



The University of the State of New York

The State Education Department State Review Officer

No. 08-061

Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:

Michael Best, Special Assistant Corporation Counsel, attorney for petitioner, G. Christopher Harriss, Esq., of counsel

Partnership for Children's Rights, attorneys for respondent, Erin McCormack, Esq., of counsel

DECISION

Petitioner (the district), appeals from the decision of an impartial hearing officer which found that it offered an appropriate educational program to respondent's (the parent's) son, but ordered the district to continue to fund the student's private placement at the Cooke Center for Learning and Development at Our Lady of Pompeii (Cooke) through the conclusion of the 2007-08 school. The parent cross-appeals from the impartial hearing officer's determination which found that the district offered her son an appropriate educational program for the 2007-08 school year and denied her request for payment of her son's tuition costs at Cooke for the 2007-08 school year. The appeal must be dismissed. The cross-appeal must be dismissed.

At the time of the impartial hearing, the student was attending third grade at Cooke where he was unilaterally re-enrolled by his mother in September 2007 (Tr. pp. 25, 317; Parent Ex. A at p. 1; see Parent Exs. Z; BB).¹ The Commissioner of Education has not approved Cooke as a school with which districts may contract to instruct students with disabilities (8 NYCRR 200.1[d], 200.7). The student's eligibility for special education programs and services as a student with a speech or

¹ The student attended Cooke during the 2005-06 and 2006-07 school years (see Parent Ex. A at p. 2; see also Tr. p. 299). The student's attendance at Cooke for the 2005-06 school year was the subject of a previous impartial hearing, which resulted in a decision dated March 15, 2006 (amended March 21, 2006); the student's attendance at Cooke for the 2006-07 school year was the subject of a Stipulation of Settlement and Discontinuance (Parent Ex. A at p. 2).

language impairment is not in dispute in this appeal (see 34 C.F.R. § 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

During the 2006-07 school year, the student's mother obtained two private evaluations of her son, which she provided to the district in January 2007 (Parent Exs. K; L; CC). In August and October 2006, the student underwent a comprehensive neuropsychological and psychoeducational evaluation due to his "history of speech and language delays, difficulty acquiring academic skills, and difficulty sustaining attention" to clarify the nature of the student's difficulties and to determine the student's educational, social, and emotional needs (Parent Ex. L at p. 1). Behavioral observations of the student revealed variable attention and that when engaged in "visual or hands-on" tasks, the student exhibited increased focus, "expressed enthusiasm," took "pride in his successes," and demonstrated meticulous attention to detail in his written work (id. at p. 2). The evaluator—a psychologist—noted that when drawing, the student exhibited "sustained attention without difficulty and put great effort into his drawing" (id.). When given tasks requiring auditory and/or verbal skills, the student "became more easily fatigued, distracted and impulsive," and the evaluator noted that he "benefited" from "frequent breaks" (id.). The student became frustrated with tasks he perceived as difficult and "felt insecure about his abilities" (id.).

To assess the student's cognitive functioning, the evaluator administered the Wechsler Preschool and Primary Scale of Intelligence-Third Edition (WPPSI-III), which yielded a full-scale IQ score of 95 (average range), a verbal scale score of 86 (low average range), and a performance scale score of 93 (average range) (Parent Ex. L at pp. 2, 9). Generally, the evaluator noted that the student "performed stronger on visually based tasks" (id. at p. 2). The student attained a processing speed score in the superior range, which the evaluator described as a "significant strength," and he attained a general language score in the average range (id. at pp. 2, 4, 9).

An assessment of the student's memory skills using the Wide Range Assessment of Memory and Learning (WRAML) yielded a visual memory index in the low average range and a verbal memory index in the extremely low range (Parent Ex. L at p. 3). The evaluator indicated that although the student "demonstrated weak short-term memory skills," the student demonstrated a "significantly stronger" memory for "visual information than for verbal information" (id.). According to the evaluator, the student exhibited "great difficulty retaining auditory and verbal information in short term memory" and benefited from the use of visual aids and frequent repetition to "learn new information" and to "retain language-based information" (id.).

To assess the student's attention and executive functioning, the evaluator used a developmental neuropsychological assessment, the NEPSY, to measure the student's visual and auditory attention, which revealed that the student performed in the average range (Parent Ex. L at pp. 3, 9-10). The student demonstrated high average ability on a task involving manipulatives that required him to "plan ahead and visualize solutions to problems" (id. at p. 3). The evaluator noted that throughout the evaluation, the student exhibited strong visual attention, but variable auditory attention "depending upon the extent to which the information he was attending to involved language comprehension" (id.).

The evaluator also used the NEPSY to assess the student's visual motor skills, graphomotor skills, and language processing skills (Parent Ex. L at pp. 3-4, 9-10). The student exhibited "excellent" visual motor skills and performed in the "very superior range copying geometric

designs" and "judging line orientation" (id. at pp. 3, 9-10). The student also demonstrated an appropriate right-handed pencil grip, an "excellent" ability to draw with "precision" and "great attention to details," which the evaluator described as "advanced skills for his age" (id. at p. 4). However, despite his well-developed drawing ability, the student could not write his last name and the evaluator opined that the student's "handwriting difficulties [were] due in part to the language processing involved in writing letters" (id.). With respect to language processing, the student's NEPSY scores fell within the borderline range and were "significantly lower than his other domain scores" (id.). The student performed in the low average range on a phonological processing task requiring him to "break apart words at the level of letter sounds and word segments," as well as on a "task assessing speed and fluency of language production" (id.). The evaluator indicated that the student exhibited "extreme difficulty on a task of language comprehension" and "great difficulty both attending to and comprehending auditory and verbal information" (id.).

An administration of the Wechsler Individual Achievement Test-Second Edition (WIAT-II) to assess the student's academic achievement yielded reading and mathematics composite scores in the low average range (Parent Ex. L at pp. 4-5, 10). Overall, the student's results indicated that he performed "stronger on tasks assessing rote knowledge and weaker on tasks assessing comprehension skills" (id. at p. 4). At that time, the student's academic skills ranged from "a Kindergarten to early [first] grade level" (id. at pp. 4, 10).

Assessment of the student's social/emotional functioning and behavior using both the parent and teacher rating scales of the Conners' Rating Scale-Revised: Long Version (CPRS-R: L) reflected the parent's "mild concerns" about the student's "restlessness and inattention" and an elevated score regarding perfectionism reported by the student's teacher (Parent Ex. L at pp. 5, 11). The student's teacher indicated that the student tended to set "very high goals for himself, [was] a perfectionist, and check[ed] his work over and over" (id. at p. 5). The evaluator further noted the student's enthusiasm for learning, his insecurity about his abilities, his awareness of his slow academic achievement, and his resulting "frustration and embarrassment" (id.). It was also noted that outside the learning environment, the student felt "good about himself and his relationships" (id.).

