The University of the State of New York

The State Education Department
State Review Officer

No. 08-001

Application of a STUDENT WITH A DISABILITY, by his parents, for review of a determination of a hearing officer relating to the provision of educational services by the Board of Education of the Springville-Griffith Institute Central School District

Appearances:
Hodgson Russ LLP, attorney for respondent, Ryan Everhart, Esq., of counsel

DECISION

Petitioners appeal from a decision of an impartial hearing officer which found that the pendency placement and services respondent provided for their son for the 2006-07 school year were appropriate, the substantive portions of the student's 2006-07 individual education program (IEP) were appropriate, and ordered an evaluation of the student. Respondent cross-appeals from that portion of the decision that denied respondent's motion to dismiss the case in its entirety on the basis of mootness and res judicata. Respondent also cross-appeals from the finding that petitioners are to have the option to receive mileage reimbursement for transportation to vision therapy services. The appeal must be sustained in part. The cross-appeal must be sustained in part.

Preliminarily, I will address a procedural issue. Petitioners request that I recuse myself. Respondent opposes petitioners' recusal request. Here, I am not personally familiar with the parties in this case, nor do I have any personal, economic or professional interest relevant to these proceedings (8 NYCRR 279.1[c][4]). Having given petitioners' request due consideration, I find that I am able to impartially render a decision and that the provisions of 8 NYCRR 279.1 do not require recusal in this instance. In accordance with the forgoing, petitioners' recusal request is denied (Application of the Bd. of Educ., Appeal No. 07-092).

At the commencement of the impartial hearing on June 29, 2007, petitioners' son had completed the seventh grade at respondent's middle school where he was attending an integrated program in the general education setting (Tr. pp. 225, 228, 230; Parent Ex. F). The student has deficits in expressive and pragmatic language and in reading comprehension, as well as behavioral challenges and vision difficulties (Dist. Ex. 30 at pp. 4, 6). He is reportedly working in the low average range in science, social studies, math, and English and demonstrates the ability to

comprehend and respond to the seventh grade curriculum both verbally and in writing (Dist. Ex. 38 at p. 1). Progress notes issued during the 2006-07 school year indicate that the student was considered a "pleasure" to have in class and demonstrated good effort; however, in French and social studies he exhibited inconsistent performance in completing his assignments (Parent Exs. B-1; B-3; B-5). The student is reportedly able to read aloud without assistance from a seventh grade general education text and has a good understanding and use of curriculum vocabulary (Answer to Cross-Appeal Ex. A at p. 4). He is able to calculate multi-step equations using basic computation of rational numbers, integers, and geometric formulas, as well as, check his work for accuracy (id.). The student usually uses appropriate tone and volume for the social setting (Dist. Ex. 38 at p. 1). The student's report card for the final marking period dated June 13, 2007 reflected final average grades of 69 in English, 88 in math, 67 in science, 72 in social studies, and 75 in French, although he failed the final examinations in English, science, and social studies (Parent Ex. B-7).

The student has been found eligible for special education programs and services as a student with autism[1] (Dist. Ex. 30 at p. 1; see 34 C.F.R. § 300.8[c][1]; 8 NYCRR 200.1[zz][1]). He has been the subject of seven previous appeals to this office (Application of a Child with a Disability, Appeal No. 07-007; Application of a Child with a Disability, Appeal No. 05-059; Application of a Child with a Disability, Appeal No. 04-105; Application of the Bd. of Educ., Appeal No. 04-085; Application of a Child with a Disability, Appeal No. 04-011; Application of a Child with a Disability, Appeal No. 03-050; Application of the Bd. of Educ., Appeal No. 02-070). Familiarity with the facts in those decisions will be assumed. Pursuant to his pendency program, the student should be receiving special education services under his June 24, 2003 IEP and subsequent amendments for the timeframe covered in this appeal (Tr. pp. 22-23; Parent Ex. R; IHO Ex. 7).

