



# The University of the State of New York

## The State Education Department State Review Officer

No. 08-035

**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 Hicksville Union Free School District**

**Appearances:**

Law Offices of Frederick K. Brewington, attorneys for petitioners, Ira Fogelgaren, Esq., of counsel

Guercio & Guercio LLP, attorneys for respondent, John P. Sheahan, Esq., of counsel

### DECISION

Petitioners (the parents) appeal from the decision of an impartial hearing officer which determined that the educational program and services recommended by respondent's (the district's) Committee on Special Education (CSE) for their son for the 2006-07 school year were appropriate and that the issues raised by the parents regarding the educational program and services recommended by the CSE for their son for the 2005-06 school year were moot. The appeal must be sustained in part.

At the time of the impartial hearing, the student was attending an ungraded classroom at the New York State Association for the Help of Retarded Children (AHRC) (Tr. pp. 1, 22, 53). The Commissioner of Education has approved AHRC as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7). The student's eligibility for special education programs and services as a student with multiple disabilities is not in dispute in this appeal (see 34 C.F.R. § 300.8[c][7]; 8 NYCRR 200.1[zz][8]).

According to a recent neuropsychological evaluation, the student exhibits moderate to severe intellectual deficiencies, global cognitive deficits, impaired verbal and visual-spatial abilities, and significant deficits in expressive and receptive language skills, including phonology, syntax, semantic, and pragmatic language skills (Dist. Ex. 16 at pp. 1, 6-7). Although the student has difficulties with communication, he can communicate his "wants and needs with prompts and guidance" (*id.* at p. 6). The student demonstrates severely deficient constructional and graphomotor skills, impaired visual-perceptual skills, and deficits in his fine motor coordination and motor planning skills (*id.*). In addition, the student has poor attention capabilities and requires

"repeated verbal directions and guidance to maintain his focus" and reinforcers to "increase his motivation" (id.). The student exhibits impaired basic academic skills "across all domains," which is "consistent with his cognitive abilities" (id. at p. 7). Based upon the assessments administered, the evaluator determined that the student's presentation is consistent with Pervasive Developmental Disorder-Not Otherwise Specified (PDD-NOS), and that his "intellectual deficits and impaired adaptive functions" suggests an additional diagnosis of moderate mental retardation (id.).

The student began receiving special education programs and services when he was two years old (Parent Ex. A1 at p. 35).<sup>1</sup> He first entered AHRC when he was ten years old (id.). At age 11, AHRC's medical director conducted a neurological evaluation of the student, which included observations of the student, evaluations of his behavior and cognitive functioning within the classroom, a physical examination, and an interview of the student's mother (id. at pp. 35-37). At that time, the student's mother reported that the student failed to demonstrate his abilities in school settings, and that he was more independent, expressive and interactive in his home environment (id. at p. 35).

AHRC's medical director reported that during the classroom observation, the student was relatively easy to engage (Parent Ex. A1 at p. 36). She observed the student trace and identify letters and noted that he could also identify numbers, colors and shapes, count objects, and identify "words that begin with certain letters" (id.). When motivated, the student spoke in full sentences; she characterized his speech as "clear and easy" to understand, but poorly modulated and often perseverative (id.). The medical director reported that the student needed constant reassurance and refocusing (id.). Although she noted that the student seemed more comfortable "removed" from other children in the classroom, he would attempt to initiate peer interactions when he was not engaged by classroom staff (id.). She reported that the student exhibited a significant language processing disorder, deficits in semantic/pragmatic language skills, social interaction skills, difficulties writing and holding a pencil, as well as deficits in fine motor, gross motor and motor planning skills (id. at pp. 36-37). The medical director concluded that due to these deficits, the student functioned in the retarded range of development (id. at p. 37). She reported that the student failed to demonstrate his full intellectual potential in a school setting due to his anxiety, tendency toward sensory overload and significant avoidant behaviors (id.). The medical director recommended considering the use of a "behavioral modification program with appropriate rewards, a socialization group or psychological intervention within the class room setting," in addition to individual occupational therapy (OT), physical therapy (PT) and speech-language therapy (id.).

The student remained at AHRC through the 2003-04 school year (see Dist. Exs. 23-24; 58; 73-77; see also Tr. pp. 53-55, 601). Due to medical issues in early 2004, the student could not

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<sup>1</sup> Parent Exhibit A is identified as the parents' due process complaint notice (see Parent Ex. A at pp. 1-5). The parents attached eight documents to their due process complaint notice, which, for purposes of clarity, will be referred to sequentially as Parent Exhibits A1-A8 (see Parent Exs. A1-A8).

attend school, and the district provided homebound instruction,<sup>2</sup> which consisted of special education instruction, speech-language therapy, and OT, for the remainder of the 2003-04 school year (Dist. Exs. 22; 58; 81; Parent Exs. B-C; see Tr. pp. 55-58, 69-70, 72-73, 601-02, 614).

In March 2004, the district initiated the process of locating a placement for the student for the 2004-05 school year (Dist. Ex. 97). The district advised the parents by letter dated March 29, 2004, that the student had been accepted into the Board of Cooperative Educational Services (BOCES) program available at the Rosemary Kennedy School (RKS) for the 2004-05 school year (Dist. Ex. 98). While the district attempted to locate a placement for the student, the special education teacher who provided homebound special education instruction services to the student strongly encouraged the parents to remove their son from AHRC and to consider the program at RKS because she believed the student was capable of making more progress (Tr. pp. 73-74, 194, 358; see Tr. pp. 57-65, 78; Parent Ex. B; see also Dist. Ex. 124 at p. 1). In a May 2004 progress report, the homebound special education teacher reported that since she began working with the student in April 2004, he had made "remarkable" progress and learned to read "20 words" with 85 percent accuracy (Parent Ex. B at p. 1). In addition, the student's homebound speech-language therapist opined in his May 2004 progress report that AHRC was "negatively impacting" the student's "educational progress" and noted that the student required an educational setting that would "push" his abilities and cause a "scaffolding effect" (Parent Ex. C at p. 2; see Tr. pp. 76-77).

On June 3, 2004, the CSE convened to conduct the student's annual review and to develop the student's individualized education program (IEP) for the 2004-05 school year (Parent Ex. A1 at pp. 1-37). The CSE recommended continuing the student's placement at AHRC in a 10:1+3 special class program, with adaptive physical education and school-based related services of counseling, OT, and speech-language therapy (id. at pp. 1, 32). In addition, although the CSE recommended placement at AHRC in a 10:1+3 special class program for summer 2004, with adaptive physical education and school-based related services, the parents requested and received approval for their son to attend a recreation program instead of the formal school-based program at AHRC (id. at p. 33; see Tr. pp. 601-02, 612-13; see also Dist. Ex. 58). During summer 2004, the student attended the recreation program, and the district provided home instruction services, which consisted of special education instruction, speech-language therapy services, and OT services (see Tr. pp. 72-73, 247-48; Dist. Exs. 21 at p. 1; 58; 71; 81-82; Parent Ex. D at p. 1; see also Parent Ex. A4 at pp. 1, 16-17).

After the June 3, 2004 CSE meeting, the parents continued to communicate with district personnel regarding the student's placement for the 2004-05 school year, and the district continued to send information packets to several other locations throughout summer 2004 (Tr. pp. 78-82; see Dist. Exs. 99-109). The student's father testified that initially, he and his wife were "dead set against" sending their son to RKS for the 2004-05 school year (Tr. p. 78). In the past, the parents had considered RKS as a potential placement, but after visiting RKS, they had determined that

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<sup>2</sup> According to the district's policy, "homebound instruction" is a "service provided to students who cannot attend school because of medical, emotional or disciplinary problems. Secondary students receive instruction for two hours per day, and elementary students receive one hour of instruction per day" (Dist. Ex. 44 at p. 2). The policy also states that the district "makes provisions for homebound instruction upon referral from a physician or from the Assistant Superintendent of Special Education and Pupil Personnel Services, following the guidelines established by the superintendent for placing a student on homebound instruction" (id.).

