



# The University of the State of New York

## The State Education Department State Review Officer

No. 08-060

### **Application of the BOARD OF EDUCATION OF THE EVANS-BRANDT CENTRAL SCHOOL DISTRICT for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability**

#### **Appearances:**

Harris Beach PLLC, attorneys for petitioner, David W. Oakes, Esq., of counsel

Goldstein, Ackerhalt & Pletcher, LLP, attorneys for respondents, Judith M. Gerber, Esq., of counsel

#### **DECISION**

Petitioner (the district) appeals from a decision of an impartial hearing officer which determined that the educational program and services recommended by its Committee on Special Education (CSE) for respondents' (the parents') son for the 2007-08 school year was not appropriate and awarded additional services and other relief. The appeal must be dismissed.

At the time of the impartial hearing, the student was 14 years old, in the eighth grade and eligible to receive special education services as a student with multiple disabilities (see 34 C.F.R. 300.8[c][7]; 8 NYCRR 200.1[zz][8]). At various times the student has received diagnoses of an attention deficit hyperactivity disorder (ADHD), a pervasive developmental disorder (PDD)-Asperger's disorder (Parent Ex. 43), and a central auditory processing disorder (CAP) (id. at p. 2). The hearing record also shows that the student has medical diagnoses including lumbar lordosis, thoracolumbar scoliosis and spina bifida occulta (Parent Ex. 34 at p. 1). The student wears glasses and takes medication at home (Parent Ex. 24). The hearing record shows that the student's academic skills fall primarily in the low average to average range (Parent Ex. 44 at p. 5) with auditory processing, reading and math deficits (Parent Ex. 24 at pp. 2, 7). At the time of the impartial hearing, the student was attending an 8:1+1 self-contained classroom in a district middle school operated by the local Board of Cooperative Education Services (BOCES) (id. at p. 4). The student was recommended to receive related services including assistive technology, counseling, occupational therapy (OT) consult and speech-language therapy (id.). The student's eligibility for special education programs and services as a student with multiple disabilities is not in dispute.

The student was initially classified as a student with a learning disability in kindergarten, was subsequently reclassified as a student with an other health impairment in May 2001 and was most recently reclassified as a student with multiple disabilities (Tr. p. 30; Parent Ex. 7 at p. 1).

On November 25, 2003, the student's mother brought her son for a central auditory processing evaluation (Parent Ex. 48). The resulting report included pertinent history which indicated that at the time of the evaluation, the student was 10 years old, in the fourth grade, had repeated third grade and was currently placed in a special education classroom with two teachers and six students (*id.* at p. 1). The student participated in mainstream social studies with the assistance of an aide and received counseling and OT once per week and speech-language therapy twice per week (*id.*). Difficulty with reading, reading comprehension, attention, math, following directions, handwriting and an inability to complete self-directed homework were reported by the student's mother (*id.*). The evaluation results revealed that the student had normal hearing bilaterally, but that he scored significantly below normal limits on the three tests administered which the evaluator determined was indicative of a severe central auditory processing delay (*id.* at pp. 1-2). The report identified specific areas of difficulty including phonemic decoding, auditory memory, organization and listening in the presence of competing background noise (*id.* at p. 2). The report provided recommendations to address these needs, ranging from preferential seating near the teacher, use of a wideband "FM" system in school, a structured learning environment and frequent use of visual aids, to auditory training in school from a speech therapist using the Katz Phonemic Synthesis program and the auditory components of the Lindamood Auditory Discrimination in Depth program (*id.*). Testing modifications were recommended for the student's academic setting which included a quiet environment, directions read to ensure understanding and extra time for all timed exams (*id.*).

By letter dated September 12, 2005, the district was notified by the senior child and family therapist and the director of medical services at Child and Adolescent Treatment Services that the student's Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (DSM-IV) diagnoses included an attention deficit hyperactivity disorder and a PDD-Asperger's disorder (Parent Ex. 43).

On December 16, 2005, when the student was 12 years old, a district psychologist, the CSE chairperson and the student's special education teacher conducted evaluations as part of the triennial evaluation process culminating in a report entitled "Multidisciplinary Reevaluation Report" that was utilized at an April 27, 2006 CSE meeting (Parent Exs. 16 at p. 3; 44 at pp. 1-7). Administration of the Wechsler Abbreviated Scale of Intelligence (WASI) yielded a full scale IQ score of 85 (low average) with no marked contrast between his verbal IQ score of 88 and performance IQ score of 85 (Parent Ex. 44 at p. 6). The student's performance on the Weschler Individual Achievement Test – Second Edition (WIAT-II) reflected low average skills on all reading subtests indicating even development in word recognition, decoding, spelling and comprehension skills, and a relative weakness in mathematics indicated by his score of 69 (low to very low) on the numerical operations subtest (*id.* at p. 5). The Behavior Assessment System for Children - Second Edition (BASC- 2) was completed by the student's teacher whose responses revealed composite scores in the clinically significant range for "externalizing problems" and "internalizing problems" due to elevated scores on the hyperactivity, aggression, and depression scales (*id.* at pp. 5-6). The evaluator also reported clinically significant findings on the atypicality and withdrawal scales, noting odd or immature behaviors and that the student had difficulty

making friends (id. at p. 6). The evaluator determined that the teacher's responses revealed no significant difficulties with attention or learning and yielded a score in the average range on the school problems composite (id.). Adaptive scales composite scores also were determined to be in the average range indicating the student displayed adequate adaptive behaviors and social skills (id. at pp. 5-6).

On April 13, 2006, at the request of the CSE, a speech pathologist conducted an evaluation to determine the status of the student's speech-language function for his triennial review (Parent Ex. 38). Administration of the Comprehensive Receptive and Expressive Vocabulary Test - Form A (CREVT-2) which measured the student's proficiency in receptive and expressive vocabulary, yielded average or above average scores with standard scores of 109 and 99 (id. at p. 1). The Test of Language Development-Intermediate:3 (TOLD-I:3) which measures receptive and expressive competence in the major areas of linguistics and compares language strengths and weaknesses of the student, revealed that scaled scores on five of the six subtests fell in the average range with one subtest score in the below average range (id. at p. 2).<sup>1</sup> The composite quotients results reflected strengths in syntax and speaking with standard scores of 91 and 94.<sup>2</sup> Below average standard scores were achieved in listening (85), semantics (87), and spoken language (89) (id.). The Elementary-Test of Problem Solving-Revised (TOPS-R) was used to assess problem solving and language based critical thinking skills including clarifying, analyzing, generating solutions, evaluating and affective thinking (id.). The student scored significantly lower on this test with a standard score of 82 (id.). The evaluator stated that the student's "responses often indicated he may have an ego-centric perspective that would make it difficult for him to understand another's point of view and that some of his answers showed imprecise reasoning that might cause him to jump to conclusions in unfamiliar situations" (id. at pp. 2, 3). The evaluator recommended that the student be dismissed from speech therapy and suggested that counseling may address his difficulties in understanding other points of view and jumping to conclusions (id. at p. 3).