By due process complaint notice dated February 16, 2007, which included 26 procedural and 31 substantive claims, petitioners requested an impartial hearing (IHO Ex. 12). On March 28, 2007, respondent filed a motion to dismiss on the basis of res judicata and asserted that petitioners' claims relating to the functional behavioral assessment (FBA), the vision therapy services and the provision of a 1:1 aide were previously addressed in Application of a Child with a Disability, Appeal No. 07-007 (IHO Ex. 1). On April 12, 2007, petitioners responded and filed a motion opposing respondent's motion to dismiss on the basis of res judicata. Petitioners asserted that respondent failed to conduct its own FBA (IHO Ex. 2, App. B at p. 2). Petitioners also asserted that they disagreed with the vision therapy recommendations in the student's 2006-07 IEP; however, they conceded that the issue was barred by the principle of res judicata (Tr. pp. 36-47; IHO Ex. 2 at pp. 2-3). Additionally, petitioners contended that the student's 2006-07 IEP inappropriately recommends a 1:1 aide for art and technology (IHO Ex. 2, App. B at p. 2).

On June 20, 2007, respondent also filed a motion to dismiss petitioners' hearing request as moot on the basis that the student's 2006-07 IEP was never implemented because the student was receiving services under pendency during that time period, and therefore there is no actual relief that could be granted to the student (IHO Ex. 3). On June 27, 2007, petitioners filed a response to respondent's motion to dismiss, requesting a decision from the impartial hearing officer regarding

[1] I noted in my previous decision that there is limited information regarding the student's clinical diagnoses and this same issue remains in the present appeal (Application of a Child with a Disability, Appeal No. 07-007).

the CSE's recommendations contained in the 2006-07 IEP on the basis that respondent did not offer the student a free appropriate public education (FAPE) (IHO Ex. 4 at p. 3).

A series of requested extensions and rescheduling of hearing dates from both petitioners and respondent resulted in a June 29, 2007 hearing date for oral arguments on the motions regarding res judicata and mootness (Tr. pp. 34-42, 73-78; IHO Decision at pp. 1-3). The impartial hearing officer heard testimony on whether respondent was to conduct its own FBA in addition to a previous independent FBA; on whether vision therapy was a previously litigated issue; and whether the provision of a 1:1 aide was to be litigated as a substantive behavioral component of the student's 2006-07 IEP (Tr. pp. 36, 72-84, 428-29).

The impartial hearing officer requested additional memoranda from both parties in further support of their previous motions on mootness (Tr. pp. 105-06). Upon reconvening the hearing on July 12, 2007, respondent argued that the student's 2006-07 IEP, which was never implemented, was moot (Tr. pp. 102-07; IHO Exs. 3; 5). The impartial hearing officer ultimately ruled on respondent's motion to dismiss on the basis of mootness by bifurcating the 2006-07 IEP into separate procedural and substantive components. He reasoned that the procedural issues were moot because there was no possible remedy and that the substantive issues were not moot in "that services that were rendered and found to be inadequate would tend to be more likely to be carried over into the subsequent school year" (Tr. pp. 198, 200, 204-05).

The impartial hearing concluded on October 12, 2007. At the conclusion of the impartial hearing, the parties were given until November 16, 2007 to submit post-hearing briefs (Tr. pp. 1072-73). During the impartial hearing and in its post-hearing brief, respondent requested that petitioners consent to an evaluation of the student (Tr. pp. 344-46, 439-42; Resp't Post-Hr'g Br. at pp. 22-23; IHO Ex. 14). Petitioners sent a subsequent letter dated November 27, 2007 to the impartial hearing officer requesting that respondent's request for an evaluation be dismissed in its entirety (IHO Ex. 13). By letter dated November 30, 2007 to the impartial hearing officer, respondent again requested that the impartial hearing officer order an evaluation of the student (IHO Ex. 14).