After providing a summary of the testing results, the evaluator noted the student's diagnosis of mixed receptive-expressive language disorder and recommended the following: placement in a small, language-enriched classroom "specializing in the education of children with learning disabilities;" "a multi-sensory approach to instruction throughout the school day;" speech-language therapy, counseling, and occupational therapy (OT) to work on handwriting; 12-month programming for speech-language services; continued use of an "FM unit" in school; reading aloud at home; use of visual aids and repetition of information at school and at home; and encouragement to pursue his artistic skills (Parent Ex. L at pp. 7-8). The evaluator also recommended the following testing accommodations: extended time (1.5), separate location, test directions and questions read aloud and explained as needed, and an opportunity to respond orally to questions or to dictate responses to a scribe (id. at p. 7). In addition, the evaluator recommended the following classroom accommodations: waiver of the student's requirement to read aloud in front of peers, seating provided in the front of the classroom and in close proximity to the teacher, and verbal directions repeated and rephrased when necessary (id.).

In October and November 2006, the student underwent a comprehensive speech-language evaluation, which included the administration of the Expressive One Word Picture Vocabulary Test (EOWPVT), the Receptive One Word Picture Vocabulary Test (ROWPVT), and the receptive and expressive language subtests of the Clinical Evaluation of Language Fundamentals-4 (CELF-4) (Parent Ex. K at pp. 1-10). On the EOWPVT used to assess the student's spoken English vocabulary, the student performed in the low average range (id. at pp. 2-4). Administration of the ROWPVT, which required the student to orally identify pictures to assess his comprehension of English vocabulary, also yielded scores in the low average range (id.).

The evaluator administered receptive and expressive language subtests of the CELF-4 to assess the student's language use and comprehension (Parent Ex. K at p. 4). The receptive language subtests measured the student's auditory processing skills (the ability to listen, remember, process, and formulate a response); the student's receptive semantic abilities (the ability to categorize words and identify opposites); and the student's ability to understand spoken paragraphs (the ability to process "lengthy, meaningful, and linguistically complex information" and to use short-term memory skills to understand the main idea, inference, detail, sequence, and prediction of the orally presented short paragraph) (id. at pp. 4-5). The student performed in the low range in auditory processing skills, "within normal limits" in receptive semantic abilities, and with "moderately reduced abilities" in his ability to understand spoken paragraphs (id. at pp. 3-5). The expressive language subtests measured the student's knowledge of word structure rules (ability to use grammatical structures in spoken language); the student's expressive formulation skills (the ability to formulate sentences related to pictures using a target word/phrase); and the student's auditory memory skills (the ability to recall, and repeat verbatim, sentences of increasing length and complexity) (id. at pp. 5-6). The student's scores demonstrated a "mildly reduced ability to use grammatical structures in his spoken language," that he performed in the low average range in his ability to formulate sentences, and that he presented with a "decreased ability" to understand orally presented information (auditory memory skills) (id. at pp. 3, 5).

In addition to the language tests, the evaluator administered various phonological awareness subtests to assess the student's phonological processing skills (Parent Ex. K at pp. 3, 6). The student could identify and produce "rhyming words, identify phonemes in the initial position in words, and perform 2 syllable deletion tasks" (id. at p. 6). The student presented with difficulties identifying phonemes "in the final and medial position in words, segment sentences, and segment phonemes," blending phonemes, deleting syllables, substituting syllables and phonemes, substitution tasks, repeating 5-digit numbers, reciting the alphabet, and recalling the months of the year (id.). After being shown the alphabet, the student could recite the alphabet names and corresponding sounds with "100% accuracy" (id.). Informal assessments of the student's reading and writing demonstrated severely decreased reading and writing production skills (id. at pp. 6-7). Finally, the evaluator tape recorded and transcribed language samples, which revealed difficulties in the student's ability to include details in descriptions, to summarize his favorite movie, to explain his own thoughts, and to formulate complex sentences (id. at p. 7).

Overall, the evaluator described the student as "friendly" and "playful," and that he displayed a "moderate receptive and expressive language delay that negatively impact[ed] his academic and social success" (Parent Ex. K at p. 8). She noted that the student's language deficits included "poor comprehension" of orally presented stories, "reduced ability following directions, reduced ability to use grammatical structures in his spoken language, . . . , difficulty formulating

complete complex sentences, and decreased phonological awareness skills" (id.). The evaluator noted that the student's ability to use grammatical structures in his spoken language represented "essential" skills in reading and writing (id.). The report also noted the student's severely decreased reading and writing skills (id.). Based upon the information presented, the evaluator recommended two 30-minute sessions per week of speech-language therapy in a 1:1 setting to address the three long-term goals developed and incorporated into the evaluation report (id. at p. 9). The goals included the following: to increase the student's receptive and expressive language skills; to increase the student's reading comprehension and production; and to increase the student's writing production (id.). In addition to the goals, the evaluator developed 11 detailed and measurable short-term objectives that targeted the student's needs in the areas of auditory processing, grammatical structures, formulating complex sentences, and phonological awareness skills (id.).

On May 14, 2007, the Committee on Special Education (CSE) convened at Cooke to conduct the student's annual review and to develop his individualized educational program (IEP) for the 2007-08 school year (Parent Ex. G at p. 1; see Tr. pp. 90-91). The CSE consisted of a district school psychologist (who also acted as the district representative), a district special education teacher, a district social worker, an additional parent member, the student's mother, the student's special education teacher at Cooke, the student's speech-language therapist at Cooke, and a site supervisor from Cooke (Parent Ex. G at p. 2; see Tr. pp. 255-57). At the impartial hearing, the student's mother testified that the Cooke staff members in attendance at the CSE discussed the student's "academic functioning level and progress," as well as his present levels of performance "academically, socially and with his speech and language" (Tr. pp. 299-300; see Tr. pp. 94-97). The student's mother also testified that she requested a Related Services Authorization (RSA) at the CSE meeting to allow her son to receive speech-language therapy during summer 2007 (Tr. pp. 300-01). The district's school psychologist who attended the CSE meeting testified that the CSE had a "very lengthy discussion" about the parent's RSA request, the student's eligibility for extended school year services (ESY), substantial regression, and a document presented to the CSE to support the parent's request (Tr. pp. 97-102, 300-01; see Dist. Exs. 7; 9).² The school psychologist further testified that based upon the discussion at the meeting, the CSE determined that the student was not eligible for ESY services and denied the parent's request for an RSA (Tr. pp. 99-102, 300-01).