On April 27, 2006, the CSE convened for a "re-eval/annual review" meeting (Parent Ex. 16 at p. 1). The participants in the meeting included one of the parents, the CSE chairperson, the school psychologist, the speech-language pathologist from BOCES and the student's special education teacher from BOCES (id. at p. 9). The resultant individualized education program (IEP) for the 2006-07 school year classified the student as a student with multiple disabilities and recommended placement in an 8:1+1 self-contained classroom at a district middle school with related services of counseling at the rate of one 30-minute session per week in a group and one 30-minute session per week individually, and OT one 30-minute session per week in a group (id. at pp. 1-4). Adapted physical education was recommended due to the student's difficulty with social interactions (id. at p. 5). Program modifications included repeat directions to teacher, student may leave room upon request, daily report sent home and visual reinforcement of auditory information (id. at p. 4). Testing accommodations allowed for extended time (2x), administration in a small group in a separate location with minimal distraction, simplification of language in directions and use of a calculator (id. at pp. 4, 5). A word processor was listed as a needed assistive technology device (id.). The IEP reflected test scores in the low average to average range in reading and spelling and the low range for math (id. at p. 3). The 2006-07 IEP contained eight annual goals

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<sup>1</sup> The evaluator reported these scores as standard scores (Parent Ex. 38 at p. 2).

<sup>2</sup> The report incorrectly indicated "Semantics" instead of "Speaking" (Parent Ex. 38 at p. 2).

addressing the student's needs in study skills (two goals), reading (one goal), writing (one goal), math (two goals), and his social/emotional/ behavioral needs (two goals) (id. at pp. 7-8).

The student's performance during the 2006-07 school year is reflected in a cumulative quarterly progress report covering September 2006 through June 2007 (Parent Ex. 27). The report measures progress on the student's IEP goals and records academic grades (id.). The report reflected grades of "some progress," "progressing satisfactorily" or "achieved" for all academic areas, work skills, social interaction and behavioral skills (id. at p. 1). The report also reflected "some progress," "progressing satisfactorily" or "achieved" for all annual goals for each quarter for the 2006-07 year (id. at pp. 3-4). Teacher comments described the student's positive contribution and participation in group discussions, retention of material, use of a calculator and keyboard and that the student was a "pleasure" to have in class (id. at p. 2).

On May 3, 2007, the CSE convened for the student's annual IEP review to draft an IEP for the 2007-08 school year (Parent Ex. 18). The following people were in attendance at the CSE meeting: the CSE chairperson, the school psychologist, the BOCES supervisor, the student's BOCES special education teacher, one of the parents and two advocates for the parents from the Learning Disabled Association (LDA) (Parent Ex. 19 at p. 1). The IEP indicated the parent provided input into the student's present level of physical development in a phone call to the OT regarding the student's hands cramping during writing (Parent Ex. 18 at p. 3). There is nothing in the hearing record indicating that the parents objected to the proffered IEP. Building on a successful program and successful results in 2006-07, the resultant IEP continued the student's classification of having multiple disabilities and continued placement in an 8:1+1 self-contained classroom in a BOCES program at a district middle school, with mainstream classes for art and keyboarding (id. at pp. 4, 7).<sup>3</sup> Recommended related services included one 30-minute group session and one 30-minute individual session of counseling per week, one 30-minute assistive technology consult per month, and one 30-minute OT consult (indirect) per month as a push-in service (id. at p. 4). According to the CSE meeting minutes dated May 3, 2007, the CSE recommended that a speech-language evaluation be performed (Parent Ex. 19 at p. 2). The IEP contained goals that were identical to the goals listed on the 2006-07 IEP (compare Parent Ex. 18 at pp. 6-7, with Parent Ex. 16 at pp. 7, 8).

Pursuant to the recommendations in the May 3, 2007 IEP, the district conducted a speech-language evaluation on May 16, 2007 (Parent Ex. 37). A district speech-language therapist administered the Clinical Evaluation of Language Fundamentals-Third Edition (CELF-3) to assess the student's current speech functioning (id.). Based on standard scores of 57 receptively and 61 expressively, with a total language score of 56 indicating performance in the very low range, the evaluator recommended services of two group sessions per week in a "mixed setting" (id.).

Following completion of the speech-language evaluation, the district's CSE reconvened on June 14, 2007 to amend the student's IEP and added two 30-minute group speech-language therapy sessions in a "mixed setting" setting (Parent Exs. 20; 21). Participating in the meeting were the district chairperson, the school speech-language therapist, the student's BOCES teacher, the school

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<sup>3</sup> CSE meeting notes reflect a recommendation of a 12-month program and individual counseling services once per week, but a 10-month program was indicated on the IEP itself (compare Parent Ex. 19 at p. 2, with Parent Ex. 18 at p. 5).

psychologist, the student's mother and her LDA advocate (Parent Ex. 21 at p. 1). There is no indication in the hearing record that the parent objected to the addition to the IEP. Extended school year (ESY) services were removed from the student's IEP at the request of the parents because the student was scheduled to have surgery performed on his foot (Tr. p. 140; Parent Ex. 21).

The CSE reconvened again on September 19, 2007 to amend the student's 2007-08 IEP, adding "modify homework to a maximum of 40 minutes" at the parents' request and adding two goals to address the student's speech-language needs that had been inadvertently omitted during the previous amendment to the IEP (Tr. pp. 85, 103; Parent Ex. 24 at pp. 5, 7, 8). The meeting was attended by the CSE chairperson, the parent and her LDA advocate (Parent Ex. 25 at p. 2). The parent requested that the school psychologist and an additional parent member not be in attendance (Tr. pp. 100-01). The CSE meeting minutes indicated the parent had spoken to the student's teacher regarding reading comprehension difficulties and new glasses for the student although no changes on the IEP were made related to this (Parent Ex. 25 at p. 2). There is nothing in the hearing record indicating that the parent objected to the proffered IEP at the CSE meeting.