The impartial hearing officer rendered a decision on December 10, 2007 finding that the student had received all of his pendency services with the exception of vision therapy and that petitioners had not met their burden of proving that the student's substantive portion of the 2006-07 IEP was inappropriate (IHO Decision at p. 47). The impartial hearing officer ordered that respondent reimburse petitioners for travel costs if petitioners opt to transport their son to vision therapy services (id.). The impartial hearing officer further ordered the student to receive occupational therapy (OT) for one month, after which the CSE shall reconvene to review the student's progress and present levels of performance (id. at p. 50). The impartial hearing officer further ordered the student to undergo an evaluation, including an FBA, at public expense in order to determine the extent of the student's autism as his diagnosed disability (id.). The impartial hearing officer specified that if there is uncertainty as to the specific instrument(s) needed to evaluate the student, then the CSE is to reconvene to determine what appropriate assessment tools should be utilized (id.).

Petitioners appeal the impartial hearing officer's decision. Petitioners assert that the impartial hearing officer erred by failing to issue subpoenas for petitioners' requested witnesses at no cost and erred in ordering an evaluation of the student. Petitioners also contend that the

impartial hearing officer erred in determining that the substantive portions of the student's 2006-07 IEP and the student's 2006-07 pendency placement provided the student with a FAPE, and petitioners request reversal of these determinations. Petitioners further request relief in the form of compensatory services or "corrective action" for the services and period of time that the student did not receive pendency placement services.

Respondent filed an answer and cross-appeal, stating that the impartial hearing officer erred by 1) not dismissing the case in its entirety on the grounds of mootness and res judicata, and 2) ruling that petitioners have the "option" to receive mileage reimbursement to vision therapy services.

On February 5, 2008, petitioners filed a document entitled "reply to the answer/answer to cross appeal" that sought to respond to each of respondent's answers including a response to the cross-appeal. This document also included an affidavit, a letter, and three exhibits: the student's 2007-08 IEP (Ex. A), a letter from respondent to petitioners dated April 3, 2007 (Ex. B), and a letter dated November 27, 2007 from petitioners to the impartial hearing officer (Ex. C). By letter dated February 6, 2008, respondent objected to petitioners' additional pleading based on the allegations that it was served one day late and that it failed to comply with State regulations.

Pursuant to State regulations, a reply is limited to any procedural defenses interposed by respondent or to any additional documentary evidence served with the answer (8 NYCRR 279.6). In this case, respondent does not raise any procedural defenses or attach any additional documentary evidence to its answer. Therefore, I have not considered petitioners' reply because it does not comply with State regulations (Application of a Child with a Disability, Appeal No. 06-046; Application of a Child with a Disability, Appeal No. 04-064; Application of a Child with a Disability, Appeal No. 02-009; Application of a Child with a Disability, Appeal No. 98-37). State regulations further provide that petitioners shall answer respondent's cross-appeal within 10 days after service of a copy of the answer and cross-appeal upon petitioners (8 NYCRR 279.4[b]). Here, respondent did not submit an affidavit of service along with its answer and cross-appeal, therefore a determination cannot be made whether petitioners' additional pleading was served in a timely manner. In the exercise of my discretion, and under the circumstances of this case, I will consider petitioners' answer to the cross-appeal. However, I caution both parties to comply with State regulations.

The burden of persuasion in an administrative hearing challenging an IEP is on the party seeking relief (see Schaffer v. Weast, 546 U.S. 49 [2005] [finding it improper under the IDEA to assume that every IEP is invalid until the school district demonstrates that it is not]).[2]

The dispute between the parties in an appeal must at all stages be "real and live," and not "academic," or it risks becoming moot (see Lillbask v. State of Conn. Dep't of Educ., 397 F.3d 77, 84 [2d Cir. 2005]; see also Chenier v. Richard W., 82 N.Y.2d 830, 832 [1993]; Hearst Corp. v.

[2] On August 15, 2007, New York State amended its Education Law to place the burden of proof upon the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement would continue to have the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c], as amended by Ch. 583 of the Laws of 2007). The amended law took effect for impartial hearings commenced on or after October 14, 2007. In this case, the amended law does not apply because the impartial hearing was commenced before the effective date of the amendment.