RKS was not an appropriate placement because it was "too big," "too overwhelming," and had "too many people, too many walls and kids" for their son (Tr. pp. 74-75). The student's father also testified that the district's school psychologist and the district's then-current director of special education (director 1), as well as the student's homebound special education teacher, "strongly recommended" that the student attend RKS for the 2004-05 school year (Tr. p. 78). During summer 2004, several informal meetings occurred between the parents and district personnel, and at one meeting in particular, director 1 offered to provide home instruction services, without a request for such services from the student's parents, in addition to the school-based program at RKS, for the 2004-05 school year (Tr. pp. 78-82, 614). At that time, the student's father accepted the program because he believed that the school-based program would provide his son with the necessary life skills he required and that the additional home instruction services would continue his son's academic progress (Tr. p. 81). The student's father testified that although he was apprehensive about placing his son at RKS, he "trusted" the recommendations made by the district's personnel and the student's home instructors regarding his son's capabilities and education (Tr. pp. 80-82, 194).<sup>3</sup>

On September 2, 2004, the CSE reconvened to revise the student's 2004-05 IEP to reflect the following: placement in a 9:1+2 special class program at RKS; school-based related services of OT and speech-language therapy; and home instruction services consisting of speech-language therapy for two 30-minute sessions per week and special education instruction for three 60-minute sessions per week (Parent Ex. D at pp. 1-2; compare Parent Ex. A1 at pp. 1, 32-33, with Parent Ex. D at pp. 1-2, 9-10; see Tr. pp. 572, 575-82).<sup>4</sup> The student attended RKS during the 2004-05 school year and received school-based related services and home instruction services pursuant to his IEP, and in addition, continued to receive home instruction OT services, although the OT services were not specified on his September 2, 2004 IEP (Tr. pp. 72-73, 81-82, 247-48; Dist. Exs. 17-20; 29; 62; 66; 68-70; 83-84; Parent Ex. D at pp. 1, 9-10).<sup>5</sup>

On May 23, 2005, the CSE convened at RKS to conduct the student's annual review and to prepare his IEP for the 2005-06 school year (Parent Ex. A4 at p. 1). Participants included the following CSE members: director 1 (as district representative) and the district's school psychologist; RKS staff, including a psychologist, a special education teacher, a speech-language therapist, the assistant principal, an occupational therapist, and a curriculum/behavior representative; and the student's parents (id. at p. 19). The student's father testified that when he reviewed the IEP at the May 23, 2005 CSE meeting, he noticed that some of the home instruction services—in particular, the special education instruction and OT services—were not included in

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<sup>3</sup> By request dated July 28, 2004, the district requested placement for the student at RKS for the 2004-05 school year (Dist. Ex. 57). The student and his family attended a screening at RKS on August 6, 2004 and the student was accepted for placement at RKS in a 9:1+2 special class program with school-based related services of OT and speech-language therapy (Dist. Ex. 21).

<sup>4</sup> The September 2004 CSE also revised the student's 2004-05 IEP to reflect his attendance in the recreation program during summer 2004 and his receipt of home instruction services consisting of special education instruction (five 90-minute sessions per week) and speech-language therapy (two 30-minute sessions per week) during summer 2004 (Parent Ex. D at pp. 1, 10; see Tr. pp. 601-02).

<sup>5</sup> It should be noted that although home instruction OT services are not contained in any of the IEPs submitted into the hearing record, except for the May 23, 2005 IEP, the student's father provided un rebutted testimony that his son continuously received home instruction OT services following the provision of homebound OT instruction during spring 2004 (Tr. pp. 72-73, 241, 247-48; see Dist. Exs. 9; 11; 13; Parent Exs. A1; A4 at pp. 1, 16-17; A5).

the IEP (Tr. pp. 83-84, 131-32; see Parent Ex. A4 at pp. 1-16). When he raised the issue of the missing home instruction services to the other CSE members, the student's father testified that the "generalized consensus of all of those in attendance" was to continue to provide the same program—including the home instruction services of special education instruction, speech-language therapy, and OT services—for the 2005-06 school year because all of the CSE members were "quite comfortable" with the progress made by student during the 2004-05 school year when he had received a combined school-based and home-based program (Tr. pp. 82-84, 217-18, 235, 586-87, 621). The student's father further testified that he documented the CSE's agreement to provide home instruction OT services and to "continue" the home instruction special education instruction services with his own handwritten notations on the IEP (Tr. pp. 83-92, 123-28, 230-31, 586-87; Parent Ex. A4 at pp. 1, 16-17). The handwritten notation regarding the home instruction OT services was initialed by the district's school psychologist (Tr. p. 91; Parent Ex. A4 at pp. 16-17). The student's father understood that his son would receive "home generalized academic instruction that would help him to learn to read and do some basic math skills" through the home instruction special education services (Tr. pp. 83-84). The student's father also requested home instruction PT services at the CSE meeting, but was advised that he needed a physician's letter to support his request and that it would be discussed at a "later time" (Tr. pp. 85-86, 125; Parent Ex. A4 at p. 1).

The IEP contained the student's present levels of performance, which indicated that he initiated interactions with adults to communicate needs and social interactions with peers (Parent Ex. A4 at p. 4). The student had a "minimal" sight word vocabulary, deficits in communication and fine motor skills, difficulties with short-term and long-term memory, and difficulty understanding concrete and abstract concepts (id. at pp. 4-5). The CSE determined that the student responded to social reinforcement, benefitted from "aided language" and visual strategies to follow personal or classroom schedules, required verbal or visual prompts to complete tasks, and required extra time to complete class assignments (id.). The IEP indicated that the student was easily distracted and that his self-management skills were an area of concern (id.). He required behavioral management intervention "during the entire school day long term or all year with the same intensity" (id. at p. 4). The CSE developed annual goals and short-term objectives to address the student's areas of need in functional reading, functional math, writing, self-management, community, vocational, social-emotional, transitional planning, OT, adaptive physical education, and speech-language (id. at pp. 7-13). In the summary of transition activities, the CSE recommended that the student receive school-based instruction in community training and activities of daily living (ADLs) and that he participate in prevocational training and an IEP diploma program (id. at p. 14). Based upon the information provided at the meeting, the May 2005 CSE recommended a 12-month program, placement at RKS in a 9:1+2 special class program, school-based related services, and home instruction services for the 2005-06 school year (Tr. pp. 83-92; Parent Ex. A4 at pp. 1, 16-17).<sup>6</sup>

After the conclusion of the May 23, 2005 CSE meeting, the parents requested to see their son at RKS and were led to the RKS "time out room" (Parent Ex. A at p. 2; see Tr. pp. 92-93, 385-87). When they arrived at the RKS "time out room," the parents alleged that they observed a

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<sup>6</sup> The district did not submit into evidence any other copy of the student's May 23, 2005 IEP and did not present any other documentary or testimonial evidence to sufficiently refute the student's father's testimony regarding the May 23, 2005 CSE meeting or regarding the handwritten notations adding home instruction services to the May 23, 2005 IEP.

"dark closet-like area" that appeared to be "locked from the outside" and heard their son "sobbing inside" (Tr. p. 389; Parent Ex. A at p. 2). The parents learned that their son had been placed in the RKS "time out room" numerous times between January and May 2005 (see Dist. Ex. 19 at p. 5; Parent Ex. A at p. 2; see also Dist. Ex. 62 at p. 5). After learning this information and observing the "time out room," the parents immediately withdrew their son from RKS and advised the district that their son would not return to the RKS program or placement for the 2005-06 school year (Parent Ex. A at p. 2; see Tr. pp. 92-94).<sup>7</sup> In June and July 2005, the district sent information packets to four locations seeking an alternative placement for the student for the 2005-06 school year (Dist. Exs. 111-14). In addition, the district voluntarily provided, at no cost to the parents, home-based behavioral consultant services during July and August 2005<sup>8</sup> and continued to provide home instruction services consisting of special education instruction, speech-language therapy and OT during summer 2005 (Tr. pp. 94-95, 105-06, 583, 585-86; Parent Exs. A at p. 3; A3 at pp. 1-3). In addition, the parents engaged the services of a private psychologist, who provided services to the student and the family beginning July 2005 and continuing through February 2007 (see Tr. pp. 890-91; Parent Exs. A6 at pp. 1-2; A7 at pp. 1-2; A8; E).<sup>9</sup>

By letter dated July 25, 2005, the district invited the parents to attend a CSE meeting scheduled for August 4, 2005, to conduct an annual review of the student's special education program (Dist. Ex. 15).<sup>10</sup> The notice for the CSE meeting identified the expected attendees as the

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<sup>7</sup> The parents filed a Notice of Claim against the district, dated June 30, 2005, and a Notice of Municipal Hearing, dated July 29, 2005, relating to these events (Dist. Exs. 7-8; see Tr. pp. 381-91, 396-99). The parents also commenced a civil lawsuit in federal court against the district and other defendants by summons and complaint dated May 23, 2006 (Dist. Exs. 1-2).

<sup>8</sup> The home-based behavioral consultant's services focused on providing strategies to manage the student's behavioral difficulties (Parent Ex. A3 at p. 1). The consultant identified numerous behaviors to address and selected his attention-seeking and task-avoidant behaviors exhibited during the home-based services as a primary focus of treatment (id.). She successfully implemented and used a token economy system during learning tasks, and she used visual icons, written household rules and praise to decrease the student's identified behaviors (id. at p. 2). The behavioral consultant reported that the student exhibited a delayed response time and performed better academically when visual support accompanied text and instruction, and when she minimized distractions and provided short breaks between activities (id.). She made numerous recommendations regarding the student's next educational environment, including the provision of behavioral consultant services three hours per week to train his educational staff, completion of a functional behavioral assessment (FBA), and development of a reinforcement system (id. at p. 3). She also recommended four hours per month of parent training, social skills training with peers at a similar functioning level to the student, and suggestions for future educators regarding how to modify their interactions with the student (id.).