In a prescription dated November 13, 2007, the student's physician ordered a physical therapy (PT) evaluation and treatment for the student including paraspinal stretch/strengthen, core strengthen, hamstring stretch, postural education and modalities (Parent Ex. 31). On November 19, 2007, a BOCES physical therapist completed an evaluation of the student to explore the student's complaints of pain from tailbone to shoulder blades, severe low back pain and lower extremity weakness (Parent Ex. 32). The evaluation revealed signs and symptoms consistent with right thoracolumbar scoliosis with subsequent back pain (*id.* at p. 2). The evaluator recommended diagnostic testing and a treatment plan with an orthopedic physician; participation in activities to encourage upright, erect posture and increase postural endurance to prevent further scoliosis development; verbal prompts to assume an appropriate posture; and a daily home exercise program of stretching and strengthening (*id.*). The evaluator opined that the student did not appear to qualify for school based PT (*id.*).

In a due process complaint notice dated January 4, 2008, the parents requested an impartial hearing, alleging that the district had failed to offer the student a free appropriate public education (FAPE) (Dist. Ex. 5 at Ex. A at p. 3).<sup>4</sup> The parents asserted that: (1) OT, speech-language therapy and assistive technology services were not delivered as required by the 2007-08 IEP;<sup>5</sup> (2) the student's test scores and evaluations evidenced regression and his behavior had worsened; (3) the 2007-08 IEP goals were nearly identical to the 2006-07 IEP goals; (4) the student's PT evaluation, conducted by the district, was insufficient and failed to identify his need for PT services; and (5) school personnel failed to provide the parents with consultations and weekly reports as required by the 2007-08 IEP (*id.*).

The parents proposed the following relief in their due process complaint notice: (1) that the district fund new independent PT, OT, speech-language, neuropsychological and educational

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<sup>4</sup> It is not explained in the hearing record why the parents did not request a CSE meeting to address their concerns with the goals, their son's behavior, and implementation of the IEP given that the CSE had demonstrated responsiveness to their requests to meet with them and their advocates in the past.

<sup>5</sup> The parents' due process complaint notice does not specify the date of the 2007-08 IEP that they were challenging.

evaluations of the student; (2) that the district conduct a functional behavioral assessment (FBA) and develop a behavioral intervention plan (BIP); (3) that the district begin to confer with the parents regarding the student's needs; (4) that the district provide additional services to make up for services that the district failed to provide; (5) that after the new evaluations were completed, the CSE meet to amend the student's IEP; and (6) attorney's fees.<sup>6</sup>

Following the filing of the due process complaint notice, a resolution session was held on or about January 22, 2008 (Tr. p. 162; Dist. Ex. 5 at Ex. M at p. 3).<sup>7</sup> The district agreed to provide the requested evaluations, conduct an FBA and develop a BIP, confer informally with the parents regarding the student's educational needs and convene a CSE meeting subsequent to completion of the evaluations (Dist. Ex. 5 at Ex. N at pp. 3-5). The extent of the requested compensatory additional services was not resolved, nor was an agreement discussed on attorney's fees for the parent's attorney (*id.*). Although no written settlement agreement was signed at the resolution session, the parties resolved prior to the hearing all of the issues but additional services, convening of the CSE, and attorney's fees (Tr. pp. 47-52, 256-58). The hearing record does not indicate why the issue of additional services was not resolved at the resolution session.

An evaluation was conducted on January 26, 2008 by an independent speech pathologist at Mount Mercy Speech Center (Parent Ex. 41). The evaluation reflected a diagnosis of a moderate central auditory processing delay (*id.*). The resulting report indicated that the student had difficulty with sound blending, had tolerance fading memory, telescopic and cluttered speech, a lateral lisp effecting the production of s, sh, ch and j in all positions of words, and recommended a treatment plan to address these needs including the use of Katz's Phonemic Synthesis Program, Coddling and Gardner's Perceptual Development Remedial Activities and Schneider's Magic Penny Reading Secrets Book 3 (*id.*). The report also indicated that the student achieved a score at the 75th percentile for receptive vocabulary on the Peabody Picture Vocabulary Test, Form III and at the "<1st" percentile with a standard score of "<40" on the Goldman Fristoe 2 Test of Articulation (*id.*). The evaluator's recommended treatment plan addressed the student's auditory processing needs to increase memory span and literacy development including organizing information, drawing conclusions and inferences, recalling facts and details and developing writing skills (*id.*).

An evaluation by an independent occupational therapist at Optimal Therapy Associates Services (OTAS) conducted on February 6, 2008 reflected that the student's strengths included non-motor/visual perceptual skills; and that the student's areas of need included visual motor skills,

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<sup>6</sup> The parents did not specify the amount of additional services sought. The district did not object to the due process complaint notice on sufficiency grounds (see 20 U.S.C. § 1415[b][7][A][ii]; 34 C.F.R. § 300.508[b]; 8 NYCRR 200.5[i][1]). The Senate Report pertaining to the 2004 amendment to the Individuals with Disabilities Education Act (IDEA) noted that "the purpose of the sufficiency requirement is to ensure that the other party, which is generally the school district, will have an awareness and understanding of the issues forming the basis of the complaint" (S. Rep. 108-185, Individuals with Disabilities Education Act Senate Report No. 108-185, "Notice of Complaint," [November 3, 2003]). The Senate Committee reiterated that they assumed with the earlier 1997 amendments' notice requirement that it "would give school districts adequate notice to be able to defend their actions at due process hearings, or even to resolve the dispute without having to go to due process" (*id.*).