Clyne, 50 N.Y.2d 707, 714 [1980]). In general, cases dealing with issues such as desired changes in IEPs, specific placements, and implementation disputes may become moot at the end of the school year because no meaningful relief can be granted (see, e.g., Application of the Bd. of Educ., Appeal No. 06-044; Application of the Bd. of Educ., Appeal No. 05-058; Application of a Child with a Disability, Appeal No. 04-027; Application of a Child with a Disability, Appeal No. 00-037; Application of the Bd. of Educ., Appeal No. 00-016; Application of a Child with a Disability, Appeal No. 96-37). Administrative decisions rendered in cases that concern such issues that arise out of school years since expired may no longer appropriately address the current needs of the student (see Daniel R.R. v. El Paso Indep. Sch. Dist., 874 F.2d 1036, 1040 [5th Cir. 1989]; Application of the Bd. of Educ., Appeal No. 07-028; Application of a Child with a Disability, Appeal No. 06-070; Application of a Child with a Disability, Appeal No. 04-007). However, a claim may not be moot despite the end of a school year for which the student's IEP was written, if the conduct complained of is "capable of repetition, yet evading review" (see Honig v. Doe, 484 U.S. 305, 318-23 [1988]; Lillbask, 397 F.3d at 84-85; Daniel R.R., 874 F.2d at 1040; Application of a Child with a Disability, Appeal No. 04-038).

The exception applies only in limited situations (City of Los Angeles v. Lyons, 461 U.S. 95, 109 [1983]), and is severely circumscribed (Knaust v. City of Kingston, 157 F.3d 86, 88 [2d Cir. 1998]). It must be apparent that "the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration" (Murphy v. Hunt, 455 U.S. 478, 482 [1982]; see Knaust, 157 F.3d at 88). Controversies are "capable of repetition" when there is a reasonable expectation that the same complaining party would be subjected to the same action again (Weinstein v. Bradford, 423 U.S. 147, 149 [1975]; see Hearst Corp., 50 N.Y.2d at 714-15). To create a reasonable expectation of recurrence, repetition must be more than theoretically possible (Murphy v. Hunt, 455 U.S. 478, 482 [1982]; Russman v. Bd. of Educ., 260 F.3d 114, 120 [2d Cir. 2001]). Mere speculation that the parties will be involved in a dispute over the same issue does not rise to the level of a reasonable expectation or demonstrated probability of recurrence (Russman, 260 F.3d at 120). Mootness may be raised at any stage of litigation (In re Kurtzman, 194 F.3d 54, 58 [2d Cir. 1999]).

I will first address petitioners' claim that the student's 2006-07 IEP, completed on October 17, 2007, did not offer the student a FAPE for the 2006-07 school year (Tr. pp. 93, 95-96, 202; IHO Ex. 3 at Ex. A). The impartial hearing officer found that petitioners' procedural 2006-07 IEP claims are moot and allowed for limited testimony to proceed on the substantive issues concerning the 2006-07 IEP (Tr. pp. 95, 99, 198, 200, 204, 359, 597, 958).

I find that the impartial hearing officer erred in bifurcating the mootness analysis into separate procedural and substantive components. He should have determined whether both procedural and substantive claims for the 2006-07 IEP were moot. The student's 2006-07 IEP has expired and its services were never implemented because the student should have received services pursuant to pendency (Tr. p. 359; IHO Ex. 3; Application of the Bd. of Educ., Appeal No. 06-044). Additionally, the student's 2006-07 IEP was superseded by his 2007-08 IEP that was completed on June 15, 2007, 14 days prior to the commencement of the impartial hearing (Answer to Cross-Appeal Ex. A; Application of the Bd. of Educ., Appeal No. 06-044 [finding that once a new IEP has been devised it supersedes the student's prior program from a former school year and so a finding that the student was not provided a FAPE would have no actual impact on the parties]). Accordingly, I find that the 2006-07 IEP has been rendered moot and does not fall within the narrow exception for reviewing moot cases that are capable of repetition yet evading review.