<sup>9</sup> The private psychologist reportedly addressed problems related to the student's negative school experiences associated with the use of the RKS "time out room" (Parent Ex. A6 at p. 1). The treatment plan included assessment and treatment of the student's trauma regarding the time-outs; successful separation from family and return to school; development of effective management alternatives for school and home; and treatment of family members for their own trauma regarding the student's distress (id.).

<sup>10</sup> The July 25, 2005 letter inviting the parents to attend the August 4, 2005 CSE meeting was signed on behalf of director 1 (Dist. Ex. 15).

following individuals: the district's school psychologist, "parent member," "alternate chairperson," "parent member," "TEA,"<sup>11</sup> and "regular teach home instructor" (id.).

On August 4, 2005, the CSE convened with the following members in attendance: the district's school psychologist who had attended the May 23, 2005 CSE meeting (as district representative); a committee psychologist; the student's home instruction special education teacher; RKS staff, including the special education teacher and the psychologist who had attended the May 23, 2005 CSE meeting; the RKS principal; the district's attorney; the parents; the parents' attorney; and the student's home-based behavioral consultant who provided services during summer 2005 (Dist. Ex. 14). According to his testimony, the student's father believed that the CSE meeting was scheduled to determine the student's placement for the 2005-06 school year (Tr. pp. 96, 119-20). The student's father testified that it was at this CSE meeting that he first became aware that the district "had withdrawn" the home instruction services and removed all of the home instruction services—special education instruction, speech-language therapy, and OT services agreed upon at the May 23, 2005 CSE meeting—from the student's 2005-06 IEP (Tr. pp. 95-98, 124-28, 152, 157-59, 161, 479-81, 521; compare Parent Ex. A5 at pp. 1, 11-12, and Dist. Ex. 13 at pp. 1, 6-7, with Parent Ex. A4 at pp. 1, 16-17).<sup>12</sup> The student's father also testified that district personnel did not contact him prior to the CSE meeting to discuss the removal of the home instruction services, to discuss the student's progress during summer 2005, or to inquire about the student's needs (Tr. pp. 96-98). The student's father also learned at the CSE meeting that the district withdrew the services provided by the home-based behavioral consultant during summer 2005 and continued to recommend placement at RKS for the 2005-06 school year (Tr. pp. 106-07, 487).

During testimony and in response to a question regarding what, if any, discussion occurred "with regard to why the home services were not recommended at the CSE meeting," the student's father stated that "it wasn't a very productive meeting. We did not discuss home services really as much as we discussed we were not sending my son back to [RKS]" (Tr. pp. 161-62). He further testified that "98 percent [of the CSE meeting] revolved around sending [my son] back to [RKS] and not about his home services" (Tr. p. 163). Later in testimony, the student's father stated that the "CSE meeting was gauged and steered about sending my son back to [RKS], not towards his home services" (Tr. pp. 244-45). He further testified that although either he or his attorney raised the issue of the lack of home instruction services at the CSE meeting, and that the home-based behavioral consultant also raised the issue, the CSE "never discussed" the removal of the home instruction services, or the student's need for home instruction services, because an "argument ensued when [the CSE] recommended . . . [RKS], and the entire meeting, basically, shut down"

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<sup>11</sup> The hearing record does not clarify what a "TEA" is.

<sup>12</sup> The hearing record contains two IEPs dated August 4, 2005: a draft copy (Parent Ex. A5) and a finalized version (Dist. Ex. 13). When compared to the May 23, 2005 IEP, the August 4, 2005 draft copy did not include a placement recommendation, home instruction services, the student's present levels of performance, or the annual summary of transition activities, but did include annual goals, short-term objectives, and recommendations for the student's school-based related services, which had been modified from those items contained in the May 23, 2005 IEP (compare Parent Ex. A4 at pp. 1, 3-5, 7-17, with Parent Ex. A5 at pp. 1, 3, 5-12). The finalized version of the August 4, 2005 IEP differed from both the May 23, 2005 IEP and the August 4, 2005 draft copy IEP (compare Dist. Ex. 13, with Parent Ex. A4, and Parent Ex. A5).

(Tr. pp. 429-35, 487, 500, 502-07, 594-96).<sup>13</sup> The student's father did not recall whether there was an agreement to "review and revise" the student's behavioral intervention plan (BIP) or whether the CSE agreed to continue to search for an alternative placement (Tr. pp. 437-38). He did recall, however, that the CSE advised that "they have no schools readily available to accept my son" and that RKS was, at that time, the "only" placement available (Tr. pp. 438, 533-34, 539).

After the August 4, 2005 CSE meeting, the district continued to seek an alternative placement for the student for the 2005-06 school year and sent information packets to three additional locations (Dist. Exs. 116-18). The district received letters of rejection from five of the potential placements between August 4 and September 2, 2005 (Dist. Exs. 49; 51-53; 115).

The student's father testified that although he could not recall the specific date, he initiated contact with AHRC in September 2005 to inquire about a potential placement for his son at AHRC for the 2005-06 school year (Tr. pp. 442, 597-99). During that initial contact with AHRC, the student's father learned that the district had not applied to AHRC as a potential placement for the student for the 2005-06 school year (Tr. pp. 553, 599; see Dist. Exs. 111-14; 116-18; see also Dist. Exs. 48-49; 51-53; 115). The student's father then contacted the district's school psychologist and the district's director of special education (director 2) and informed them that he had "found a school" for his son (Tr. pp. 599-600). By letter dated September 9, 2005, the district sent an information packet to AHRC seeking a placement for the student for the 2005-06 school year (Dist. Ex. 122; see Tr. p. 600).

In two separate letters dated September 9, 2005, the student's father requested a CSE meeting to discuss the "future placement" of his son since the student was not receiving any services at that time, and further requested a list of all of the potential placements sought by the district on behalf of his son for the 2005-06 school year, as well as copies of the responses from these potential placements (Dist. Exs. 120-21). In a response dated September 14, 2005, the district supplied the parents with a copy of its "homebound instruction" policy (Dist. Ex. 44).

By an undated letter signed by director 2, the district forwarded a finalized version of the August 4, 2005 IEP to the parents sometime in September 2005 (Dist. Ex. 119 at pp. 1-2).<sup>14</sup> In that letter, director 2 summarized the August 4, 2005 CSE meeting, noting the parents' concern regarding placement at RKS for the 2005-06 school year, the CSE's recommendations to revise the student's existing BIP and to change the student's "classroom environment," the parents' objections to certain goals, and that the student had not been accepted into any other "alternative placement" (id.). Director 2 also included a list of documents reviewed by the August 4, 2005 CSE: a May 17, 2005 psychological triennial evaluation; a functional behavioral assessment

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<sup>13</sup> The student's father also testified that during the CSE meeting, the student's home instruction special education teacher stated that the student required home instruction services to learn and that he also required a school-based program for social skills and life skills (Tr. pp. 107-08, 591-92).

<sup>14</sup> According to the hearing record, director 2 started his position as the district's director of special education in September 2005, on the first Wednesday after Labor Day (Tr. pp. 1115-16). Reviewing the calendar, September 7, 2005 was the first Wednesday after Labor Day in September 2005.

(FBA)/BIP dated January 1, 2005 (amended February 2, 2005);<sup>15</sup> a May 17, 2005 behavioral data sheet; a May 20, 2005 speech-language evaluation; a 2004-05 teacher report; an April 12, 2005 OT triennial report; and two speech-language therapy reports, dated April 1 and June 15, 2005 (id. at p. 2).<sup>16</sup> The undated letter did not mention home instruction services, any discussion regarding home instruction services at the CSE meeting, or any educational reason or rationale for the removal of the student's home instruction services (see id. at pp. 1-2). According to his testimony, the student's father could not recall specifically when he received the finalized version of the August 4, 2005 IEP (Tr. pp. 150, 555-56).

The finalized version of the August 4, 2005 IEP recommended placement at RKS in a 6:1+1 special class with the following school-based related services: two 30-minute sessions of individual OT per week; one 30-minute session of individual speech-language therapy per week; and two 30-minute sessions of group speech-language therapy per week (Dist. Ex. 13 at pp. 1, 6). The finalized IEP did not recommend any home instruction services (see Dist. Ex. 13). In addition, the finalized August 4, 2005 IEP contained revised assessment scores, which had been conducted on May 17, and 20, 2005, and retained the present levels of performance that had been included in the May 23, 2005 IEP (Dist. Ex. 13 at p. 2; compare Dist. Ex. 13 at pp. 3-4, 10-12, with Parent Ex. A4 at pp. 3-5). The finalized IEP also included many of the same annual goals and short-term objectives set forth in the August 4, 2005 draft IEP (compare Dist. Ex. 13 at pp. 13-19, with Parent Ex. A4 at pp. 6-10). In addition, the finalized IEP contained a BIP, dated September 2005, that was identical to a BIP developed by RKS staff for the student's attendance during the 2004-05 school year at RKS, dated January 5, 2004 (amended February 2, 2005) (compare Dist. Ex. 13 at pp. 20-24, with Parent Ex. A2 at pp. 1-5; see Dist. Ex. 29 at pp. 1-5).