In the academic performance and learning characteristics' section of the IEP, the CSE noted that formal tests administered to the student indicated that he functioned in the average range intellectually and demonstrated strong visual attention and memory (Parent Ex. G at p. 3). The CSE noted the student's difficulty with "retaining auditory and verbal information" and his delayed receptive and expressive language (id.). The IEP included the student's most recent WIAT-II results for reading, writing, and mathematics, indicating that the student's academic skills ranged between kindergarten to first grade instructional levels (id.). To address the student's identified academic management needs, the CSE recommended multisensory instruction, preferential seating, visual cues, repetition of information and directions, and simplified language (id.). The IEP noted that according to a March 5, 2007 school report, the student could "answer who, what

² The document, dated May 30, 2006, and titled "Speech-Language Addendum," recommended a 12-month program for speech-language services "throughout the summer" but does not refer to a specific school year (Dist. Ex. 9).

and when questions within a story, with some teachers assistance;" he could add and subtract "numbers up to 10 using counting cubes;" he understood money; and although he knew money values, he could not "combine them" (id. at p. 4). The IEP also indicated the student was "learning to use picture cues to understand story comprehension" and pointing "to words to keep him focused" (id.). At the time of the CSE meeting, teacher estimates indicated that the student performed at the "high" kindergarten instructional level in reading and writing, and at the first grade instructional level in mathematics (id.). To address these additionally identified academic management needs, the CSE recommended the use of manipulatives in mathematics, teacher prompts, an "FM unit," rewording directions, visual cues, and the use of manipulatives in reading (id.).

With respect to the student's social/emotional present levels of performance, the IEP indicated that the student was easily distracted, that he tended to be a "perfectionist," and preferred to work "alone rather than asking for help" (Parent Ex. G at p. 5). The IEP also noted that the student "may shut down" when faced with "challenging" tasks and that he experienced frustration when he "forgets information" (id.). The IEP indicated that the student's behavior did not seriously interfere with instruction and could be addressed by a regular and/or special education teacher (id.). To address the student's identified social/ emotional management needs, the CSE recommended counseling, support and encouragement to correct the student's homework and class work errors, and the use of visual cues to "minimize his frustration and tendencies toward perfectionism" (id.). In the health and physical development present levels of performance, the IEP noted that an auditory processing evaluation revealed the student's "difficulties in tolerance-fading memory and decoding," and that he also had difficulties with visual tracking (id. at p. 6). The IEP also noted that the student "has been prescribed glasses for homework and class work to assist with visual tracking tasks" (id.). The IEP contained 7 annual goals and 24 short-term objectives to address the student's areas of need in social interaction skills, speech-language, literary response and expression skills, information and understanding skills, number concepts, measurement skills, and expressive and receptive language skills (id. at pp. 7-9).

Based upon the information provided, the CSE recommended placement in a 12:1+1 special class in a community school with related services of counseling and speech-language therapy for the 2007-08 school year (Parent Ex. G at pp. 1, 12). The CSE recommended one 30-minute session per week of counseling in a 1:1 setting; one 30-minute session per week of counseling in a 3:1 setting; and three 30-minute sessions per week of speech-language therapy in a 1:1 setting (id. at p. 12). The hearing record does not indicate that the student's mother expressed any objections about programming, other than her request for an RSA for summer speech-language therapy services, during the CSE's formulation of the student's 2007-08 IEP.

On May 30, 2007, the student's mother signed a 10-month enrollment contract with Cooke for the 2007-08 school year (Parent Ex. V at pp. 1-4).

In July 2007, the student's mother received a Final Notice of Recommendation (FNR) dated June 26, 2007, which identified the district's recommended placement of the student in a 12:1+1 special class in the student's home-zone community school and related services (Dist. Ex. 3; see Tr. pp. 24, 301-02, 322). At the impartial hearing, the student's mother testified that she contacted the assistant principal of the recommended placement in late July and was told to call back in early August; when the student's mother contacted the recommended placement in early August, she

was told to call back in late August (Tr. pp. 302-03). By letter dated August 8, 2007, the student's mother advised the district that she could neither accept nor reject the placement recommended in the FNR at that time because she would not be able to observe a classroom until September 2007 (see Parent Ex. BB; see also Tr. pp. 302-03). In her letter, the student's mother indicated that if the recommended placement was not appropriate for her son, she would re-enroll him at Cooke for the 2007-08 school year and seek payment of his tuition costs from the district (id.). The student's mother called the recommended placement again in September and scheduled an appointment to visit the school during the first week of September (Tr. pp. 303-04). At that visit, the student's mother spoke with the special education teacher of the recommended 12:1+1 special class, she observed the classroom, and she spoke with a speech-language therapist (Tr. pp. 304-05, 314-15). On September 26, 2007, the student's mother returned to visit the recommended placement with Cooke's site supervisor and spoke with the school psychologist and the same speech-language therapist she had spoken to at the earlier visit (Tr. pp. 305-06, 314-15; see Tr. p. 278).³ The student's mother determined that the recommended placement was not appropriate to meet her son's speech-language and auditory processing needs, noting that she was uncertain as to whether her son would receive the recommended speech-language therapy services, and further, because she was concerned about management needs of other students in the special class (Tr. pp. 306-07). By letter dated September 27, 2007, and received by the district on October 10, 2007, the student's mother rejected the recommended placement, notified the district that her son would remain enrolled at Cooke for the 2007-08 school year, and indicated that she would file for an impartial hearing (Parent Ex. Z).

By due process complaint notice dated November 9, 2007, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2007-08 school year because the annual goals and short-term objectives in the student's IEP would not "yield meaningful educational progress" and that the recommended placement failed to meet the student's special education needs, noting the student's "particular" need for "speech-language therapy with emphasis on auditory training" (Parent Ex. A at pp. 1-2). The parent requested an interim pendency determination finding that Cooke was the student's pendency placement and directing the district to pay the costs of the student's attendance at Cooke based upon an unappealed impartial hearing officer decision, dated March 15, 2006 (id. at p. 2; see Parent Exs. B at pp. 5-7; C at p. 3).⁴ As relief, the parent requested a finding that the district failed to offer the student a FAPE for the 2007-08 school year, that Cooke was an appropriate placement, that equitable considerations favored the parents, and that the parent was entitled to reimbursement for the costs of her son's tuition at Cooke for the 2007-08 school year (id.). In addition, the parent requested

³ The Cooke site supervisor who accompanied the student's mother to the September 26, 2007 visit at the recommended placement was not the same Cooke site supervisor who attended the May 14, 2007 CSE meeting (compare Tr. pp. 224, 230, 251-52, 256, 271, 306, with Parent Ex. G at p. 2).