Accordingly, I need not discuss the merits of petitioners' assertion that the October 17, 2006 IEP failed to offer the student a FAPE for the 2006-07 school year.

I will now consider the student's pendency services and petitioners' request for relief in the form of compensatory services or "corrective action" based on the claim that the student's pendency services were not provided throughout the 2006-07 school year. I am unable to determine whether the services were provided consistent with pendency because petitioners were not afforded a full opportunity to call witnesses to support their claim.

The pendency provisions of the Individuals with Disabilities Education Act (IDEA) and the New York State Education Law require that a student remain in his or her then current educational placement, unless the student's parents and the local agency or State otherwise agree, during the pendency of any proceedings relating to the identification, evaluation or placement of the student (20 U.S.C. § 1415[j]; Educ. Law § 4404[4]; 34 C.F.R. § 300.518[a]; 8 NYCRR 200.5[m]). The pendency inquiry focuses on identifying the student's then current educational placement (Zvi D. v. Ambach, 694 F.2d 904, 906 [2d Cir. 1982]). Although not defined by statute, the phrase "then current placement" has been found to mean the last agreed upon placement at the moment when the due process proceeding is commenced (Murphy v. Bd. of Educ., 86 F. Supp. 2d 354, 359 [S.D.N.Y. 2000] aff'd, 297 F.3d 195 [2002]; Application of a Child with a Disability, Appeal No. 01-013; Application of the Bd. of Educ., Appeal No. 00-073).

During the pendency of the impartial hearing the student was to receive services pursuant to his 2003-04 IEP (Parent Ex. R) and subsequent amendments (Dist. Ex. 7 at pp. 9-10). The June 24, 2003 IEP recommended a 12:1+1 integrated program for 300 minutes five times a week. Speech-language services were recommended for 30-minute sessions, three times a week in an individual setting and two times a week in a group setting (Parent Ex. R at p. 1). Counseling was recommended for a 30-minute session, once a week in a group setting (id.). Specialized reading instruction was recommended for 30-minute sessions, in a group setting, five times a week (id.). As a result of an agreement reached during an impartial hearing held on December 15, 2005, the student's pendency program was amended to include math, science, social studies and English in an inclusion setting, specialized "one-on-one reading," 30 minutes of individual counseling once a week, and individual speech-language services four days a week in addition to group speech-language services once a week (Dist. Ex. 7 at pp. 9-10). Respondent had provided the student with OT services for 30-minute sessions twice a week, commencing January 2006, and had agreed to continue such services as part of the student's pendency program (Tr. p. 149; Dist. Ex. 7 at p. 10).

In reviewing petitioners' claims relating to pendency, I must address petitioners' assertion that the impartial hearing officer erred by not allowing them to subpoena respondent's witnesses at no cost. In their due process complaint notice dated February 16, 2007, petitioners presented a list of witnesses that they wanted called during the impartial hearing. The witness list was comprised of school district personnel, including staff providing direct services to the student. Respondent declined to make all but one of the witnesses available stating throughout the impartial hearing that 10-month employees would not be produced because they were not under the control of respondent during the summer months and that respondent would make available only 12-month employees to testify (Tr. pp. 167-68, 173-79, 189-92). The impartial hearing officer offered to serve the subpoenas on respondent but stated that petitioners would have to bear a $15.00 fee for each witness pursuant to the Civil Practice Law and Rules (CPLR) and could recoup these fees under attorney fees in federal court (Tr. pp. 178, 189-92). As a result, petitioners called one 12-

month employee, the school district's Director of Special Education, as a witness during the summer months without the issuance of a subpoena (Tr. p. 167). Although on October 12, 2007 respondent produced a 12-month school counselor who was on petitioners' witness list, respondent did not make available any of the other 10-month school employees once the impartial hearing had resumed during the 2007-08 school year (Tr. pp. 997-98; IHO Ex. 12 at p. 9).