By letter dated September 15, 2005, AHRC accepted the student for placement in a 10:1+3 special class program with school-based related services of speech-language therapy and OT for the 2005-06 school year (Dist. Ex. 43).

On September 22, 2005, the CSE reconvened to revise the student's 2005-06 IEP to reflect his placement at AHRC (Dist. Ex. 11 at p. 1). Attendees at the meeting included director 2 (as district representative), the district's school psychologist, the student's father, and the director of AHRC via telephone (Dist. Ex. 12). The IEP indicated the student's placement at AHRC in a 10:1+3 special class with the same recommendation for school-based OT services as set forth in the finalized August 4, 2005 IEP (compare Dist. Ex. 11 at p. 6, with Dist. Ex. 13 at p. 6).

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<sup>15</sup> The district did not submit an FBA/BIP dated January 1, 2005 (amended February 2, 2005) into the hearing record (see generally, Dist. Exs. 9; 11; 13; 25-32). The district did, however, submit an FBA/BIP dated January 5, 2004 (amended February 2, 2005) (Dist. Ex. 29 at pp. 1-5). In addition, the FBA/BIPs attached to the finalized August 4, 2005 IEP and to the September 22, 2005 IEP, are both dated September 2005 and are both identical to the FBA/BIP dated January 5, 2004 (compare Dist. Ex. 11 at pp. 20-24, and Dist. Ex. 13 at pp. 20-24, with Dist. Ex. 29 at pp. 1-5).

<sup>16</sup> In the district's Post-Hearing Brief, the district acknowledged that the May 23, 2005 CSE reviewed the results of the standardized testing performed on May 17, and May 20, 2005 (Dist. Post-Hr'g Br. at pp. 30-31, n. 19; see Dist. Exs. 11 at pp. 2-3; 119 at p. 2). In addition, the district also acknowledged that the August 4, 2005 and September 22, 2005 CSEs reviewed the same "teacher reports and evaluations previously presented and discussed" at the May 23, 2005 CSE meeting (Dist. Post-Hr'g Br. at pp. 30-31; see Dist. Ex. 119 at p. 2).

In his testimony, director 2 described the September 22, 2005 CSE meeting as his first meeting with the student's father (Tr. pp. 1116-19, 1122-23). During that meeting, he expressed his "concerns that right now [the student] is not in school, and that, you know, should he continue not to be in school I would consider that a matter of educational neglect" (Tr. pp. 1117-18). The student's father then contacted his attorney, and director 2 overheard the student's father say that "[director 2] is going to refer me to [Child Protective Services]' or something like that" (Tr. p. 1118). Director 2 further testified that the meeting "ended with agreement that [the student] would return to AHRC" (*id.*). In addition, although the student's father described the CSE meeting as being an "adversarial setting," he recalled stating at the CSE meeting that the CSE's recommended school-based related services were insufficient and that the student also required home instruction related services (Tr. pp. 249-51).<sup>17</sup>

Director 2 also recalled that the student's father was interested in a "home-based program," but could not recall "too much about that part of the conversation" (Tr. p. 1119). According to his testimony, director 2 spoke to the student's father about the May 23, 2005 IEP, referring to it as the student's "last IEP," because he "felt a responsibility for these home services" (Tr. pp. 1120-22). Upon his arrival at the district in September 2005, director 2 used the May 23, 2005 IEP as his "resource document to know where they were at" with the student (Tr. pp. 1115, 1156-57). He later admitted in testimony that the recommendations for home instruction services in the May 23, 2005 IEP were recommendations for the 2005-06 school year, from September 2005 through June 2006 (Tr. pp. 1156, 1159-63). He recalled that the student's father was "cooperative and responsive to everything we had done" at the September 22, 2005 CSE meeting (Tr. p. 1122).

During the 2005-06 school year, the student attended AHRC. In January 2006, the student's AHRC teachers and therapists prepared reports regarding the student's present levels of performance and made recommendations for services for the 2006-07 school year (Dist. Ex. 130 at pp. 4-11). The student's occupational therapist reported that the student exhibited difficulty transitioning from the classroom to the therapy room and required "constant" encouragement to transition; she also noted that he required "maximum" prompting and reinforcement to engage in therapeutic tasks (*id.* at p. 4).<sup>18</sup> The therapist reported that the student "often" displayed avoidance behaviors (*id.*). She also reported that the student made "slow but steady progress" in the area of written communication skills and that he continued to work on self-care goals (*id.*). The therapist recommended continuing individual OT services for two sessions per week for the 2006-07 school year (*id.*).

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<sup>17</sup> Although the student's father could not specify a date during his testimony, he consistently described a meeting that occurred subsequent to the August 4, 2005 CSE meeting, which was attended by himself, the school psychologist, and director 2, where he asked "'what happened between May 2005 and August of '05, where you determined . . . how you determined my son does not need these [home instruction] services'" and that no "educational justification" was provided (Tr. pp. 100-01, 433, 481, 483-89, 496-97, 500, 562-63). He also consistently testified that at this meeting, he was told that "if you send [your son] back to [RKS], we will continue the home services. If he is not sent back to [RKS], the services are ended" (Tr. pp. 100-01, 120-23, 151-52, 156-57, 160-61, 433, 481, 483-89, 496-98, 500, 562-63).

<sup>18</sup> The occupational therapist's report is dated January 3, 2005, but refers to the student currently attending AHRC and provides recommendations for the 2006-07 school year; therefore, it appears the correct date should be January 3, 2006 (Dist. Ex. 130 at p. 4).

The student's AHRC speech-language pathologist also reported that the student exhibited difficulty transitioning to and from the therapy room and from one activity to another during therapy (Dist. Ex. 130 at p. 5). She further noted that the student's noncompliant behaviors interfered with work on his goals (*id.*). Although the student required consistent redirection and verbal prompting to attend to tasks, secondary reinforcers such as use of the computer and social reinforcement (praise), were "effective at times" (*id.*). The report summarized the areas she focused on with the student, including improving his receptive and expressive language skills, pragmatic language skills, and joint attention skills, and reported that the student made "minimal progress" in those areas (*id.* at pp. 5-6). She noted that the student exhibited difficulty generalizing learned vocabulary from session to session and needed frequent repetition of previously presented material (*id.* at p. 6). In addition, the student inconsistently focused on tasks for five minute intervals and was described as "highly distractible" and "self-directed" (*id.* at pp. 5-6). The speech-language pathologist reported that the student did not appear to enjoy group therapy sessions and was easily distracted by peers (*id.* at p. 5). For the 2006-07 school year, the speech-language pathologist recommended that the student receive individual therapy for three sessions per week, rather than a combination of individual and group therapy, in an effort to improve the student's ability to attend and to "address his goals/objectives more effectively" (*id.* at p. 7).

In February 2006, the student's parents and private psychologist met with the student's AHRC classroom teacher, speech-language pathologist, occupational therapist, and the AHRC school psychologist, to assess the student's adjustment to the school-based program and to develop recommendations for his IEP for the 2006-07 school year (Parent Ex. A7 at pp. 1-2; *see* Tr. pp. 918-19). In a summary report prepared by the private psychologist and dated June 12, 2006, he noted that although the student was "slowly and gradually becoming acclimated" to the AHRC environment, the student continued to exhibit "fear and resistance in attending school" and "fear and apprehension" associated with his bus routine (Parent Ex. A7 at p. 1). The report indicated that the student had difficulty sustaining time on task, attention, and behavioral compliance with transitions (*id.*). At the meeting, AHRC staff described its method of managing the student's behaviors through a "tight" behavioral plan "including an incentive system, verbal prompts, gentle redirection, distractions and simple calm encouraging communication," and significantly, without the use of a time-out room (*id.*). AHRC staff reported that the student's slow acclimation to the school setting "significantly delayed his acquisition of academic skills" (*id.*). The student's parents indicated that his "attention and on-task behavior . . . substantially improved" when the student received home instruction for "academics, speech and behavior management" (*id.* at p. 2). The private psychologist further noted that the "removal" of the home instruction services "undoubtedly denied A.H.R.C. the academic backup necessary for them to maximize their academic progress" with the student, which "denies [the student] his educational potential" (*id.*). Based upon the information provided, the private psychologist opined that home instruction services constituted a "crucial component" of the student's educational plan and without those services, his educational progress would be "significantly impaired" (*id.*). He further stated that because the student's needs were "made worse by the punitive approach to management used within [RKS], the inclusion of supportive home services constituted a reasonable and necessary addition to [the student's 'IEP']" (*id.*).