<sup>7</sup> According to federal regulations, the "purpose of the [resolution] meeting is for the parent of the child to discuss the due process complaint, and the facts that form the basis of the due process complaint, so that the [school district] has the opportunity to resolve the dispute that is the basis for the due process complaint" (34 C.F.R. § 300.510[a][2]; see also 8 NYCRR 200.5[j][2]).

eye-hand coordination, upper body gross coordination, upper body speed and coordination, lower body balance and coordination and auditory-visual perception (Parent Ex. 36 at p. 3). The results of the Developmental Test of Visual Perception-Adolescent and Adult (DTVP-A) which measures visual perceptual and visual motor abilities indicated the student's "motor reduced" subtest scores were in the average range, visual motor integration scores were all below average except visual motor speed and that a significant difference in the student's overall visual motor integration scores versus motor-reduced visual perception scores indicated that the student had difficulty completing activities when there is a motor component (id. at p. 2). The evaluator reported that an observation of the student's handwriting revealed that writing is a laborious task for him requiring significant cognitive effort (id.). Administration of the Perceptual Memory Task: Assessment for Individual Learning Style (PMT) which determines the student's strongest learning channel revealed that visual information processing was effective for the student and sequential auditory memory was an area of need (id.). The report included a detailed analysis of the student's perceptual memory skills including trait profiles and instructional/training strategies to address these traits (id. at pp. 4-10). The evaluator reported that results from administration of the Perceptual-Motor Assessment for Children (P-MAC) indicated "definite limitations" in eye-hand coordination and upper body gross coordination; "probable limitations" in upper body speed and coordination, lower body balance and coordination, and auditory-visual perception; and "possible limitations" in size discrimination, bimanual speed and coordination, and right sensory motor functions (id. at p. 3). The student's average standard score for all areas measured was 73, his perceptual motor standard score was also 73 which the evaluator indicated was 1.8 standard deviations below the average for the general population (id. at pp. 15, 16).

A PT evaluation, also conducted on February 6, 2008 at OTAS, revealed poor postural mechanics, decreased muscle tone in the trunk, and muscle imbalances throughout the trunk and lower extremities which affected the student's ability to sit or stand for prolonged periods (Parent Ex. 34 at p. 2). The student's posture in standing was significant for a severe forward head, rounded shoulder and posterior pelvic tilt with the left shoulder height greater than his right shoulder height (id. at p. 1). The student's sitting posture revealed a forward head posture with rounded shoulders, increased thoracic kyphosis, and a posterior pelvic tilt (id.). The evaluator determined that the student's range of motion was within functional limits for his upper and lower extremities and although the student presented with severe forefoot pronation bilaterally and decreased arm swing, the evaluator deemed that his gait was functional (id.).

Administration of the Bruininks-Oseretsky Test of Motor Proficiency, Second Edition (BOT-2), a standardized test used to determine the gross motor skill level of a child between the ages of 4 and 21 years, yielded scaled subtest scores of 8 in running speed and agility, 10 in balance and 7 in bilateral coordination, all of which the evaluator determined were in the below average range (Parent Ex. 34 at p. 4). The student achieved a scaled subtest score of 11 in strength, which the evaluator determined to be in the average range (id.). The evaluator reported that the student's below average performance in bilateral coordination indicated difficulty in performing motor skills involved in playing sports and recreational games which require coordinated arm/hand and leg/foot movements when the limbs on the opposite sides of the body are synchronized (id. at p. 6). The evaluator indicated that the student achieved a score in the below average range on the balance subtest, which evaluates motor control skills that are integral for maintaining posture for standing, walking or reaching (id. at pp. 6-7). He further reported that the student's below average

performance in running speed and agility indicated difficulty controlling and coordinating large musculature involved in locomotion, as in recreational and competitive sports (id. at p. 7).

The evaluator determined that the student exhibited significant poor postural mechanics, decreased muscle tone in his trunk, and muscle imbalances throughout his trunk and lower extremities that affected the student's ability to sit or stand for prolonged periods (Parent Ex. 34 at p. 2). The evaluator did not provide recommendations in the evaluation report (id.).

The OT, PT, and speech evaluations were conducted by February 2008 (Parent Exs. 34; 36; 41). The FBA was conducted and the BIP drafted by the beginning of March 2008 (Tr. p. 155). To address the parents' concern about conducting more informal meetings between the parents and service providers, an informal meeting was held in January 2008.<sup>8</sup> The district, by letter dated March 7, 2008, invited the parents to a CSE meeting to be held on April 3, 2008 to "actively participate as a member of the committee and discuss any information that is relevant with respect to the identification, evaluation, and educational placement of your child" (Dist. Ex. 6).<sup>9</sup>

On March 14, 2008, the district filed a motion to dismiss the parents' due process complaint notice arguing, inter alia, that the matter was moot because the district had satisfied all of the parents' requests in the due process complaint notice, or was in the process of doing so, with the exception of the request for attorney's fees (Dist. Exs. 3; 4; 5). In a six-page decision dated April 4, 2008 and delivered to the parties on the first day of the impartial hearing, the impartial hearing officer denied the district's motion to dismiss, finding that there were two unresolved issues from the due process complaint notice that warranted going forward with an impartial hearing (IHO Ex. 1). Those two issues were: 1) the additional services claim ("the District claims that it will provide additional services if there is a showing of deprivation, but it is not clear whether both parties would agree on what constitutes a deprivation in this context") (IHO Ex. 1 at p. 3); and 2) the development of an appropriate new IEP (id.).<sup>10</sup>

The impartial hearing began on April 7, 2008 and concluded on April 10, 2008, after two days of testimony (Tr. pp. 1, 280). At the impartial hearing, the district presented documentary evidence and offered testimony from the district's director of special education (Tr. pp. 39, 265-66). The parents presented documentary evidence and offered testimony from the student's mother and a private physical therapist who had evaluated the student (Tr. pp. 215, 237).

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<sup>8</sup> In attendance were the district's director of special education, the student's mother, the parents' attorney, the school psychologist, the BOCES supervisor, the student's special education teacher and the student's speech therapist (Tr. pp. 59-61).

<sup>9</sup> The parents declined to attend because the pending neuropsychological evaluation had not yet been completed and the parents wanted to wait until it was received (Tr. pp. 73-74). The neuropsychological evaluation was completed in early April 2008 (Pet. Ex. A). The hearing record does not indicate why the parties did not have a CSE meeting shortly thereafter to consider the evaluations and revise the student's IEP.

<sup>10</sup> As indicated in footnote 9 supra, the district expressed a desire to convene a CSE meeting prior to the impartial hearing to develop a new IEP.

By decision dated June 2, 2008, the impartial hearing officer found that the district had failed to offer the student a FAPE because: (1) the 2007-08 IEP goals were inappropriate;<sup>11</sup> (2) the district failed to provide services as the IEP specified including assistive technology, speech-language and OT services; (3) the district failed to conduct a sufficient PT evaluation; (4) the district failed to prove that its behavioral interventions met the student's needs; and (5) the district failed to show that the student was progressing in the district's placement and program (IHO Decision at pp. 14-20). The parents raised several other arguments during the impartial hearing regarding why the district failed to offer a FAPE, but the impartial hearing officer declined to rule upon them after finding that he lacked jurisdiction because the arguments had not been raised in their due process complaint notice (id. at pp. 15-16, 17, 18, 20).