Here, the impartial hearing officer's failure to issue subpoenas impermissibly infringed upon petitioners' due process rights. While the impartial hearing officer correctly stated that he can serve the subpoenas upon respondent, the impartial hearing officer erred in stating that petitioners must pay an accompanying witness fee (Tr. p. 174; 8 NYCRR 200.5[j][3][iv]). I find respondent's representation in the hearing record that it is unable to produce 10-month employees to be unpersuasive particularly here where portions of the impartial hearing were held during the school year (Tr. pp. 167-68, 173-79, 189-92). Here, respondent should have made its current employees available as witnesses at the impartial hearing at no cost to petitioners (see Impartial Hearing Process for Students with Disabilities, New York State Education Department Office of Vocational and Educational Services [December 2001] at p. 18). Petitioners were not required to produce a $15.00 witness fee (Tr. pp. 189-92; see Penfield Road Corp. v. Morrison-Vega, 116 A.D.2d 1035, 1037 [4th Dep't 1986]; see also Incorporated Village of Great Neck Plaza v. Nassau County Rent Guidelines Board, 69 A.D.2d 528, 534 [2d Dep't. 1979]; Matter of Richard W., 18 Ed Dep't Rep 407, Decision No. 9899). Parents have a right to compel the attendance of witnesses (34 C.F.R. § 300.512[a][2]; 8 NYCRR 200.5[j][3][xii]), subject to an impartial hearing officer's discretion to limit or exclude the testimony of witnesses that he or she deems to be irrelevant, immaterial, unreliable or unduly repetitious (8 NYCRR 200.5[j][3][xii][c], [d], [e]).

There was no determination by the impartial hearing officer that the witnesses requested by petitioners would have offered irrelevant, immaterial, unreliable or unduly repetitious testimony. Because petitioners were not afforded an opportunity to call certain requested witnesses, particularly here where they had the burden of persuasion, I find that this was a significant infringement upon their due process hearing rights requiring a remand. I will therefore remand this matter for the purpose of allowing additional testimony related to petitioners' claim of improper delivery of pendency services during the 2006-07 school year and their claim for compensatory services. Having already determined that petitioners' claims relating to the October 17, 2006 IEP for the 2006-07 school year are moot, there is no need for testimonial evidence regarding either procedural or substantive issues pertaining to that IEP. Upon remand, respondent is directed to produce witnesses currently employed by respondent at no cost to petitioners to provide testimony concerning the provision of pendency services to the student during the 2006-07 school year. The impartial hearing officer may limit or exclude the testimony of witnesses that he deems to be irrelevant, immaterial, unreliable or unduly repetitious (8 NYCRR 200.5[j][3][xii][c], [d], [e]).

I find that although OT is part of the student's 2006-07 pendency services there is testimony from both parties and there is sufficient evidence in the hearing record to support a finding that the portion of the impartial hearing officer's order addressing OT should be upheld. The hearing record reflects that respondent scheduled the student to receive OT services for 30-minute sessions twice a week (Parent Ex. F). Respondent's director of special education testified that the student did not receive OT as scheduled because respondent was unable to obtain a prescription with a doctor's signature for the service to be provided (Tr. p. 329). By letters dated August 4, 2007 and August 18, 2007 respondent's director of special education notified petitioners that a physician's

"script" was required each year in order to provide OT to the student and that therapy could not begin for the 2006-07 school year until respondent received same (Parent Ex. C-6; Dist. Exs. 26-28). A letter to petitioners dated September 7, 2007 stated that a prior prescription for OT had expired and respondent was unable to provide the student with OT until respondent received the physician's prescription (Dist. Exs. 24; 25). Each of the aforementioned letters referenced an enclosed "medical record release of information" that respondent requested be returned so that respondent could contact the student's physician (Parent Ex. C-6; Dist. Exs. 24-28). Respondent's director of special education testified that the purpose of the medical release of information was to comply with the requirements of the Health Insurance Portability and Accountability Act (HIPAA) "so that we can send the prescription and the OT recommendations to the doctor so that he can sign off " (Tr. p. 331). She also testified that respondent has a responsibility to obtain therapy prescriptions (Tr. p. 163). The hearing record reflects that the student's mother responded by letter dated September 15, 2007 to the aforementioned correspondence and suggested that the director of special education request that the school's physician write a prescription for the student's OT (Parent Ex. C-11). The hearing record also reflects that the student's mother had received a prescription for OT at the student's August 25, 2006 medical appointment (Parent Ex. E-11 at pp. 2, 3). The student's mother testified that on approximately August 27, 2006 she sent a copy of the medical report of that appointment and the OT prescription to "the District" by facsimile (Tr. pp. 498, 575). She also testified that she did not inform respondent's director of special education that she had an OT prescription in her possession or that she had sent a copy of the OT prescription by facsimile (Tr. pp. 577-78). Testimony elicited from respondent's middle school nurse indicates that the nurse received a copy of the report from the student's August 25, 2006 medical appointment "somewhere between maybe the 28th and the 18th of October" by facsimile forwarded from respondent's elementary school which did not include a prescription for OT (Tr. pp. 902-07).