By letter dated March 20, 2006, the district's director of special education (director 3) invited the parents to attend the student's 2006-07 annual review (Dist. Ex. 130 at pp. 1-2; *see* Tr.

pp. 1147-48).<sup>19</sup> On March 29, 2006, the CSE convened to conduct the student's annual review and to develop the student's IEP for the 2006-07 school year (Dist. Ex. 9). Attendees included the following individuals: director 2 (as district representative); AHRC staff, including the school psychologist, the student's speech-language pathologist, the student's special education teacher, the student's occupational therapist, and an AHRC program supervisor; and the student's parents (Dist. Ex. 10). The CSE reviewed and accepted the goals prepared and submitted by the student's AHRC teachers and therapists (Dist. Ex. 9 at p. 6). AHRC's school psychologist testified that the CSE discussed the student's progress during the course of the 2005-06 school year and how, at that time, the student could walk into AHRC with "minimal" difficulty, walk down the stairs with his backpack, and proceed into the classroom (Tr. pp. 1262-63). She further testified that by the date of the CSE meeting, the student could participate in an academic program and work for 10 to 15 minutes without a break (Tr. pp. 1263-64). The CSE recommended continuing the student's placement in a 10:1+3 special class at AHRC for the 2006-07 school year with school-based OT and speech-language therapy (Dist. Ex. 9 at pp. 1-2). The CSE also incorporated annual goals into the 2006-07 IEP to address the student's areas of need, including classroom routine and adjustment, math, money, writing, reading, OT, speech therapy, transition and leisure skills (*id.* at pp. 5, 7-17). The IEP did not contain any recommendation for home instruction services for the 2006-07 school year (*see* Dist. Ex. 9).

By due process complaint notice dated September 21, 2006, and received by the district on October 27, 2006, the parents alleged that the district failed to provide home instruction services consisting of special education instruction, speech-language therapy, and OT services since May 23, 2005 through the present (Parent Ex. A at pp. 1-5). In particular, the parents alleged that the district improperly removed the home instruction services set forth in the student's May 23, 2005 IEP and that the district refused to provide home instruction services in retaliation to complaints made by the parents with regard to alleged incidents at RKS during the 2004-05 school year (*id.* at p. 3; *see* Dist. Exs. 7-8). In addition, the parents alleged that the August 4, 2005 CSE did not consider the home-based behavioral consultant's report, which contained recommendations for continued parent training and strategies to manage the student's behavior (Parent Ex. A at p. 3). As relief, the parents requested "starting home services as were provided prior to May 23, 2005, and as discussed in the May 23, 2005, IEP, and also to make up for services at home which were not provided from May 23, 2005 to date," implementation of the recommendations made by the student's private psychologist, implementation of the recommendations made by the student's home-based behavioral consultant, and additional home-based behavioral consultant services to "make up for the services not provided from August, 2005 to date" (*id.* at pp. 4-5).

By response dated November 6, 2006, the district responded to the substance of the parents' due process complaint notice, but did not raise any claims regarding the sufficiency of the parents' due process complaint notice (Dist. Ex. 3 at pp. 1-4). The parties attended a resolution session and agreed to conduct a neuropsychological evaluation of the student, which occurred over four days

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<sup>19</sup> According to the hearing record, director 2 remained in his position as the district's director of special education through the 2005-06 school year and director 3 became the district's director of special education upon his departure (Tr. pp. 1147-48).

in January, February, and March 2007 (Dist. Exs. 4-5; 38-41; see Dist. Ex. 16).<sup>20</sup> The first day of testimony occurred on July 30, 2007 (Tr. p. 1). The impartial hearing concluded on January 8, 2008, after seven days of testimony (Tr. p. 1250).

At the impartial hearing, director 2 testified that when he started his position at the district in September 2005, he was advised that the student did not have a placement for the 2005-06 school year and that his parents disagreed with the placement recommended by the CSE (Tr. pp. 1148-49). He did not, however, discuss the student with the previous director of special education, director 1, at any time (Tr. pp. 1150, 1155). He did recall discussing the student with the school psychologist soon after his arrival, but could not recall the sum and substance of that discussion (Tr. pp. 1155-56). Director 2 reviewed the student's May 23, 2005 IEP, and at some point, the student's entire file (Tr. pp. 1156-57). He also testified that he could not recall whether the student's special education file contained evaluations of the student conducted between May 23, 2005 and August 4, 2005 (Tr. pp. 1172-73). He was never told, and he also did not inquire, as to "why the home instruction that was included in the May 23, 2005 IEP was not included in the August 4, 2005 IEP" (Tr. p. 1173). Director 2 further testified that he did not know the reason the student received home instruction services—special education instruction, OT, and speech-language therapy—during the 2004-05 school year, and although he "was sure" he had conversations, he did not fully understand the "discussion . . . that led up to that recommendation" for these services in 2004-05 (Tr. pp. 1211-12).

Director 2 testified that he first spoke with the student's father in early September 2005 via telephone, and that at that time, the student's father was "upset that the school was not providing home services" or that his son was not receiving a "home program" (Tr. pp. 1164-66). He also recalled that the student's father expressed an interest in the applications sent by the district to potential placements and what "choices" were available (Tr. pp. 1164-68).

In his decision dated March 14, 2008, the impartial hearing officer first addressed the parents' allegation that the district failed to offer their son a free appropriate public education

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<sup>20</sup> The independent neuropsychological evaluation assessed the student's cognitive, language, visual-perceptual/constructional, motor/visual-motor, memory/learning, academic, and behavioral/adaptive function skills (see Dist. Ex. 16 at pp. 1-6, 9-11). The neuropsychologist concluded that the student demonstrated global cognitive impairments, impaired language and communication skills, difficulties with social reciprocity, stereotyped motor mannerisms, and a lack of varied and make-believe play (id. at p. 7). Recommendations included that the student receive "extensive" special education interventions and teaching modifications, implementation of a highly structured behavior management program with a hierarchy of reinforcements, and a continuation of speech-language therapy and OT services (id. at pp. 7-8). The neuropsychologist also recommended that the student be considered for "additional home-based therapeutic and educational interventions" because he required "consistency and continuity of interventions" to further augment his skills (id. at p. 8).

(FAPE)<sup>21</sup> for the 2006-07 school year (IHO Decision at pp. 9-19). He concluded that based upon the evidence presented, the parents failed to sustain their burden to establish that the district failed to offer the student a FAPE for the 2006-07 school year (id. at p. 11). The impartial hearing officer noted that the failure to offer home instruction services constituted the parents' only challenge to the student's 2006-07 IEP (id.). The impartial hearing officer opined that, at best, the evidence demonstrated that the student would "enjoy some incremental benefits from a home program" and that this "falls short of proving that the absence of home instruction resulted in an IEP that was not reasonably calculated to confer educational benefits or provided only trivial benefits" (id. at p. 19). He also noted that on the continuum of services, "home instruction is ranked as one of the most restrictive environments" and must be "weighed against the [Individuals with Disabilities Education Act's (IDEA)] mandate that education be provided in the least restrictive environment" (id.). Based upon the evidence, the impartial hearing officer concluded that the March 29, 2006 IEP met the student's special education needs by providing for a 12-month program, "placing him in a small special education class; giving him individual sessions of speech and language therapy and OT; and placing him in a transition class, where [he] can learn to apply his skills in outside environments" (id.).

Next, the impartial hearing officer turned to what he referred to as the "parents' apparent challenge to the IEPs generated for the 2005-06 school year," and explained that he used the word "apparent" because the due process complaint notice is not exactly a model of clarity in identifying which IEPs the parents are formally challenging" (IHO Decision at p. 19). He noted that although the parents' due process complaint notice made "numerous references to the CSE meetings held in 2005, it is not clear whether the references are only intended to provide background information for the challenge to the 2006-7 IEP or whether the parents are seeking a formal review of the legality of these IEPs" (id. at pp. 19-20).

The impartial hearing officer concluded that even if the parents' due process complaint notice sought a formal review of the 2005-06 IEPs, "the mootness doctrine precludes such a review" (IHO Decision at p. 20). He determined that since the 2005-06 school year ended before the parents filed their due process complaint notice, the issues raised regarding the 2005-06 school year were moot, noting that the parents failed to explain their "delay in filing," and thus, did not warrant an exception to the mootness doctrine (id.). The impartial hearing officer noted his confusion as to why the parents delayed in filing their due process complaint notice since the parents "obviously believed strongly that their son is entitled to home services and they knew that these services had been withdrawn in August 2005" (id.). In the alternative, the impartial hearing officer concluded that if he had reached the merits of the 2005-06 school year, he would have determined that the IEPs were appropriate "because the evidence presented for both school years is essentially the same, and for all the reasons discussed above, I find that is it not sufficient to

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<sup>21</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]).

meet the parents' burden of proof" (*id.*). The impartial hearing officer dismissed the parents' due process complaint notice in its entirety and denied their requested relief (*id.* at p. 21).