After finding a denial of a FAPE, the impartial hearing officer examined each of the parents' requested remedies and ordered the district to: (1) convene the CSE to re-write the 2007-08 IEP and include additional OT and assistive technology services if appropriate, "within 15 days"; (2) create a new BIP with participation of CSE and the parents, "within 15 days"; (3) provide the student with additional PT services one time per week for the remainder of the 2007-08 school year, summer 2008, and the 2008-09 school year; and (4) provide the student with additional speech-language services one time per week for the remainder of the 2007-08 school year, summer 2008, and the 2008-09 school year (IHO Decision at pp. 20-27).

The district appeals and argues that the impartial hearing officer erred in failing to grant the district's motion to dismiss for mootness because the district had agreed to provide all of the relief that the parents had requested and the parents only declined the agreement in order to have an opportunity to recover attorney's fees. The district also argues that there was no basis for the impartial hearing officer's award of additional services. Lastly, the district argues that the impartial hearing officer's order requiring the district to take actions pertaining to the 2007-08 school year, at a time when the school year had nearly ended, was arbitrary and capricious and an abuse of his discretion.

In their answer, the parents addressed the district's factual claims, set out a counter statement of facts and requested that the district's petition be denied in its entirety. The parents argue that the impartial hearing officer properly denied the district's motion to dismiss because there were unresolved issues regarding their additional services claim. Furthermore, the parents argue that they complied with all required procedures leading up to the impartial hearing and did not engage in acts that could be construed as "gaming the system". The parents contend that the impartial hearing officer properly found that the student did not receive a FAPE and awarded appropriate additional services that were supported by the record. The parents also contend that the impartial hearing officer properly found that the district's BIP was deficient, correctly directed the district to produce a new BIP and properly found that the 2007-08 IEP was deficient and correctly directed the district to produce a new IEP.

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<sup>11</sup> Because the district did not offer testimony from anyone familiar with how the goals were drafted, the impartial hearing officer concluded that the district failed to carry its burden to prove that the goals were appropriate. The district brought one witness to the impartial hearing, the district's director of special education. As a result, no testimony was taken from any of the student's teachers or related services providers. The district noted that these potential witnesses were BOCES employees who declined to testify, and the district did not take advantage of the impartial hearing officer's offer to subpoena any witnesses that the district desired (Tr. p. 206).

Turning first to the district's argument that the impartial hearing officer erred in failing to grant its motion to dismiss the matter, I find that the impartial hearing officer properly held that unresolved issues brought forth in the parents' due process complaint notice precluded dismissing the case as moot (IHO Ex. 1 at p. 3).

As a general rule, the dispute between the parties in an appeal must at all stages be "real and live" and not "academic," or it risks becoming moot (see Lillbask v. State of Conn. Dep't of Educ., 397 F.3d 77, 84 [2d Cir. 2005]). However, a claim may not be moot if the conduct complained of is "capable of repetition, yet evading review" (see Honig v. Doe, 484 U.S. 305, 318 [1988]; Lillbask, 397 F.3d at 84-85; Daniel R.R. v. El Paso Indep. Sch. Dist., 874 F.2d 1036 [5th Cir. 1989]; Application of a Child with a Disability, Appeal No. 06-070; Application of a Child with a Disability, Appeal No. 04-038). Ordinarily, an unresolved claim for additional services will prevent a case from becoming moot due to the passage of time (see Application of a Child with a Disability, Appeal No. 07-123; Application of the Bd. of Educ., Appeal No. 07-031). However, it has been held that where the parties have resolved every outstanding issue in a matter with the exception of additional services, and the district has unreservedly agreed to provide any additional services that the parent(s) requested, a case may be moot because there is no dispute in controversy (see Application of a Student with a Disability, Appeal No. 08-008).

The district's memorandum of law cites Application of a Student with a Disability, Appeal No. 08-008, extensively to support its argument that the parents' claims should be dismissed as moot. However, the facts in this matter are distinguishable from those in Application of a Student with a Disability, Appeal No. 08-008, and a different result is called for. In Application of a Student with a Disability, Appeal No. 08-008, a State Review Officer concurred with the impartial hearing officer that the parents' claims were moot and held that:

The hearing record supports the conclusion that [the district] agreed to meet all of [the parents'] requests regarding the student's substantive educational concerns. In addition, [the district] agreed to correct any procedural errors and to provide additional educational services to compensate for the failure to provide services identified by [the parents], which resulted in gaps in the delivery of services to the student (Application of a Student with a Disability, Appeal No. 08-008).

However, in the case at bar the impartial hearing officer determined that the district had not resolved the parents' additional services claim and had not yet satisfied the parents' demand for a new IEP (IHO Ex. 1 at p. 3). To wit, the impartial hearing officer's motion decision states:

The [d]istrict claims that it will provide additional services if there is a showing of deprivation, but it is not clear whether both parties would agree on what constitutes a deprivation in this context. The [d]istrict also has not shown that it has satisfied the parent[s]' demands for a new IEP 'as appropriate'. Again, it is not clear

whether both parties would agree on what constitutes an appropriate IEP (id.).<sup>12</sup>

The impartial hearing officer's reference to the need for "a showing of deprivation" is drawn from an affidavit in support of the district's motion to dismiss wherein a district representative states that the district will provide additional services "if any such deficiency is shown" (Dist. Ex. at p. 6). The district representative also averred that although the parents had not specified all of the additional services requested, she was aware that the parents believed the student was due additional OT services given that OT services were not delivered in compliance with the IEP (id. at p. 5). The district representative suggested that OT additional services would not be required because "OT services began later in the school year but have been more than made up" (id.; see also Dist. Ex. 5 at Ex. N at p. 5). Therefore, under the circumstances in this case, I find that the parents' additional services claim is not moot.

Next I will turn to the district's argument that the impartial hearing officer's award of additional services had no basis because the district offered the student a FAPE for the 2007-08 school year.

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 that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living (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]).<sup>13</sup> A student's educational program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.6[a][1]; see Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 132 [2d Cir. 1998]).

