work environment and appropriate work place conversation (id.). Instruction in "community connections" provides students with information regarding community resources and activities to use during free time and brings students into the community to meet people, such as the security staff at the local mall and staff at a culinary training institute (Tr. pp. 380-83, 386; see Dist. Ex. 44). The "community connections" trips are directly related to the New York State learning standards (Tr. pp. 405-09). The special education teacher communicated with the student's reading teacher, math teacher, speech-language pathologist, and occupational therapist at least one time per week (Tr. p. 385).

I disagree with the impartial hearing officer's finding that petitioner "tracked" the student for an IEP diploma (IHO Decision at p. 41). The student's eighth grade special education teacher stated that her program does not track students toward a particular type of diploma; rather, she evaluates students on their individual abilities (Tr. pp. 594-96, 686). She stated that she had students moving into a Regents program because they demonstrated potential to be able to complete the work required (Tr. pp. 686-87). The student's ninth grade special education teacher testified that "rarely" is an IEP diploma designation found on a student's IEP, and that she does not make the assumption in ninth grade that a student will receive an IEP diploma (Tr. pp. 384-85; see Tr. p. 437). She reported that she has had students leave her self-contained classroom and receive regular education instruction (Tr. p. 385). The CSE Chairperson testified that the student was not tracked for an IEP diploma based on his eighth grade placement in a Life Skills class; rather, the student required the type of instruction that occurred in that class (Dist. Ex. 1 at p. 6; Tr. pp. 238-

39). The CSE Chairperson testified that, in conjunction with the high school principal, he makes the decision whether or not a student receives credit for a particular subject (Tr. pp. 1916-17). He also stated that the student's ninth grade class paralleled the ninth grade general education curriculum and the decision to award credit to a student is individualized, not based on class placement (*id.*). The student's ninth grade program offered the opportunity for students to earn credit for English and Science (Tr. pp. 1972-73).

I now turn to the impartial hearing officer's determination that the August 2006 CSE subcommittee improperly decreased the amount of counseling services the student would receive (IHO Decision at p. 36). For the reasons discussed below, I disagree. The record reflects that the information before the May, August, and September 2006 CSE subcommittees regarding the student's counseling needs related to his difficulty interacting with peers (Tr. p. 770; Dist. Exs. 1 at p. 5; 7 at pp. 23, 25; 19 at pp. 15-16). The August 2006 IEP provided three annual goals in this area and recommended a counseling consult one time per month (Dist. Ex. 1 at pp. 1, 8-9). The independent neuropsychologist recommended that the student's social skills training occur in a group context without an additional academic task (Dist. Ex. 7 at p. 25). The student's ninth grade special education teacher testified that the student's social emotional goals contained in the August 2006 IEP were addressed by the social skills instruction in her classroom and that she did not recommend more than one time per month counseling (Tr. pp. 373, 388, 394-97, 424-25). She described collaboration with speech-language pathologists regarding informal conversation skill instruction and use of "skills streaming," described as direct social skills instruction that occurred in her classroom (Tr. pp. 394-95).<sup>6</sup> Through modeling, students are taught how to initiate conversations, practice the skills on each other, and receive critical feedback from their classroom peers (Tr. pp. 396-97). The student's speech-language pathologist testified that the purpose of her "consult" was to monitor the student's social pragmatic skills, explaining that the student sometimes had difficulty getting along with other students (Feb. 12, 2007 Tr. pp. 789, 812-13). She further testified that the proposed 12:1+1 setting was a language-based class and could provide the student with sufficient intervention for his language deficits (Feb. 12, 2007 Tr. p. 825). The interventions used in the recommended program are also consistent with the independent neuropsychologist's recommendation that the student receive counseling to focus on "concrete day-to-day issues" (Dist. Ex. 7 at p. 27). Although the impartial hearing officer determined that the August 2006 CSE subcommittee inappropriately decreased the amount of counseling services, I find that the student received appropriate social skills training in the 12:1+1 setting in addition to the monthly counseling consult.