At the impartial hearing, the student's mother testified that she understood that "the occupational therapist is required to have a prescription or a referral from a licensed medical doctor in order to provide occupational therapy services or to evaluate a student" and that she had been informed in previous training that "it is the school district's responsibility to obtain the prescription" (Tr. pp. 503-04; see Educ. Law § 7901). However, in the instant case, respondent was unable to obtain a prescription for OT despite repeated written requests for petitioners to provide consent for respondent to contact the student's physician and despite petitioners being in possession of an OT prescription prior to the start of the school year. Although petitioners argue that they "supplied the most current physical examination results from her family physician including a prescription . . . to the district by October 2006," the impartial hearing officer found that "both parties have an obligation to cooperate with the other, and the parent failed to do so by obfuscating the script delivery" (IHO Decision at pp. 29, 50). I find no reason to modify the impartial hearing officer's determination regarding this issue.

Next I review petitioners' contention that the impartial hearing officer erred when he ordered "an autism evaluation" because petitioners have never received a request from respondent to consent to "an autism evaluation" and petitioners have never requested an "autism evaluation." Petitioners also argue that the ordering of an "autism evaluation" was not part of their due process complaint notice and therefore the impartial hearing officer exceeded his jurisdiction in ordering respondent to conduct "an autism evaluation." Respondent argues that "an autism evaluation" is critical to fully assessing the student because petitioners attribute the student's behavioral difficulties, including his refusals, to his diagnosis of autism.

Federal and State regulations mandate that each child with a disability be reevaluated at least once every three years (34 C.F.R. § 300.303[b][2]; 8 NYCRR 200.4[b][4]). The procedure for a reevaluation requires the CSE and other qualified professionals to conduct an initial review of the existing evaluation data including information provided by the student's parents, current classroom-based assessments and observations, and observations by teachers and related service providers (34 C.F.R. § 300.305[a][1]; 8 NYCRR 200.4[b][5][i]). Based on that review, and based on input from the student's parents, the CSE must then identify what additional information, if any, is needed to determine whether the student continues to have an educational disability, the student's present levels of performance, whether the student needs special education services, or whether any additions or modifications to the special education services are needed (34 C.F.R. § 300.305[a][2]; 8 NYCRR 200.4[b][5][ii]). If additional information is needed, the school district must administer tests and obtain other evaluation materials to produce the needed information (34 C.F.R. § 300.305[c]; 8 NYCRR 200.4[b][5][iii]). However, before administering tests or other evaluation materials to reevaluate a student with a disability, a school district must obtain informed parental consent (34 C.F.R. § 300.300[c]; 8 NYCRR 200.5[b][1][i]).[3] Informed consent from the parent is also required before the initial provision of special education and related services (34 C.F.R. § 300.300[b][1]; 8 NYCRR 200.5[b][1][ii]). If the parent refuses to consent to the reevaluation, a school district may, but is not required to, pursue the reevaluation by using the consent override procedures described in 34 C.F.R. § 300.300 (a)(3)[4] (34 C.F.R. § 300.300[c][1][ii]; 8 NYCRR 200.4[a][8], [b][1]; 200.5).[5]