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

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<sup>12</sup> State regulations allow an impartial hearing officer to conduct a prehearing conference to, among other things, simplify or clarify issues (8 NYCRR 200.5[j][3][xi][a]). The impartial hearing officer did not conduct a prehearing conference in this matter to simplify or clarify the remaining issues. It also appears that neither party requested such a prehearing conference.

<sup>13</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]).

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]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd 07-0479-cv [2d Cir. Aug. 19, 2008]).

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

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs, establishes annual goals related to those needs, and provides for the use of appropriate special education services (Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

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 (see Somoza v. New York City Dep't of Educ., 2008 WL 3474735, at \*1 [2d Cir. Aug. 14, 2008]; 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]). While compensatory education is a remedy that is available to students who are no longer eligible for instruction, State Review Officers have awarded "additional services" 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 (see Application of the Bd. of Educ., Appeal No. 06-074; 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).

The New York State Legislature amended the 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 statute took effect for impartial hearings commenced on or after October 14, 2007 (see Application of the Bd. of Educ., Appeal No. 08-016). Here, the parents' due process complaint notice was dated January 4, 2008 (Dist. Ex. 1). Accordingly, the district had the burden of proof to demonstrate that it offered the student a FAPE for the 2007-08 school year.

In making his determination that the district failed to offer the student a FAPE for the 2007-08 school year, the impartial hearing officer identified deficiencies in the 2007-08 IEP as well as deficiencies with the evaluations that the CSE relied upon in creating the IEP and failures to implement the educational program as designed (IHO Decision at pp. 14-20). For the reasons set forth below, I concur with the impartial hearing officer and find that the district failed to offer the student a FAPE.

The district contends that the impartial hearing officer erred in determining that there was any deficiency with respect to the goals in the 2007-08 IEP. The impartial hearing officer found, and I agree, that the goals in the student's 2007-08 IEP did not adequately address the student's identified needs (IHO Decision pp. 14-15). The hearing record reflects that the CSE convened on May 3, 2007, June 14, 2007, and September 19, 2007 to develop the student's educational program for the 2007-08 school year (Parent Exs. 18; 19; 24).

The present levels of performance in the student's proposed 2007-08 IEP reflected the student's need for a positive, supportive learning environment; a systematic approach to organizing materials; reading instruction at a fourth to fifth grade level; consistent review of previously learned math skills and computation methods; development of multi-step word problems in math; and increasing the student's ability to contribute appropriate and relevant information in group discussions (Parent Ex. 24 at p. 2). Annual goals to address the student's deficits in reading, writing and math were included in the IEP (id. at p. 7), and although instructional levels were not indicated, CSE meeting notes reflect that a fifth to sixth grade instructional level was determined to be appropriate for each area (Parent Ex. 19 at p. 2).

The impartial hearing officer correctly found that the IEP did not include annual goals to address the student's identified needs in organization, contributing relevant information to discussions, or in developing problem solving strategies (IHO Decision at pp. 14-15). While goals were included to address study skills, they were not an identified need of the student (Parent Ex. 24 at p. 7).

Likewise, the 2007-08 IEP indicates that the student's classroom comments "easily swerve" into inappropriate and "emotionally charged" areas such as references to body parts and bodily functions (Parent Ex. 24 at p. 2). Although the 2007-08 IEP identifies a need for guidance and clarification regarding appropriate social topics, this need is not specifically addressed by a goal (id. at p. 3).

In addition to these deficiencies identified by the impartial hearing officer, the hearing record reflects that the student exhibited severe receptive and expressive language delays and a moderate auditory processing disorder (Parent Ex. 37). The two goals on the student's September 2007 IEP developed by the speech-language therapist addressed the student's auditory processing disorder; however, no speech-language goals addressed the student's identified receptive and expressive language delays (Parent Ex. 24 at pp. 7, 8).

The CSE determined that due to the student's difficulty with social interactions, he was unable to participate in physical education in the general education setting and recommended adapted physical education (Parent Ex. 24 at p. 6). However, the CSE did not address this need with goals (Tr. p. 112; Parent Ex. 24 at pp. 7, 8).

The management needs portion of the 2007-08 IEP provides for environmental modifications and material resources to address some of the student's needs relative to his multiple diagnoses and includes preferential seating, a small quiet environment, directions repeated as needed and repeated back to speaker by the student, work tasks broken down into one and two step directions, reminders and assistance to check work for completeness and accuracy, and presentation of materials both visually and auditorily (Parent Exs. 24 at pp. 2, 3; 48 at p. 2). However, although the CSE identified the student's need for frequent movement breaks during "academic periods" throughout the day to relax muscular tension this was not identified as a management need in the 2007-08 IEP (Parent Ex. 24 at p. 4).

While the deficiencies with the content of the IEP may not have risen to the level of denying the student a FAPE on their own, those deficiencies, in concert with the failures to properly implement the IEP as discussed below, did deny the student a FAPE.

The district contends that the impartial hearing officer erred in finding that the district did not provide appropriate assistive technology services for 2007-08; however, the hearing record does not support this argument. The hearing record reflects that the student was not provided with the monthly 30-minute sessions of assistive technology in the general education setting called for in the 2007-08 IEP (Parent Ex. 24 at p. 4). The CSE chairperson testified that assistive technology services were not provided to the student in September, October, and November of the 2007-08 school year, but that the student was provided with one 70-minute session on December 14, 2007 to make up for the missed sessions (Tr. pp. 67, 68). However, during this make-up session, the software which was recommended on the student's 2007-08 IEP was not able to be accessed due to problems with the passwords (Tr. p. 117; Parent Ex. 24 at p. 4). Moreover, although the 2007-08 IEP reflects that the assistive technology services were to be provided in the general education setting, the hearing record reflects that the student did not participate in keyboarding in the general education setting, but rather, within his self contained classroom (Tr. pp. 242, 243). Similarly, the IEP states that the student was to be mainstreamed for art classes, but the hearing record shows that the student began to participate in the general education setting for art only a few days before the beginning of the impartial hearing on April 7, 2008 (Tr. pp. 242, 243). The hearing record supports a finding that the district failed to implement the student's IEP with respect to assistive technology services for the 2007-08 school year.