The impartial hearing officer also determined that the level of OT service recommended in the student's August 2006 IEP was inappropriately reduced in light of his handwriting skills (IHO Decision at pp. 37-38). The student's January 2006 OT evaluation report indicates that the focus of therapy was to improve his fine motor and visual motor skills (Dist. Ex. 25 at p. 1). The occupational therapist stated that the student was instructed in touch typing and keyboarding skills, in which he demonstrated "slow, steady progress" (*id.* at p. 2). She recommended that the student receive an OT consult to address functional skills that impact his academic performance (*id.*). The February 2006 assistive technological evaluation report stated that samples of the student's writing were legible to himself, his teacher and the evaluator and, therefore, the need for a portable word

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<sup>6</sup> "Skillstreaming" is an instructional training program designed to develop the social skills of students and utilizes modeling, role-playing, and performance feedback.

processor was ruled out (Dist. Ex. 24 at pp. 2-3). At that time, according to the assistive technology evaluator, the student's word processing skills were "well developed," he used multiple fingers on both hands and achieved a typing speed of 15 words per minute during a dictated typing task (id. at p. 3). Although assistive technology was not recommended as a result of the February 2006 evaluation, the evaluator recommended that the student should have opportunities to complete writing assignments on the computer (id. at p. 4).

The independent neuropsychological evaluation report states that the student's handwriting was not consistently legible and that he had difficulty processing some visual/spatial information (Dist. Ex. 7 at pp. 17, 19). She recommended keyboarding training and the use of a computer to facilitate organization and bypass handwriting difficulty (Dist. Ex. 7 at p. 26). The student's summer 2006 special education teacher reported that the student resisted working on improving his handwriting and making corrections when she asked him to clean up his work (Tr. pp. 480, 510). She testified that when she attempted to use a computer with the student, he exhibited avoidance behaviors (Tr. p. 511). She opined that she would have a better estimate of the student's written expression abilities if he dictated a response rather than writing it (Tr. p. 572). The student's 2006-07 special education teacher testified that the student exhibits functional written language and can provide her with a "decent" written product (Tr. p. 425). She stated that the student can write neatly and that his difficulty with writing was related to his investment in the task (Tr. p. 425). The special education teacher stated that the student's visual perception and organizational needs were addressed by activities such as far/near point copying, planners and cooking tasks (Tr. pp. 425-26, 433).

For the 2006-07 school year, the student was scheduled to be in a computer class but did not take that class due to implementation of the pendency IEP (Tr. p. 306). The proposed 2006-07 educational program had classrooms with computers, and the CSE Chairperson testified that the student could use a computer if he wanted to (Tr. pp. 347, 354). However, the hearing record also contains evidence that the student resisted using a computer (Tr. p. 511). The CSE Chairperson testified that access to a computer/word processor was not recommended in the August 2006 IEP, but whether or not he needed one could be addressed once he began high school (Tr. pp. 349-50). The evidence in the hearing record persuades me that the CSE failed to adequately consider the student's need for OT to improve his handwriting skills, or whether a computer/word processing device is appropriate. Therefore, if it has not done so already, the CSE should reconvene and determine if additional OT and assistive technology evaluative data is necessary. The OT evaluation and assistive technology evaluation identified areas of need; however, it is unclear why the CSE recommended reducing OT services or why the use of a computer was not recommended for the student. When sufficient evaluative data has been obtained, the CSE should determine the appropriate level of OT services and whether the student would benefit from the use of assistive technology.

I have considered the parties' remaining arguments and find that I need not reach them in light of my determinations or they are without merit.

**THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.**

**IT IS ORDERED** that the decision of the impartial hearing officer dated July 24, 2007 is annulled to the extent that it determined that petitioner did not provide the student with a FAPE

for the 2006-07 school year and ordered petitioner to provide the student with 200 hours of additional services; and

**IT IS FURTHER ORDERED** that, unless the parties otherwise agree or additional OT and assistive technology evaluations have been completed, the CSE shall reconvene to determine whether additional evaluative data is necessary, and if so, shall consider such additional evaluation reports and make appropriate recommendations for the student within 30 days of the date of this decision.

**Dated:**            **Albany, New York**  
                         **October 12, 2007**

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**PAUL F. KELLY**  
**STATE REVIEW OFFICER**