Although petitioners assert in their due process complaint notice that respondent has failed to comprehensively evaluate their son in accordance with 8 NYCRR 200.4(b)(4) and (5), the hearing record reflects that respondent has attempted to reevaluate the student on several occasions; however, petitioners have refused to provide consent (Tr. pp. 344, 347, 439-40; Parent Ex. C-10). Additionally, petitioners argue that the student's specialized reading teacher failed to evaluate him before recommending termination of specialized reading instruction, that the student's writing was not evaluated prior to recommending a change in his writing curriculum, and that their son required an assistive technology evaluation (Tr. pp. 1040, 1046-50). Although the hearing record contains anecdotal evaluative information, the student's educational and cognitive functioning has not been assessed by any criterion or norm-referenced measures since the 2002-03 school year, when he was in the third grade (Dist. Ex. 30 at p. 5).

[3] Consent is defined in the federal and State regulations as meaning that the parents have been informed of all relevant information in their native language or other mode of communication, that they understand and agree in writing to the activity for which consent is sought, that the written consent form fully describes the activity for which consent is sought, lists any records that will be released and the people to whom any records will be released, and further that the parent must be aware that the consent is voluntary, may be revoked at any time, and if revoked, that revocation is not retroactive (34 C.F.R. § 300.9; 8 NYCRR 200.1[l]).

[4] A school district does not violate its obligation under section 300.111 and sections 300.301 through 300.311 if it declines to pursue the evaluation or reevaluation (34 C.F.R. § 300.300[c][1][iii]; 8 NYCRR 200.5[b][3]).

[5] Petitioners are incorrect in relying on an impartial hearing officer decision dated May 12, 2005 for the proposition that a reevaluation of the student is permanently precluded. Notwithstanding the May 12, 2005 impartial hearing officer's decision which pertains to the 2004-05 school year, respondent is not only allowed to go forward with a reevaluation, but is required to do so under federal and State regulations (34 C.F.R. § 300.303[b][2]; 8 NYCRR 200.4[b][4]).

As requested by petitioners and ordered by the impartial hearing officer, I will uphold the impartial hearing officer's order directing that respondent conduct an FBA. It is not clear from the language of the impartial hearing officer's order what he intended to order in terms of additional evaluations (IHO Decision at p. 50). However it is clear that a reevaluation of the student is needed, thus I will order a comprehensive reevaluation consistent with regulatory requirements (34 C.F.R. § 300.303[b][2]; 8 NYCRR 200.4[b][4]). I concur with the impartial hearing officer's determination that "it would be tremendously helpful to ascertain the degree that the student's autism affects him and his education" (IHO Decision at p. 44). I also agree with petitioners that their son's reading and writing skills should be evaluated as well as his need for assistive technology. I encourage petitioners and respondent to consider a comprehensive psychoeducational evaluation of the student, including, but not limited to an assessment of the student's cognitive functioning; social emotional functioning; reading, writing, and math skills; and his need for assistive technology and OT services.

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

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED, that the impartial hearing officer's decision dated December 10, 2007 is hereby annulled to the extent it determined that only the substantive issues relating to the 2006-07 IEP were moot and that the student's 2006-07 pendency program was appropriate; and

IT IS FURTHER ORDERED, that within 60 calendar days after the date of this decision, respondent's CSE shall conduct a reevaluation of the student consistent with this decision; and

IT IS FURTHER ORDERED, that this matter shall be remanded to the impartial hearing officer who shall, unless the parties otherwise agree, reconvene the impartial hearing, hear additional testimony consistent with this decision regarding the implementation of the student's pendency program during the 2006-07 school year, and render a decision within 30 calendar days of receipt of this decision; and

IT IS FURTHER ORDERED, that if the impartial hearing officer who issued the December 10, 2007 decision is not available to reconvene the impartial hearing, a new impartial hearing officer be appointed.

Dated: **Albany, New York**
March 10, 2008

PAUL F. KELLY
STATE REVIEW OFFICER