⁴ By interim decision dated March 20, 2008 (corrected March 25, 2008), the impartial hearing officer determined Cooke as the student's pendency placement and directed the district to fund the student's placement at Cooke until such time "as the pendency placement is changed or that the district can demonstrate that it is in a position to offer a specific program substantially identical to the one ordered" in the previously unappealed impartial hearing officer's decision regarding the student's 2005-06 school year, dated March 15, 2006 (Interim Decision on Pendency at pp. 8-9).

that the impartial hearing officer order the district to prospectively fund the cost of the student's attendance at Cooke from September 2007 through June 2008 (id.).

On April 4, 2008, the parties proceeded to an impartial hearing, and after three days, the impartial hearing concluded on May 13, 2008 (Tr. pp. 1, 121, 220). In addition to the presentation of testimonial evidence, both parties also submitted documentary evidence at the impartial hearing (Tr. pp. 1-345; Dist. Exs. 1-11; Parent Exs. A-C; E-Z; AA-II; LL-MM).

With regard to the May 14, 2007 CSE meeting and the development of the student's 2007-08 IEP, the district's school psychologist who attended the CSE meeting testified that the student's "current providers and classroom teacher," as well as the student's mother, participated in the meeting (Tr. pp. 93-95). She described the CSE meeting as "cordial" and that the attendees were "really open to discussion about the student's current educational progress" (Tr. p. 95). Because she had not worked with the student, the district's school psychologist recalled asking "all the providers to give [her] a lot of information in order" to make an "appropriate decision" for the student (id.). The school psychologist testified that the CSE had "a lot of reports" available for review and in particular, she recalled the student's neuropsychological/ psychoeducational evaluation from August/ October 2006, the October/ November 2006 speech-language evaluation, a progress report, and a speech-language addendum (Tr. pp. 95-97).

When questioned about the annual goals and short-term objectives in the student's 2007-08 IEP, the school psychologist testified that she was a "little surprised" that the parent's due process complaint notice indicated that the goals and short-term objectives "were not developed appropriately," because the CSE reviewed the goals at the meeting and the "teachers did not indicate that there was anything wrong with the goals that we were laying out" (Tr. p. 103). She further testified that it had "never" been brought to her attention that the goals and short-term objectives developed were not appropriate and that she would have included any additional goals or short-term objectives raised (Tr. pp. 103-04). According to her testimony, the district's special education teacher who attended the CSE meeting was primarily responsible for the development of the annual goals and short-term objectives, which were taken directly from, or based upon, the information provided in the student's most recent evaluations and educational reports, by the student's classroom teacher, and from the student's most recent progress report from Cooke (Tr. pp. 104-05; see Tr. pp. 112-17; Parent Exs. K; L; X). In addition, she noted that draft goals had been developed by the district's special education teacher who attended the CSE meeting, which were brought to the CSE meeting, reviewed, and incorporated into the IEP (Tr. pp. 112-13). The school psychologist also testified that with respect to the speech-language goals and short-term objectives, the student's speech-language therapist from Cooke did not raise any issues about the appropriateness of the goals and objectives in the student's IEP, and further, the speech-language therapist did not draft or recommend any other speech-language goals or objectives to include in the IEP (Tr. pp. 106-07, 114). She noted that according to the student's 2007-08 IEP, he was mandated to receive speech-language therapy services and counseling, that the recommended placement could provide all of the student's related services, and she further confirmed that all of the students in the school who were mandated to receive speech-language services were receiving their services (Tr. pp. 49-51).

When asked about the CSE's recommendation to place the student in a 12:1+1 special class, the school psychologist stated that based upon the assessments, the evaluations, and the classroom

teachers, "everybody was in agreement" that the student required a small classroom environment (Tr. pp. 111-12). She testified that "the CSE team . . . believed that [the student] would benefit from a small classroom environment, and with a little extra support, and that's why [the CSE] included the paraprofessional, the 12:1+1 staffing ratio" (*id.*). The school psychologist believed that the CSE, at that time, had the "most current information from the school about [the student's] performance through the teacher's conversation and observation" (Tr. pp. 115-16). The school psychologist also testified that the recommended placement would have been able to provide all of the student's IEP services, implement the annual goals and short-term objectives, and provide all of the student's accommodations (Tr. pp. 52-53).

The special education teacher who taught the recommended 12:1+1 special class also testified at the impartial hearing (Tr. pp. 153-76). In September, his class originally consisted of seven to eight students, and then throughout the 2007-08 school year, the class filled to its maximum of twelve students (Tr. pp. 169-70). His students ranged in age from six to nine years old and functioned at the "low first grade to mid second grade" level in reading and mathematics (Tr. p. 170; *see* Dist. Ex. 10). He explained that while some of the students in his classroom did exhibit acting out behaviors, only one student had a formal behavior intervention plan (BIP) (Tr. p. 171). For specials, such as art or music, his students attended with non-disabled peers (Tr. p. 174). When a student first entered his class, the special education teacher reviewed the student's IEP to determine the student's "primary difficulties" and the student's goals (Tr. p. 175). He would then assess the student to "really determine what exactly the student needs" and would use the IEP as a "general guideline" (*id.*). Because his students exhibited different learning needs, the special education teacher initially evaluated the students to "determine levels" (Tr. p. 156). Since "most of the students have some language needs," he would begin with "language-based instruction," which included instruction in vocabulary, concepts, and questions to assure an understanding of the vocabulary (*id.*). Next, the special education teacher followed up with written instruction in a "workshop model" to present the lesson to all of the students using visual aids and hands-on materials, and then he arranged the students into small groups depending upon the students' needs (Tr. pp. 156-58). The special education teacher noted a great deal of flexibility in his ability to arrange small groups based upon the students' changing needs (Tr. pp. 157-58). When the students are in small groups, the paraprofessional in his classroom—who has worked with the special education teacher for eight or nine years—assisted the students to make sure they understood their work and provided individual assistance (Tr. pp. 157-59).

To address the students' emotional and behavioral needs, the special education teacher used a classroom-wide behavior modification system that incorporated prizes and a "star chart for parties" to encourage good behavior (Tr. pp. 159-60). He also worked with parents to implement behavior plans at home for students who had "more needs" (Tr. p. 160). To prevent problems, the special education teacher focused on minimizing frustration by offering "easier" work or providing individual assistance (Tr. pp. 160-61). To address students' speech-language issues in the classroom, the special education teacher encouraged students to answer questions about their work using complete sentences and he corrected errors as they occurred (Tr. pp. 161-62). He also worked directly with the speech-language teachers in the school to identify and address the students' needs (Tr. p. 162).