On appeal, the parents contend that the impartial hearing officer erred in finding that the district offered the student a FAPE for the 2006-07 school year and that the issues raised regarding the IEPs generated for the student's 2005-06 school year were moot. Regarding the 2005-06 school year, the parents assert that the district failed to elicit or consider opinions or recommendations from the student's home-based behavioral consultant and home instruction special education teacher. For the 2006-07 school year, the parents assert that the evidence demonstrated that the district's failure to offer home instruction services denied the student a FAPE. The parents seek to reverse the impartial hearing officer's decision in its entirety and to direct the district to provide the home instruction services denied to the student since September 2005 and to provide a remedy for the district's failure to provide a school-based program to the student during summer 2005.

In its answer, the district asserts numerous affirmative defenses upon which it seeks to uphold the impartial hearing officer's decision and to dismiss the petition including, but not limited to, mootness, the statute of limitations, failure to state a claim upon which relief may be granted, unclean hands, untimeliness, and estoppel. The district also asserts that the parents attempted to raise issues on appeal and/or during the impartial hearing that were not raised in their due process complaint notice. To the extent that the parents allege procedural inadequacies, the district contends that if such inadequacies exist, they do not impede the student's right to a FAPE, and/or have not significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE, and/or have not caused a deprivation of educational benefits to the student. The district seeks to uphold the impartial hearing officer's decision in its entirety and to dismiss the petition. The parents served a "reply brief" on May 9, 2008, addressing several of the affirmative defenses raised in the district's answer. By letter dated May 20, 2008, the district challenged the timeliness and scope of the parents' reply brief, as well as the lack of verification, and objected to its consideration.

Before moving on to the merits of this appeal, I will first address the procedural matters raised concerning the parents' reply brief. State regulations provide that a reply must be served within three days of service of the answer (8 NYCRR 279.5, 279.6). The district served its answer on April 30, 2008, and the parents served their reply brief on May 9, 2008. The parents did not request an extension of time from the Office of State Review in which to serve the reply (8 NYCRR 279.10[e]). Therefore, the parents' failed to timely serve their reply brief and it will be rejected. Having rejected the reply brief due to untimeliness, it is unnecessary to address the district's additional contentions regarding the scope of the reply brief and the parents' failure to verify the reply brief.

Next, I will address the district's affirmative defense that the parents' claims in the October 27, 2006 due process complaint notice regarding the student's 2005-06 school year are barred by the applicable statute of limitations. The IDEA was amended in 2004 with an effective date of July 1, 2005. The IDEA 2004 amendments added an explicit limitations period for filing a due process complaint notice and also added explicit accrual language. IDEA 2004 requires that, unless a state establishes a different limitations period under state law, a party must request a due process hearing within two years of when the party knew or should have known of the alleged action that forms the basis of the complaint (20 U.S.C. § 1415[f][3][C]; see also 20 U.S.C. § 1415[b][6][B]; Educ. Law § 4404[1][a]). Absent clear congressional intent, a newly enacted

federal statute of limitations does not operate retroactively (see Landgraf v. USI Film Products, 511 U.S. 244, 280 [1994]; In re Enterprise Mortgage Acceptance Co., 391 F.3d 401 [2d Cir. 2005] [holding that the limitations period in the Sarbanes-Oxley Act of 2002 did not have the effect of reviving stale claims]; Application of a Child with a Disability, Appeal No. 06-083). Prior to the IDEA 2004 amendments, the IDEA did not prescribe a time period for filing a request for an administrative due process hearing and a one-year limitations period was applied in New York (M.D. v. Southington Bd. of Educ., 334 F.3d 217, 221-22 [2d Cir. 2003]; Application of the Bd. of Educ., Appeal No. 02-119). A claim accrues when the complaining party knew or should have known of the injury involved, i.e., the inappropriate education (Southington, 334 F.3d at 221).

Here, the first step in determining whether a due process complaint notice is timely is to determine when the parents' claim accrued. The district incorrectly contends that the parents' claims regarding the 2005-06 school year accrued no later than May 23, 2005. While it is true that the parents rejected the placement recommended at the May 23, 2005 immediately after the CSE meeting, the placement recommendation constituted the only challenge to the May 23, 2005 IEP. The parents did not object, and do not presently object, to the recommended home instruction services listed on the May 23, 2005 IEP. The parents' objection to the May 23, 2005 CSE's recommended placement became moot upon the agreement between the parties to place the student at AHRC in September 2005. The placement issue is moot because the student's placement for the 2005-06 school year is no longer live or in controversy and because no meaningful relief could be granted with respect to this issue (see Parent Ex. A at p. 3; Application of a Child with a Disability, Appeal No. 07-062; Application of the Bd. of Educ., Appeal No. 07-047; Application of a Child with a Disability, Appeal No. 06-109; Application of a Child with a Disability, Appeal No. 03-050). In addition, a review of the parents' due process complaint notice indicates that the parents do not challenge the May 23, 2005 IEP, but instead, referred to that IEP in comparison to the August 4 and September 22, 2005 IEPs to demonstrate the removal of the home instruction services agreed to at the May 23, 2005 CSE meeting (Parent Ex. A at pp. 1-5). Therefore, the parents' claims asserted in the instant action regarding the 2005-06 school year did not accrue on May 23, 2005, but instead, accrued upon notice of the removal of the home instruction services.

In their due process complaint notice, the parents directly challenged the August 4 and September 22, 2005 IEPs because both IEPs, when compared to the May 23, 2005 IEP, failed to contain a recommendation for home instruction services (Parent Ex. A at pp. 3-5). According to the hearing record, the parents testified that they first became aware that the CSE had removed the home instruction services from the student's IEP at the August 4, 2005 CSE meeting (Tr. pp. 95-98, 124-28, 152, 157-59, 161, 479-81, 521; see Parent Ex. A at p. 3). After the September 22, 2005 CSE meeting, the parents knew that the requested home instruction services would not be recommended or offered for the 2005-06 school year. Thus, the parents' claims accrued no later than September 22, 2005, because the parents either knew or should have known of their dissatisfaction with the district's finalized recommendations for the 2005-06 school year at that time. Thus, based upon the effective date of the newly enacted 2004 IDEA's two-year statute of limitations on July 1, 2005, the parents' claims regarding the student's August 4 and September 22, 2005 IEPs, as set forth in their due process complaint notice filed with the district on October 27, 2006, were subject to the two-year statute of limitations and were timely (Application of a Child with a Disability, Appeal No. 07-116).

Moving on to the merits of the appeal, a 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]; see 20 U.S.C. § 1414[d]; 34 C.F.R. § 300.320).<sup>22</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 student, 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]; 8 NYCRR 200.5[j][4]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007]; Bettinger v. New York City Bd. of Educ., 2007 WL 4208560, at \*4 [S.D.N.Y. Nov. 20, 2007]; Werner v. Clarkstown Cent. Sch. Dist., 363 F. Supp. 2d 656, 659 [S.D.N.Y. 2005]).

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 student 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), but it does require that IEPs provide a basic floor of opportunity consisting of individualized services designed to provide educational benefit (see Grim, 346 F.3d at 379). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see Perricelli, 2007 WL 465211, at \*15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192).

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<sup>22</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. Although the amended regulations became effective on October 13, 2006, after the development of the student's 2005-06 and 2006-07 IEPs, for convenience, the citations in this decision refer to the regulations as amended because the regulations have been reorganized and renumbered.

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).

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]).<sup>23</sup>

Turning first to the 2005-06 school year, the impartial hearing officer improperly dismissed the parents' claims regarding the 2005-06 school year as moot. In his decision, the impartial hearing officer determined that the 2005-06 issues were moot because the 2005-06 school year had expired prior to the filing of the parents' due process complaint notice without "any convincing explanation for their delay in filing" (IHO Decision at p. 20). Although the impartial hearing officer correctly noted that a "controversy must be 'real and live' and not 'academic' before it can be adjudicated," the expiration of the school year does not, in and of itself, end the inquiry of the mootness doctrine in this case (id.; 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. 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). In addition, a case becomes moot when the parties lack a legally cognizable interest in the outcome (Murphy v. Hunt, 455 U.S. 478, 481 [1982]). In determining whether a controversy has become moot, the relevant inquiry is whether the facts alleged, under all the circumstances, show that there is a substantial controversy of sufficient immediacy and reality to warrant relief (Christopher P. v. Marcus, 915 F.2d 794, 802 [2d Cir. 1990]). 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). Thus, consistent with the mootness doctrine, State Review Officers have determined that there is no need to decide issues on appeal that are no longer in controversy, or to make a determination that would have no actual effect on the parties (Application of a Child with a Disability, Appeal No. 07-066; Application of a Child with a Disability, Appeal No. 05-018;

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<sup>23</sup> 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.

Application of a Child with a Disability, Appeal No. 02-110; Application of a Child with a Disability, Appeal No. 98-73; Application of a Child Suspected of Having a Disability, Appeal No. 95-60).