The district contends that the impartial hearing officer erred in finding any deficiency with respect to the OT services provided during the 2007-08 school year. The 2007-08 IEP recommended indirect consult OT services in the general education setting, at a frequency of one

30-minute session per month (Parent Ex. 24 at p. 4). The hearing record reflects that no OT services were provided until November 29, 2007, as a district therapist was not available (Tr. p. 62). The CSE chairperson testified that beginning on November 29, 2007 the student received one 30-minute session weekly of direct or indirect OT which she opined exceeded what was required by his 2007-08 IEP (Tr. p. 63). The CSE chairperson also testified that the purpose of the recommended OT consult was not to improve the student's keyboarding skills, but rather to observe how the student was using the recommended assistive technology and software (Tr. p. 125). However, the hearing record reflects that the student did not begin the keyboarding class until April 2008, it did not occur in the general education setting and the assistive technology software programs were not accessible to the student (Tr. p. 117). The hearing record does not reflect that the student's 2007-08 IEP was amended to reflect the change in the student's OT services or to add goals to be addressed by the OT during the direct or indirect therapy sessions (Parent Ex. 24). The hearing record supports a finding that the district failed to implement the student's IEP with respect to OT services for the 2007-08 school year.

The district further contends that the impartial hearing officer erred in finding the district's (BOCES) PT evaluation (Parent Ex. 32) to be deficient; however the hearing record supports the impartial hearing officer's determination. The report of the BOCES physical therapist who evaluated the student in November 2007 indicates that the student told the evaluator that he was going to have an "MRI" in the next few weeks and reported pain from his tailbone to his shoulder blades, severe low back pain with an emphasis at his right thoracic/lumbar region, and lower extremity weakness (*id.* at p. 1). According to the evaluation report, the student's pain symptoms had started three to four years ago (*id.*). The evaluator administered several tests which revealed no change in the student's symptoms and determined that a neurological examination was noncontributory (*id.* at pp. 1-2). She noted abnormal postures when the student was sitting and standing (*id.* at p. 1). The evaluator determined that the signs and symptoms found during her evaluation of the student were consistent with right thoracolumbar scoliosis with subsequent low back pain (*id.* at p. 2).

The independent PT evaluation completed on February 6, 2008 by OTAS included observational assessments and administration of the BOT-2, the results of which indicated that the student exhibited below average skills in running speed and agility, balance, and bilateral coordination (Parent Ex. 34 at p. 1). The student achieved scores in the average range for strength, but had significantly poor postural mechanics, decreased muscle tone in his trunk, and muscle imbalances throughout his trunk and lower extremities affecting his ability to sit or stand for prolonged periods (*id.* at p. 2).

Both the BOCES physical therapist and the independent OTAS physical therapist recommended a home exercise program and education for the student on what he needed to do (Tr. pp. 77, 223, 224; Parent Ex. 32 at p. 2). The BOCES therapist opined that the student did not appear to qualify for school based PT and recommended participation in activities that encouraged upright erect posture and increased postural endurance to prevent further scoliosis development (Parent Ex. 32 at p. 2). The independent OTAS physical therapist recommended one time weekly PT services in school to work on strengthening the student's back and correcting his posture, modified seating using a chair with a straight back and a lumbar support, and to have a hot pack available to use as needed and before therapy (Tr. pp. 223-24).

The OTAS evaluator testified that the impact of the student's physical condition on his ability to function in school was that he was not able to sit or stand for long periods without having pain and would need to change positions throughout the day and stretch every one to two hours (Tr. pp. 224-25). He further testified that the student told him that "once he was in pain, he had a hard time paying attention" (Tr. p. 234). The OTAS evaluator stated that the student had "gotten tight, so he just needs to get back where he was more flexible," indicating regression in the student's flexibility over time (Tr. p. 225).

I find persuasive the OTAS physical therapist's opinion stating that in-school PT and modified seating would have been appropriate for the student for the 2007-08 school year. In making this finding, I have taken into consideration not only the evaluator's report and hearing testimony, but also the testimony of school personnel stating that such services would have been appropriate (Tr. p. 79).

Next, the district contends that the impartial hearing officer erred in finding any deficiency with respect to speech-language therapy services. Although the hearing record reflects that speech-language therapy was provided to the student at the start of the 2007-08 school year, the hearing record supports the impartial hearing officer's finding that the district failed to provide the speech-language therapy services as recommended in the student's IEP and also failed to show how individual speech-language services addressed the student's needs (IHO Decision at p. 17).

Testimony elicited from the CSE chairperson indicates that the district provided the student with two 30-minute speech-language sessions weekly starting in September 2007; however, the services were delivered individually instead of in a group, due to the unavailability of other students to group him with (Tr. p. 111). The CSE chairperson explained that the "mixed setting" indicated on the student's 2007-08 IEP referred to a general education setting such as lunch, providing the speech-language therapist the opportunity to observe and work with the student in the mainstream setting to determine how the student's language impacted his ability to communicate with other students (*id.*). However, the hearing record is unclear as to whether the district provided speech-language therapy in this setting. Moreover, the student's 2007-08 IEP does not contain speech-language goals that address the student's use of language to communicate with other students (Parent Ex. 24 at pp. 7, 8). Therefore, given that the district had the burden of proof in this matter, I concur with the impartial hearing officer's finding of deficiency with respect to speech-language services.

The district contends that the impartial hearing officer erred in finding that the district did not appropriately provide for the student's behavioral needs for the 2007-08 school year, but the hearing record supports the impartial hearing officer's determination. The hearing record reflects that for the 2006-07 school year, the student's progress report indicated that in all social/emotional areas the student was reported to be demonstrating "some progress," "progressing satisfactorily" or "achieved," with the exception demonstrating self-control in which he was reported to be demonstrating progress with teacher support (Parent Ex. 27 at p. 2). Comments on the 2006-07 progress report indicated that the student demonstrated good participation, interest and retention, and that the student enjoyed class, was a pleasure to have in class and was compassionate and kind to his classmates (*id.*).

However, the hearing record reflects that the situation had changed sometime before or during the 2007-08 school year. The present levels of performance and individual needs portion

of the student's 2007-08 IEP stated that the student needed assistance to contribute relevant information to discussions, and guidance and clarification regarding appropriate social topics, but the IEP does not contain goals to address these needs (Parent Ex. 24 at pp. 2, 3). The student's 2007-08 first quarter progress report included comments from the student's social worker indicating that the student worked most effectively when adult supervision supported his social behavior (Parent Ex 28 at p. 4). Teacher comments on the progress report refer to the student's erratic behavior and obscure comments (verbal and written) that detract from his success both academically and socially, stating that "restrictions made necessary through his inappropriate behavior and comments definitely detract from the positive experience possible in the middle school environment" (id.). The progress report indicates that in the social/emotional areas the student showed "some progress" in five of the thirteen areas, but that he was "not progressing satisfactorily" in the remaining eight areas (id.).