For reading instruction, the special education teacher used the Reading First program and indicated that, through training, he was certified as a Reading First teacher (Tr. pp. 163-64). The

special education teacher testified that he found the reading program was "extremely effective" because it consisted of different areas of reading that were necessary in order to teach students with disabilities, including sections that target phonemic language-based needs, phonics, comprehension, and vocabulary (Tr. pp. 164-65). He noted that the program produced measureable progress in his students' reading abilities (Tr. pp. 168-69).

Finally, the special education teacher testified that he recalled meeting the student's mother early in September and that she visited his classroom and asked "extensive" questions about his teaching techniques, his qualifications, differentiated learning, the levels of the students in his class, and how he addressed speech-language issues (Tr. pp. 166-68).

A speech-language therapist who worked at the recommended placement also testified for the district (Tr. pp. 123-49). The speech-language therapist possessed a Bachelor's degree and a Master's degree in communication disorders, as well as a Master's degree in reading (Tr. pp. 125-26). She described her position as a "speech improvement teacher" and that she worked with students who had expressive and receptive language delays in accord with their IEPs (Tr. p. 125). As part of her responsibilities, the speech-language therapist also consulted with the teachers, the school psychologist, the school social worker, and the students' parents (Tr. pp. 126, 134-35). She testified that in addition to herself, three other speech-language therapists worked at the recommended placement—two other "monolingual therapists" and one "bilingual therapist"—and that one of the speech-language therapists would have provided services to the student had he attended the school (Tr. pp. 128-29). She explained the process of assigning and scheduling students for their speech-language services at the beginning of the school year and noted that although her schedule was full at the time of the impartial hearing, she did not have a full caseload at the beginning of the school year (Tr. pp. 127-29, 144-46).

During her testimony, the speech-language therapist reviewed and described the annual goals and short-term objectives in the student's 2007-08 IEP related to his speech-language needs, and she then explained how she would implement each of the goals and short-term objectives (Tr. pp. 129-34). She expressed familiarity with the goals and short-term objectives on the student's IEP because she had seen similar goals and short-term objectives on other students' IEPs in the past and indicated that she would be "more than able to work with these goals" (Tr. p. 130). The speech-language therapist also explained her familiarity and experience with the student's recommended "FM unit," noting that for a student with auditory processing difficulties, the amplification device functioned to amplify sound and would help the student differentiate background noise (Tr. pp. 137, 139-40, 148-49).

She testified that she recalled meeting the student's mother and her advocate in September when they visited the recommended placement (Tr. pp. 127, 141-44). During that meeting, the speech-language therapist answered questions regarding speech-language services and whether students with disabilities attended lunch and gym with non-disabled students (Tr. pp. 135-37, 145-47). The student's mother also specifically asked the speech-language therapist about her qualifications and her training regarding central auditory processing disorders (Tr. pp. 136-38). The speech-language therapist told the student's mother that while no specific class in her training covered that area, central auditory processing disorders were addressed within her training regarding language and hearing disorders (*id.*). She also explained to the student's mother her familiarity with the "FM unit," which is one method often used to assist students with auditory

processing disorders, and that she would implement "many of the same things" that she used with her "hearing impaired children with FM units" (Tr. pp. 137, 139-40, 148-49).

The student's mother testified at the impartial hearing (Tr. pp. 289-325). She described her son's needs as primarily speech-language delayed with an auditory processing deficit, and that he was easily distracted and had difficulty with academic work (Tr. pp. 290-91). She testified that her son required repetition at school and at home, he needed help writing letters and numbers, he needed directions or commands broken down for him, he had difficulty with his memory, and that she reviewed his work with him (*id.*). The student's mother testified about and described the student's progress in his academic work, his ability to socialize, and in his ability to express what he feels while attending Cooke (Tr. pp. 299, 307-11).

Her testimony also included her recollection of the May 14, 2007 CSE meeting, the discussion regarding her request for an RSA for ESY services, the recommendation to place her son in a 12:1+1 special class, receiving the FNR, and her attempts to schedule a visit to the recommended placement (Tr. pp. 300-04). She testified that after visiting the recommended placement, she was unsure whether her son would receive all of his mandated speech-language therapy services and that she was concerned that the "behavioral issues" in the recommended classroom would "interfere" with her son's "learning process" (Tr. pp. 304-07). Due to her concerns, she rejected the recommended placement (Tr. p. 307).

When asked at the impartial hearing about her specific concerns about the recommended program, the student's mother clarified that although she believed the recommended placement could meet her son's academic needs, she did not believe it could meet his speech-language therapy needs (Tr. pp. 322-23). The student's mother further testified that although she was concerned about the behavioral issues in the recommended placement, when she spoke with the special education teacher of the 12:1+1 special class, he "didn't say specifically for that year" that he had students in his classroom with behavioral issues, but that in the past "he had worked with children . . . in his classroom, that had behavioral issues" (Tr. pp. 323-24).

By decision dated May 22, 2008 (corrected May 29, 2008), the impartial hearing officer concluded that the district offered the student a FAPE for the 2007-08 school year (IHO Decision at pp. 2-4). The impartial hearing officer found that the district's recommended placement in a 12:1+1 special class in a community school, related services of counseling and speech-language therapy, and annual goals and short-term objectives were reasonably calculated to meet the student's special education needs in the least restrictive environment (LRE) (*id.* at pp. 2-3). The impartial hearing officer noted that the 2007-08 IEP addressed the student's auditory processing disorder and that the special education teacher, the school psychologist, and the speech-language therapist from the recommended placement all testified regarding their "familiarity with the demands of that disorder" and the "capacity to address it through the program and the goals and objectives of the proposed IEP" (*id.* at p. 3). Although the impartial hearing officer acknowledged the concerns identified by the student's mother regarding the provision of speech-language therapy services, the impact of the management needs of the students in the recommended special class on her son's ability to attend, and that the special class was "not specifically language-based" in design, he determined that in order to meet their burden, the district only needed to offer a program that was reasonably calculated to confer educational benefit to the student in the LRE—and not that it be "perfect or optimal, or even the best among available options" (*id.*). Based upon the

evidence presented, the impartial hearing officer found that the district's recommended program, including the goal and objectives, addressed the student's needs "directly, both in its classroom component and in its related services" and was reasonably calculated to confer educational benefits (id. at pp. 3-4).