Here, although the 2005-06 school year expired prior to the filing of the due process complaint notice, the parents' challenges to the August 4 and September 22, 2005 IEPs are not moot because the parents seek additional educational and/or compensatory educational services as relief for the alleged denial of a FAPE for the 2005-06 school year (Parent Ex. A at pp. 4-5). Compensatory education is instruction provided to a student after he or she is no longer eligible because of age or graduation to receive instruction. It may be awarded if there has been a gross violation of the IDEA resulting in the denial of, or exclusion from, educational services for a substantial period of time (Mrs. C. v. Wheaton, 916 F.2d 69 [2d Cir. 1990]; Burr v. Ambach, 863 F.2d 1071 [2d Cir. 1988]). Compensatory education is an equitable remedy that is tailored to meet the circumstances of the case (Wenger v. Canastota, 979 F. Supp. 147 [N.D.N.Y. 1997]). In addition, a deprivation of instruction can be remedied through the provision of "additional services" before the student becomes ineligible for instruction (Application of a Child with a Disability, Appeal No. 07-109; Application of a Child with a Disability, Appeal No. 04-054; Application of the Bd. of Educ., Appeal No. 04-016; Application of the Bd. of Educ., Appeal No. 03-075; Application of a Child with a Disability, Appeal No. 01-094).

While compensatory education is a remedy that is available to students who are no longer eligible for instruction, additional services have been awarded to students who remain eligible to attend school and have been denied appropriate services, if such deprivation of instruction could be remedied through the provision of additional services before the student becomes ineligible for instruction by reason of age or graduation (Application of a Child with a Disability, Appeal No. 07-109; Application of a Child with a Disability, Appeal No. 05-041; Application of a Child with a Disability, Appeal No. 04-054; Application of the Bd. of Educ., Appeal No. 02-047; see also Bd. of Educ. v. Munoz, 16 A.D.3d 1142 [4th Dep't 2005] [finding it proper for a State Review Officer to order a school district to provide "make-up services" to a student upon the school district's failure to provide those educational services to the student during home instruction]). In general, the award of additional educational services for a student who is still eligible for instruction requires a finding that the student has been denied a FAPE (Application of the Bd. of Educ., Appeal No. 04-085; Application of the Bd. of Educ., Appeal No. 02-047). Because the student remains eligible to attend school and the parents seek relief in the form of additional educational and/or compensatory educational services, the parents and student continue to have a legally cognizable interest in the outcome of the challenges to the student's 2005-06 school year because meaningful relief may still be granted if the district failed to offer the student a FAPE for the 2005-06 school year.

Having determined that the impartial hearing officer erred when he dismissed the issues raised by the parents regarding the student's 2005-06 school year as moot, the next matter to address is whether, based upon the hearing record, the parents met their burden to establish that the district denied the student a FAPE for the 2005-06 school year. A thorough review of the hearing record supports the conclusion that procedural inadequacies relating to the August 4 and September 22, 2005 CSE meetings and recommendations significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student and resulted in a deprivation of educational benefits to the student. The student was

thereby denied a FAPE for the 2005-06 school year (20 U.S.C. § 1415[f][3][E][ii][II]; 34 C.F.R. § 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]).

With respect to the student's 2005-06 school year, the parents' challenge to the August 4 and September 22, 2005 IEPs focuses on the removal of the student's home instruction services, which had been provided to the student as a part of his IEP services since summer 2004, and which had been agreed to and incorporated into the student's May 23, 2005 IEP (Parent Ex. A at p. 4; compare Parent Ex. A4 at pp. 1, 16-17, with Parent Ex. A5 and Dist. Ex. 11 and Dist. Ex. 13). A student's written IEP memorializes the recommended special education programs and related services, as well as other essential components, required to make available a FAPE to the student (34 C.F.R. §§ 300.17[a-d], 300.320; 8 NYCRR 200.4[d][2]).

According to the student's father's testimony, the May 2005 CSE continued to recommend and authorize the provision of home instruction services in the student's May 23, 2005 IEP to make a FAPE available to the student during the 2005-06 school year (Tr. pp. 82-92, 123-28, 217-18, 230-31, 235, 586-87, 621; Parent Ex. A4 at pp. 1, 16-17).

Subsequent to the May 2005 CSE meeting, the parents attended an August 4, 2005 CSE meeting with the understanding that the intent of the meeting was to determine a placement for the student for the 2005-06 school year (Tr. pp. 96, 119-20). Upon their arrival at the meeting, however, the parents learned for the first time that the district had eliminated the home instruction services previously offered in the May 2005 IEP (Tr. p. 96; see Parent Ex. A5). The hearing record sufficiently indicates that the district's determination to remove the home instruction services occurred prior to the August 4, 2005 CSE meeting and without input from the parents (Tr. pp. 95-98, 124-28, 152, 157-59, 161, 479-81, 521; compare Parent Ex. A5 at pp. 1, 11-12, and Dist. Ex. 13 at pp. 1, 6-7, with Parent Ex. A4 at pp. 1, 16-17). The hearing record also demonstrates that the parents were not given notice of the district's intention to revise significant substantive portions of the student's 2005-06 IEP at the August 4, 2005 CSE meeting (Tr. pp. 96-98; see Dist. Ex. 15). The elimination of home instruction services from the IEP was made without adequate consideration or discussion at the meeting (Tr. pp. 96-98, 161-63, 244-45, 249-51), without consideration of additional information created about the student's needs since the May 2005 CSE meeting (Tr. pp. 94-98, 102), without consideration of the home-based behavioral consultant's report (Tr. pp. 94-95, 102), without any new or additional evaluative information (Tr. pp. 1172-73; see Dist. Post-Hr'g Br. at pp. 30-31, n. 19; see also Dist. Exs. 11 at pp. 2-3; 119 at p. 2), and without providing an educational justification or rationale as to why the student's home instruction services, which had been continuously provided to the student pursuant to his IEPs since September 2004, had been removed from the student's IEP (Tr. pp. 99-101). The student's father testified that not only did the student's home instruction special education teacher attempt to discuss the student's need for home instruction services at the CSE meeting, but that the issue was also raised by the student's home-based behavioral consultant, and either by himself or his attorney, and that these expressed concerns were not addressed or discussed at the CSE meeting (Tr. pp. 107-08, 429-35, 487, 500, 502-07, 591-92, 594-96). In addition, the district failed to mention home instruction services or why the home instruction services had been removed from the student's IEP in the undated letter forwarding the finalized version of the August 4, 2005 IEP to the parents, which, although not explicitly stated, appeared to constitute the district's prior written notice of recommendations (Dist. Ex. 119; see 20 U.S.C. § 1415[b][3]; 34 C.F.R. § 300.503; 8 NYCRR 200.5[a]; Educ. Law § 4402[1][b][3][c]).

Based upon the hearing record, the district impermissibly predetermined the removal of the home instruction services from the student's 2005-06 IEP prior to the August 4, CSE meeting. The IDEA sets forth procedural safeguards that include providing parents an opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child" (20 U.S.C. § 1415[b][1]). Federal and State regulations governing parental participation require that school districts take steps to ensure that parents are present at their child's IEP meetings or are afforded the opportunity to participate (34 C.F.R. § 300.322; 8 NYCRR 200.5[d]). Although school districts must provide an opportunity for parents to participate in the development of their child's IEP, mere parental disagreement with a school district's proposed IEP and placement recommendation does not amount to a denial of meaningful participation (see Sch. for Language and Communication Development v. New York State Dep't of Educ., 2006 WL 2792754, at \*7 [E.D.N.Y. Sept. 26, 2006] ["Meaningful participation does not require deferral to parent choice"]). Conversations about possible recommendations for a student, prior to a CSE meeting, are not prohibited as long as the discussions take place with the understanding that changes may occur at the CSE meeting (see Nack v. Orange City Sch. Dist., 454 F.3d 604, 610 [6th Cir. 2006]; Deal v. Hamilton County Bd. of Educ., 392 F.3d 840, 857-60 [6th Cir. 2004]; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 147-48 [S.D.N.Y. 2006]; Application of a Child with a Disability, Appeal No. 06-121). In addition to permissible prior conversations, the development of a draft IEP by a school district prior to a CSE meeting is not prohibited under federal or State law as long as the draft IEP is presented as a proposal, open for consideration, rather than as a matter already pre-decided without parental input (see Nack, 454 F.3d at 610 ["predetermination is not synonymous with preparation"]). But, a predetermination, or pre-selection of a student's program by a district, not subject to change or consideration of parental input, is a procedural violation of the IDEA which can support a determination that a FAPE has been denied (Deal, 392 F.3d at 857-60).