The hearing record indicates that since the beginning of the 2007-08 school year, the student demonstrated behavioral problems that included inappropriate language, "telling teachers off," in-school suspensions and one incident where the student left the cafeteria and was not found for 1/2 hour (Tr. p. 244). The hearing record indicates that an FBA and subsequent BIP was completed by the district and sent to the parents in early April 2008; however, the student's mother testified that although she was listed as a member of the team completing the FBA and BIP, she was not consulted to give input into the plan (Tr. pp. 253, 254).

Based on my review of the hearing record, I find that the district has failed to show that it adequately addressed the student's escalating behavioral needs during the 2007-08 school year. The hearing record reflects that the social/emotional/behavioral goals in the 2007-08 IEP did not accurately address the student's needs and that since the beginning of the 2007-08 school year, the student's inappropriate behavior had increased and negatively impacted his academic and social success (Parent Exs. 24 at pp. 2, 3; 28 at pp. 2-6). Although the district conducted an FBA and developed a BIP, it did not do so until April 2007 and because the district did not put the BIP into evidence it is unclear if the CSE considered the plan as set out in 8 NYCRR 200.22(b) (Tr. pp. 253, 254). In addition, the hearing record reveals that the district did not provide weekly reports to the student's mother as indicated in the 2007-08 IEP (Tr. p. 246).

The district also contends that the impartial hearing officer erred in finding that the student had not been progressing in his program. Although there is insufficient evidence in the hearing record to support a finding of a lack of academic progress, there is ample evidence of a lack of progress in the social, emotional and behavioral realms. The 2007-08 IEP failed in three ways: it did not offer a FAPE at the time it was developed, it was not properly implemented, and it was not revised as appropriate during the year when the student's social, emotional and behavioral needs increased.

Having identified flaws in the content of the student's IEP, as well as deficiencies in the implementation of the IEP, sufficient to support the impartial hearing officer's determination that the district failed to offer the student a FAPE, I turn next to the district's arguments regarding the impartial hearing officer's award of additional services.

The impartial hearing officer made specific awards of additional services for PT and for speech-language therapy for the remaining duration of the 2007-08 school year, the 2008-09

school year and the intervening summer (IHO Decision at p. 27). The district claims that there is no basis in the record for these awards, but this argument is not persuasive.

The PT award is supported by the private PT evaluation and the testimony of the private physical therapist who stated that failing to give the student PT during the 2007-08 school year "could have caused increased pain and then have affected his learning because he couldn't sit for long periods of time" and that he "would have done much better with an exercise program that he would have been given, followed through with in the school" (Tr. pp. 225-26). When asked if the student would benefit from additional PT services over and above an ordinary weekly PT session, the private therapist answered, "[i]t would benefit him as long as it wasn't given at such a frequency where it would cause him more pain" (*id.*).

Further, the speech-language therapy additional services award is supported by the hearing record. Although speech-language therapy was delivered from the start of the 2007-08 school year, it was, as described more fully above, apparently delivered in individual sessions, rather than the "mixed" group sessions called for in the 2007-08 IEP (Tr. p. 111). Given that the purpose of the "mixed" group sessions outlined in the IEP was to observe how the student communicated in the mainstream environment (*id.*), I see no reason to overturn the impartial hearing officer's finding that delivering the sessions individually constituted a deprivation that could be redressed with additional services (IHO Decision at p. 24).

The impartial hearing officer remanded the question of OT and assistive technology additional services awards to the CSE, after finding that although there was a deprivation of services shown for both OT and assistive technology, the hearing record did not contain sufficient information to determine how the deprivation effected the student or whether additional services could remedy the deprivations (IHO Decision at pp. 23, 24). Nonetheless, the hearing record does suggest that additional OT and assistive technology services may in fact be warranted because the student's 2007-08 first quarter progress report indicated he received a "not progressing satisfactorily" on his writing goal with teacher comments indicating his writing was "consistently brief and lacking details" (Parent Ex. 28 at p. 2). The assistive technology software—which was not made available to the student—addressed sentence construction, vocabulary development and keyboarding skills and speed (Parent Ex. 24 at p. 4). Upon review of the hearing record, I see no reason to disrupt the impartial hearing officer's determination on these issues. Although there is some concern in remanding a claim for compensatory education or additional services to a CSE that has failed to offer a FAPE to a student, it has been held that such remands may be appropriate in cases where the hearing record is insufficient for a reviewing officer to make the determination and where the parents do not object to the remand, as appears to be the case here (*see, e.g., Mr. I. v. Maine Sch. Admin. Dist. No. 55*, 480 F.3d 1, 26 [1st Cir. 2007]; *see also Mr. P. v. Newington Bd. of Educ.*, 512 F. Supp. 2d 89, 111-112 [D.Conn., 2007]). It is also noted that the district has expressed a willingness to work with the parents to resolve all issues. I encourage both parties to collaborate in good faith in devising appropriate programming for the student. I also encourage the parents in the future to raise their concerns whenever possible at CSE meetings.

The district's final argument is that it was arbitrary and capricious, an abuse of discretion and a violation of the mootness doctrine for the impartial hearing officer to order the district to take several actions during the remainder of the 2007-08 school year when that school year had nearly ended. The district offers no statutory or regulatory support for its contention and cites to no case law. Essentially, the impartial hearing officer ordered the district to meet to re-write the

IEP and the BIP to correct deficiencies identified during the hearing. At the time of the impartial hearing officer's decision, dated June 2, 2008, there was still more than 20 days remaining in the school year which was to end June 25, 2008 (Pet. ¶¶ 89-91). Although as a practical matter, the changes to the IEP and the BIP may have had little impact on the remainder of the school year, I am unwilling to hold that the short time remaining in the school year would have meant that an improved IEP and BIP would have no impact on the student. At the very least, corrected programs would serve as a better basis for which to plan for the 2008-09 school year. In light of the above, I find that the impartial hearing officer's orders to the district were not in violation of the mootness doctrine and were supported by the hearing record.

I have considered the parties' remaining contentions and find that it is not necessary to address them in light of my determinations herein.

**THE APPEAL IS DISMISSED.**

**Dated: Albany, New York  
August 25, 2008**

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**PAUL F. KELLY  
STATE REVIEW OFFICER**