Although the impartial hearing officer found that the district offered the student a FAPE for the 2007-08 school year, he went on to opine that the parent's unilateral placement was appropriate and that nothing in the hearing record convinced him that equities would deny or reduce funding, but given the determination that the district offered the student a FAPE, the parent's request for funding or reimbursement must be denied (IHO Decision at p. 4). However, the impartial hearing officer then concluded that due to the "late date in the school year, it would be inappropriate to transfer the child out of his current school setting" before the conclusion of the 2007-08 school year and ordered the district to continue to fund the student's private placement at Cooke through the end of the school year (id.).⁵

On appeal, the district asserts that the impartial hearing officer erred when he directed the district to continue to fund the student's placement at Cooke for the remainder of the 2007-08 school year in light of his conclusion that the district offered the student a FAPE for the 2007-08 school year. The district contends that the impartial hearing officer misapplied the legal standard used to analyze tuition reimbursement claims and the parent is not entitled to continued payment of tuition costs through the conclusion of the 2007-08 school year as a matter of law. The district further contends that the hearing record amply supports the impartial hearing officer's conclusion that the district offered the student a FAPE for the 2007-08 school year and that once the district satisfied its burden, the impartial hearing officer had no authority to order continued funding of the student's tuition costs. In the alternative, the district argues that even if the district failed to offer the student a FAPE for the 2007-08 school year, an award of prospective payment of tuition costs is not a remedy available to the parent as a matter of law, that equitable considerations would preclude an award of continued funding, and that the parent should be ordered to reimburse the district for the tuition payments made pursuant to pendency in light of the determination that the district offered the student a FAPE for the 2007-08 school year and because adjournments sought by the parent unduly protracted the proceedings and "deliberately extended the timeframe" and thus, "functionally obtained the relief" sought—namely, prospective payment of tuition at Cooke for the 2007-08 school year.

In her answer, the parent asserts that although the impartial hearing officer's decision did not conform to the dictates of the tuition reimbursement legal standard, the impartial hearing officer was within his authority to order an appropriate equitable remedy in this case. The parent argues that even if the impartial hearing officer exceeded his equitable authority, the district's appeal of the continued payment of tuition costs through the conclusion of the 2007-08 school year renders the instant claim moot, as the district's appeal would obligate the district to continue to fund the student's pendency placement from the date of the impartial hearing officer's decision through the conclusion of the instant proceedings. The parent further asserts that the district's alternative arguments on appeal are without merit, as the parent fully cooperated with the district

⁵ Based upon the hearing record, the evidence does not support the impartial hearing officer's presumption that absent an award of funding, the student would be removed from his private placement (see Parent Ex. V; Tr. pp. 289-325).

at all times, she considered in good faith the recommended placement, and she provided reasonable notice of her intention to unilaterally re-enroll her son at Cooke for the 2007-08 school year. The parent contends that the district raised the issue of notice for the first time on appeal, and thus, should be precluded from asserting such a claim. In addition, the parent argues that she satisfied the appropriate legal standard entitling her to an award of prospective tuition payments, and that the district, as a matter of law, is precluded from seeking reimbursement of the tuition payments made pursuant to pendency. The parent contends that the district's argument regarding the adjournments granted in this case is without merit, since the district never raised any objections to the scheduling and that the adjournments were not unilaterally requested by the parents.

The parent cross-appeals those portions of the impartial hearing officer's decision which determined that the district offered a FAPE to the student for the 2007-08 school year and denied the parent's request for payment of her son's tuition costs at Cooke for the 2007-08 school year. The parent argues that the goals and objectives were not designed to yield meaningful benefit because the CSE copied the goals and objectives from the student's most recent speech-language evaluation and the student's services' plan from Cooke. The parent asserts that at the time of the CSE meeting, the students had already mastered 5 out of the 24 short-term objectives copied into the student's 2007-08 IEP, and thus, the goals and short-term objectives were not appropriate to meet his special education needs and denied the student a FAPE. The parent also challenges the district's recommended placement, noting that it would not meet his special education needs.

The district answered the parent's cross-appeal and asserted that the parent was not aggrieved by the impartial hearing officer's ultimate determination and thus, had no standing to cross-appeal. The district asserted that it sustained its burden to establish that the recommended special education programs, related services, and placement offered the student a FAPE in the LRE, and that equitable considerations do not support an award of tuition payments; that the parent's factual allegations in her cross-appeal do not support the relief requested; and that case law and public policy dictate that the parent reimburse the district for payments made pursuant to pendency. The parent submitted a reply responding to the district's arguments regarding whether the parent is aggrieved and has standing to cross-appeal.

Two purposes of the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) are 1) 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; and 2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]).

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 (Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]); 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]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 2008 WL 3852180 [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 v. Florida Union Free Sch. Dist., 142 F.3d 119, 130 [2d Cir. 1998]; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the 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 200.1[cc], 200.6[a][1]; see Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs (34 C.F.R. § 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals related to those needs (34 C.F.R. § 300.320[a][2]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (34 C.F.R. § 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see 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).

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 and therefore applies to the present case.

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra, 427 F.3d 186, 192 [2d Cir. 2005]). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 C.F.R. § 300.148).

Turning first to the parent's cross-appeal, I agree with the impartial hearing officer's conclusion that the district's recommended placement in a 12:1+1 special class in a community school, the related services of counseling and speech-language therapy, and the annual goals and short-term objectives were reasonably calculated to confer educational benefits, and thus, offered the student a FAPE in the LRE for the 2007-08 school year (see IHO Decision at pp. 2-4). Relying upon the most recent evaluative information and information provided by the student's then-current teacher and speech-language therapist regarding his present levels of performance, the hearing record indicates that the CSE identified the student's needs in the areas of speech-language, auditory processing, expressive and receptive language, reading, writing, comprehension, mathematics, and social interaction skills (Parent Ex. G at pp. 3-6; see Tr. pp. 93-97, 111-12, 115-16; Parent Exs. K; L; X). The hearing record also indicates that after identifying the student's needs, the CSE reviewed draft goals developed by the district's special education teacher attending the CSE meeting—who used the student's most recent speech-language evaluation report and services' plan from Cooke to draft the goals and objectives—and notably, that neither the parent nor the student's current providers in attendance at the CSE meeting raised any concerns about the annual goals and short-term objectives proposed in the student's 2007-08 IEP or recommended any additional annual goals or short-term objectives to include in the IEP (Tr. pp. 103-04, 112-17). The 24 short-term objectives supported and clarified the student's annual goals and provided specific details regarding skills that the student would be expected to display in order to master the annual goals (Parent Ex. G at pp. 7-9). The parent's contention that the annual goals and short-term objectives would not yield meaningful educational progress because the student had already mastered five of the short-term objectives is not persuasive, especially in light of the special education teacher's testimony that had the student attended his 12:1+1 special class, he would have reviewed the student's IEP and IEP goals, assessed the student to determine "exactly" what the student needed, and would then use the student's IEP as a "general guideline" to address and meet the student's needs (see Parent Ex. A at pp. 1-2; Tr. pp. 156, 175). Based upon the foregoing, the annual goals and short-term objectives, at the time they were created, were reasonably calculated to confer educational benefit and thus, did not deny the student a FAPE.