With respect to the September 22, 2005 CSE meeting, director 2 acknowledged in testimony that in September 2005, he was aware that the student's father was "upset" that the district removed the student's home-based program in September 2005, but could not recall "too much about that part of the conversation" (Tr. pp. 1119, 1122-23, 1164-69; see Dist. Ex. 11). He also acknowledged the district's responsibility to provide the home-based program agreed to at the May 23, 2005 CSE meeting (Tr. pp. 1120-22). Based upon the hearing record, the primary purpose of the September 22, 2005 CSE meeting was to revise the student's 2005-06 IEP to add his placement at AHRC (Dist. Ex. 11 at p. 1; compare Dist. Ex. 11, with Dist. Ex. 13). The hearing record also indicates that the September 22, 2005 CSE did not include the participation of a special education teacher, regular education teacher, or the AHRC speech-language therapist who drafted newly developed speech-language annual goals and objectives (see Dist. Ex. 12; 34 C.F.R. § 300.321; 8 NYCRR 200.3).

Therefore, based upon the evidence in the hearing record pertaining to the August 4 and September 22, 2005 CSE meetings, the procedural inadequacies—including, but not limited to, the district's predetermined decision to remove the home instruction services from the student's 2005-06 IEP, to withdraw the services of the home-based behavioral consultant, and the failure to address the parents' concerns raised regarding the removal of the student's home instruction services—significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student. And further, the removal of services, without parental input, which the hearing record shows had provided some educational benefits, caused a deprivation of educational benefits. The district conducted CSE meetings in a manner that significantly impeded parental participation, improperly eliminated services, and held at least

one CSE meeting without the required members. Taken together, in this particular case, the district's actions amounted to a denial of a FAPE for the 2005-06 school year. Having met their burden to establish that the district failed to offer the student a FAPE for the 2005-06 school year, the parents and student are entitled to receive the home instruction services and home-based behavioral consultant services, which had been improperly eliminated, as additional educational services because the deprivation of instruction can be remedied through the provision of "additional services" before the student becomes ineligible for instruction. Since the hearing record indicates that the student continued to receive home instruction during summer 2005, the deprivation of educational services occurred during the remainder of the 2005-06 school year, from September 2005 through June 2006 (Tr. pp. 94-95, 105-06, 583, 585-86; Parent Exs. A at p. 3; A3 at pp. 1-3). Therefore, based upon the hearing record, the student is entitled to additional services consisting of the following: individual home instruction special education instruction by a special education teacher for three 60-minute sessions per week; individual home instruction speech-language therapy for two 30-minute sessions per week; individual home instruction OT services for one 30-minute session per week; and home instruction behavioral consultant services as recommended in the consultant's report, dated August 1, 2005, including the provision of both home-based services to the student and parent training services.

Turning now to the parents' challenge to the student's 2006-07 IEP and/or school year, a review of the hearing record supports the impartial hearing officer's conclusion that the parents failed to sustain their burden to establish that the district's March 29, 2006 IEP failed to offer the student a FAPE for the 2006-07 school year (IHO Decision at p. 11). To the contrary, the hearing record indicates that the March 29, 2006 CSE meeting did not suffer from the same procedural inadequacies associated with the August 4 and September 22, 2005 CSE meetings, and moreover, that the IEP developed at the March 29, 2006 CSE meeting was reasonably calculated to enable the student to receive educational benefits.

The hearing record demonstrates that although the parents attended the March 29, 2006 CSE meeting, the student's father could not recall specific events or discussions that occurred at the meeting (Tr. pp. 253-58, 563-65; see Dist. Ex. 10). The student's father did not disagree with any specific component(s) of the 2006-07 IEP, other than the lack of home instruction services (Tr. pp. 563-65; see Dist. Ex. 9). In addition, the student's AHRC special education teacher testified that the 2006-07 IEP accurately identified the student's present levels of performance and needs (Tr. pp. 655, 703). Director 2 testified that the student's speech-language pathologist, occupational therapist, and special education teacher reviewed the student's goals and reported to the CSE about the student's progress during the 2005-06 school year (Tr. pp. 1123-24, 1128-30; see Dist. Ex. 130 at pp. 4-11). Director 2 stated that the CSE accepted the recommendations from the student's AHRC teachers and therapists regarding the student's annual goals, related services, and special class program (Tr. pp. 1123-28, 1131-33; see Dist. Exs. 9 at pp. 1-2, 5, 7, 9-18; 130). The annual goals included in the IEP addressed the areas of classroom routine and adjustment, math, money, writing, reading, OT, speech-language therapy, and transition and leisure skills (Dist. Ex. 9 at pp. 5, 7-17).

In testimony, director 2 opined that based on the information provided by AHRC in March 2006 regarding the student's progress during the 2005-06 school year, he expected the student to make continued progress during the 2006-07 school year (Tr. p. 1137). He further stated that the services provided by AHRC were appropriate to meet the student's behavioral, speech-language, OT, and special education needs (Tr. pp. 1138-39). Based on input from AHRC personnel, director

2 concluded that the program recommended for the student on March 29, 2006 was appropriate (Tr. pp. 1139-40).

The hearing record indicates that during the 2006-07 school year, the student received approximately three hours of instruction per day and worked on acquiring a sight vocabulary, telling time, identifying money, learning functional safety signs and a transition program (Tr. pp. 661, 670-71). The student's program included three sessions per week of transition teacher services, which included taking the student to an on-site "cottage" where, for generalization purposes, the student worked on life skills (e.g. housekeeping, cooking, shopping) to reinforce activities completed both inside and outside the classroom (Tr. pp. 661-62, 685-86). The student's 2006-07 special education teacher testified that the student met "many" of the goals recommended in the 2006-07 IEP (Tr. pp. 677-78). When the special education teacher observed slow progress with the student's writing skills, she implemented a program identified in the hearing record as "Writing Without Tears" to address this need (Tr. pp. 704-05). She opined that the student's 2006-07 IEP was appropriate (Tr. p. 656).

The special education teacher further testified that when she initially met the student in July 2006, he exhibited difficulties with transitions and off-task behaviors that interfered with his learning (Tr. pp. 655-57). AHRC personnel consulted AHRC's applied behavioral analysis (ABA) supervising psychologist, who completed an FBA and developed a BIP for the student (Tr. pp. 657, 823, 826; Dist. Ex. 25). The hearing record reflects that during the 2006-07 school year, the student made significant behavioral progress by reducing the amount of time taken to transition and by reducing the instances of targeted behaviors (Dist. Exs. 25 at p. 3; 126). The reduction of demonstrated target behaviors benefitted the student because he was then able to remain on task and could spend more time attending to classroom activities and focusing on acquiring new skills (Tr. p. 849). Although the ABA supervising psychologist did not assess the student's academic progress after the BIP was implemented, she did observe him "working and participating happily" in classroom activities and exhibiting attention to the task and compliance (Tr. pp. 849, 851).

With respect to home instruction services, the testimony provided by the student's special education teacher and the AHRC ABA supervising psychologist supported the impartial hearing officer's conclusion that the student would receive an incremental benefit with the addition of home instruction services during the 2006-07 school year, which was not sufficient evidence to establish that the March 29, 2006 IEP failed to offer the student a FAPE in the 2006-07 school year (Tr. pp. 669-70, 690-91, 693-94, 841, 855-56).

Based upon the hearing record in this case, the parents sustained their burden to establish that the district failed to offer the student a FAPE for the 2005-06 school year, but failed to sustain their burden to establish that the district failed to offer the student a FAPE for the 2006-07 school year. As relief, the parents have requested additional services in the amount of the home instruction services that were not provided subsequent to the August 4 and September 22, 2005 IEPs. Having found that educational services were improperly removed from the May 2005 IEP by the August 4 and September 22, 2005 IEPs, and the above referenced services were not provided during the remainder of the 2005-06 school year from September 2005 to June 2006, and the district has not objected to the nature of the relief requested, I will order the district to provide the following home instruction services for a tenth month period from September 2008 through June 2009, to supplement the student's school-based program recommended for the 2008-09 school year: individual home special education instruction by a special education teacher for three 60-

minute sessions per week; individual home instruction speech-language therapy for two 30-minute sessions per week; individual home instruction OT services for one 30-minute session per week; and home instruction behavioral consultant services as recommended in the consultant's report, dated August 1, 2005, including the provision of both home-based services to the student and parent training services.

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

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

**IT IS ORDERED**, that the impartial hearing officer's decision, dated March 14, 2008, is annulled to the extent that it determined that the issues raised regarding the student's 2005-06 school year were moot; and

**IT IS FURTHER ORDERED**, that the district shall provide additional educational services to the student, consisting of the following: individual home instruction special education instruction by a special education teacher for three 60-minute sessions per week; individual home instruction speech-language therapy for two 30-minute sessions per week; individual home instruction OT services for one 30-minute session per week; and home instruction behavioral consultant services as recommended in the consultant's report, dated August 1, 2005, including the provision of both home-based services to the student and parent training services; and,

**IT IS FURTHER ORDERED**, that the district shall provide the additional home instruction educational services on a weekly basis for ten months from September 2008 through June 2009, to supplement the student's recommended school-based program services for the 2008-09 school year.

**Dated:**           **Albany, New York**  
                      **June 20, 2008**

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