With respect to the parent's concerns regarding the recommended placement, the hearing record indicates that the CSE's recommended placement in a 12:1+1 special class reflected the CSE's agreement that the student required a small classroom environment with additional paraprofessional support (Tr. pp. 111-12). The recommended special class also offered the student an opportunity to receive instruction in smaller groups within the classroom and to attend art or

music with his non-disabled peers (Tr. pp. 156-58, 174). The 12:1+1 special class was staffed with an experienced special education teacher, as well as an experienced paraprofessional (Tr. pp. 111-12, 157-59). According to the hearing record, the student's functional levels in reading and mathematics fell within the range of functional levels of the students attending the special class (Tr. pp. 170; see Dist. Ex. 10; Parents Exs. G; K; L). With respect to the speech-language therapy services, the hearing record indicates that the student would have received his IEP mandated speech-language therapy services from an experienced and well-qualified speech-language therapist who was familiar with the student's needs specific to his auditory processing difficulties, the use of the recommended FM unit, and the proposed annual goals and short-term objectives, and who would have consulted with the student's special education teacher and parent regarding the student's needs (Tr. pp. 125-26, 128-29, 134-35, 137-39; see Tr. pp. 52-53). The hearing record also demonstrates that the recommended special class, while not designated as "language-based," did focus on the students' speech-language needs and the reading program used targeted phonemic language-based needs, phonics, comprehension, and vocabulary (Tr. pp. 156, 164-65, 168-69). As for the parent's concern that behavioral issues in the special class would interfere with her son's learning process, the special education teacher of the recommended placement testified that he incorporated a classroom-wide behavior modification program and worked to prevent problems by addressing the students' low frustration tolerance (Tr. pp. 159-61). Therefore, based upon the evidence in the hearing record, the recommended placement was also reasonably calculated to confer educational benefits to the student and offered the student a FAPE in the LRE.

Having concurred with the impartial hearing officer's determination that the district sustained its burden to establish that it offered the student a FAPE in the LRE for the 2007-08 school year, I need not reach the contentions raised by the parties relating to equitable considerations and find that the parent is not entitled to tuition reimbursement; thus, the parent's cross-appeal is dismissed in its entirety (20 U.S.C. § 1412[a][10][C]; see Carter, 510 U.S. 7; Burlington, 471 U.S. at 370; Application of the Dep't of Educ., Appeal No. 06-120; Application of a Child Suspected of Having a Disability, Appeal No. 06-087; Application of the Dep't of Educ., Appeal No. 06-077; Application of a Child Suspected of Having a Disability, Appeal No. 05-122; Application of the Bd. of Educ., Appeal No. 04-098).

Turning to the district's appeal, while I agree with the district's contention that, as a matter of law, the impartial hearing officer erred in ordering the district to continue to fund the student's placement at Cooke for the remainder of the 2007-08 school year in light of his conclusion that the district offered the student a FAPE, I also agree with the parent's argument that the district's issue on appeal has become moot by virtue of the instant proceedings and the requirements of pendency during an appeal, which obligate the district to continue to fund the student's pendency placement through the conclusion of any administrative and/ or judicial proceedings (see 20 U.S.C. § 1415[e][3]; Educ. Law § 4404[4]; 34 C.F.R. § 300.518[a]; 8 NYCRR 200.5[m]). The dispute between the parties in an appeal must at all stages be "real and live," and not "academic," or it risks becoming moot (see Lillbask v. State of Conn. Dep't of Educ., 397 F.3d 77, 84 [2d Cir. 2005]; see also Chenier v. Richard W., 82 N.Y.2d 830, 832 [1993]; Hearst Corp. v. Clyne, 50 N.Y.2d 707, 714 [1980]; Application of a Child with a Disability, Appeal No. 07-139). 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; 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).

In this case, the impartial hearing officer's interim decision dated March 20, 2008 (corrected March 25, 2008), established Cooke as the student's pendency placement and directed the district to fund the student's placement at Cooke (Interim Decision on Pendency at pp. 8-9). The IDEA and the New York State Education Law require that a student remain in his or her then current educational placement, unless the student's parents and the district otherwise agree, during the pendency of any proceedings relating to the identification, evaluation or placement of the student (20 U.S.C. § 1415[j]; Educ. Law §§ 4404[4], 4410[7][c]; see 34 C.F.R. § 300.518; 8 NYCRR 200.5[m]). In addition, during the pendency of administrative and judicial proceedings, a student remains at his current educational placement, "unless the State or local educational agency and the parents or guardian otherwise agree" (20 U.S.C. § 1415[e][3]; Educ. Law § 4404[4]; 34 C.F.R. § 300.518[a]; 8 NYCRR 200.5[m]).⁶ Furthermore, in order to comply with State and federal law pendency provisions, a district's responsibility to maintain a student's pendency placement includes funding that placement (see Murphy v. Arlington Cent Sch. Dist., 297 F.3d 195 [2d Cir. 2002]; Bd. of Educ. v. Schutz, 290 F.3d 476 [2d Cir. 2002], cert. denied, 537 U.S. 1227 [2003]; see also 20 U.S.C. § 1415[j]; 34 C.F.R. § 300.518; Educ. Law § 4404[4][a]; 8 NYCRR 200.5[m]).

Therefore, although the issue on appeal regarding the impartial hearing officer's error in awarding continued funding of the student's placement at Cooke until the end of the 2007-08 school year may be considered "real and live," the remedy sought by the district—namely, to annul

⁶ It is well settled that an impartial hearing officer's decision is final and binding upon the parties unless appealed to a State Review Officer (34 C.F.R. § 300.510[a]; 8 NYCRR 200.5[k]). Consequently, the impartial hearing officer's interim decision on pendency establishing Cooke as the student's pendency placement during the instant proceedings and directing the district to fund the student's pendency placement is final and binding (Application of a Child with a Disability, Appeal No. 07-050; Application of a Child with a Disability, Appeal No. 07-026; Application of a Child Suspected of Having a Disability, Appeal No. 06-092; Application of a Child with a Disability, Appeal No. 06-085; Application of a Child with a Disability, Appeal No. 04-024; Application of a Child with a Disability, Appeal No. 03-108; Application of a Child with a Disability, Appeal No. 02-100).

this portion of the impartial hearing officer's decision directing the district to fund the placement— has been rendered moot because a determination of the issue would have no actual effect on the parties given the district's continued obligation to fund the student's placement at Cooke under pendency through the conclusion of the instant administrative and/or judicial proceedings. Thus, the district's request to annul that portion of the impartial hearing officer's decision ordering the district to continue to fund the student's placement at Cooke until the end of the 2007-08 school year is dismissed as moot.

Finally, I am not persuaded by the district's argument that the parent should be ordered to reimburse the district for tuition payments made pursuant to pendency in light of the determination that the district offered the student a FAPE or because the adjournments granted in this case unduly protracted the proceedings thereby allowing the parent to "functionally" obtain the relief she sought. The district contends in a footnote in the petition that the facts of this case warrant a change in the law established in a previous appeal (Application of a Child with a Disability, Appeal No. 05-091),⁷ which denied a district's counterclaim to recoup payments made pursuant to an unappealed pendency order despite a determination on appeal that the district offered the student a FAPE for the school year in question. The district cites case law to support their argument that public policy and fairness considerations dictate a recoupment of these payments (see Doe v. Brookline Sch. Comm., 722 F.2d 910 [1st Cir. 1983]; Mayo v. Baltimore City Pub. Sch., 40 F. Supp. 2d 331 [D. Md. 1999]).

In further support of its argument, the district attached additional documentary evidence to the petition, and in response, the parent also attached additional documentary evidence on this issue. Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an impartial hearing officer's decision only if such additional evidence could not have been offered at the time of the hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of the Dep't of Educ., Appeal No. 08-024; Application of a Student with a Disability, Appeal No. 08-

⁷ Application of a Child with a Disability, Appeal No. 05-091, held in pertinent part:

Although this issue appears to be one of first impression in this circuit, two federal districts courts in New York have recently alluded in dicta to the fact that if this scenario ever presented itself, it would be unlikely that a district could recoup such payments (see Bd. of Educ. v. Schutz, 137 F. Supp. 2d 83, 92 n.15 [N.D.N.Y. 2001], aff'd, 290 F.3d 476 [2d Cir. 2002], cert. denied, 537 U.S. 1227 [2003]; Murphy v. Arlington Cent. Sch. Dist., 86 F. Supp. 2d 354, 367 n.9 [S.D.N.Y. 2000], aff'd, 297 F.3d 195 [2d Cir. 2002]). After a review of case law from other circuits rejecting the idea of recoupment, the Court in Schutz noted "Accordingly, it appears as though the tuition payments made by the District during the pendency of [the proceedings] may not be subject to recoupment from [the parents], and no opinion is offered as to the manner in which this burden might be allocated between the District and the State" (Schutz, 137 F.Supp.2d at n.15 [J. Hurd]). Given these circumstances, I decline to order [the parents] to reimburse the district for costs incurred by respondent in maintaining the student's pendency placement, an expense it was required to pay in order to comply with the pendency provisions of state and federal law (see Murphy v. Arlington Cent Sch. Dist., 297 F.3d 195 [2d Cir. 2002]; Bd. of Educ. v. Schutz, 290 F.3d 476 [2d Cir. 2002], cert. denied, 537 U.S. 1227 [2003]; see also 20 U.S.C. § 1415[j]; 34 C.F.R. § 300.51[8]; Educ. Law § 4404[4]; 8 NYCRR 200.5[m]).

003; Application of the Bd. of Educ., Appeal No. 06-044; Application of the Bd. of Educ., Appeal No. 06-040; Application of a Child with a Disability, Appeal No. 05-080; Application of a Child with a Disability, Appeal No. 05-068; Application of the Bd. of Educ., Appeal No. 04-068). In this case, the additional documentary evidence consists of a series of e-mail correspondence between the parties and the impartial hearing officer regarding the scheduling of the impartial hearing, as well as a copy of the district's case history report (Pet. Ex. 2; Answer Ex. A). I will accept the additional documentary evidence even though it was available at the time of the impartial hearing because it is necessary in order to render a decision on this issue.

With respect to the district's allegations regarding the length of this proceeding, I note that federal and State regulations require an impartial hearing officer to render a decision within 45 days after the expiration of the resolution period (34 C.F.R. § 300.515[a]; 8 NYCRR 200.5[j][5]), unless an extension has been granted at the request of either party (34 C.F.R. § 300.515[c]; 8 NYCRR 200.5[j][5][i]). The district asserts that the parent requested and obtained a number of adjournments, which served to unduly protract the length of the proceeding and forced the district to continue to pay the student's tuition expenses at Cooke under pendency. The district further contends that by seeking and receiving the adjournments, the parent took advantage of the injunctive nature of pendency, which served to award the parent the remedy sought, namely, funding for her son's attendance at Cooke. However, a review of the additional documentary evidence submitted indicates that as the parent contends, the district did not raise any objections to the scheduling or requested adjournments, and further, that it appears that the district mutually agreed to and/or requested the adjournments granted (see Answer Ex. 1 at pp. 1-2, 8-9, 11-17). Given the facts borne out by the additional evidence, I am not persuaded that the parent, alone, is at fault for the length of the proceedings or that the facts of this case warrant a change in the law entitling the district to recoup payments it made pursuant to pendency.⁸ Therefore, the district's

⁸ However, I do remind and caution the impartial hearing officer, as well as both parties in this matter, that it is incumbent upon the impartial hearing officer to only grant extensions consistent with regulatory constraints and to ensure that the record documents the reason for each extension (8 NYCRR 200.5[j][5][i]). In addition, regulatory requirements set forth specific factors that an impartial hearing officer must consider prior to granting an extension (8 NYCRR 200.5[j][5][ii]). The impartial hearing officer may grant a request for an extension only after fully considering the cumulative impact of the following factors:

- (a) the impact on the child's educational interest or well-being which might be occasioned by the delay;
- (b) the need of a party for additional time to prepare or present the party's position at the hearing in accordance with the requirements of due process;
- (c) any financial or other detrimental consequences likely to be suffered by a party in the event of a delay; and
- (d) whether there has already been a delay in the proceeding through the actions of one of the parties.

(8 NYCRR 200.5[j][5][ii]). The regulations also provide that agreement of the parties is not a sufficient basis for granting an extension, and further that "[a]bsent a compelling reason or a specific showing of substantial hardship, a request for an extension shall not be granted because of school vacations, a lack of availability resulting from the parties' and/or representatives' scheduling conflicts, settlement discussions between the parties or other similar reasons." (8 NYCRR 200.5[j][5][iii]). (see Application of a Child with a Disability, Appeal No. 06-005).

request to be reimbursed for the pendency payments made during the instant proceeding is dismissed.

I have considered the parties' remaining contentions and find that they are without merit.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS DISMISSED.

Dated: **Albany, New York**
 September 30, 2008

PAUL F. KELLY
STATE REVIEW OFFICER