The University of the State of New York

The State Education Department
State Review Officer

No. 08-069

Application of a STUDENT WITH A DISABILITY, by his parent, for review of a determination of a hearing officer relating to the provision of educational services by the Board of Education of the Ilion Central School District

Appearances:
A.J. Bosman, Esq., attorney for petitioner

Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C., attorney for respondent, Susan T. Johns, Esq., of counsel

DECISION

Petitioner (the parent) appeals from the decision of an impartial hearing officer which, inter alia, determined that respondent (the district) did not deny the student a free appropriate public education (FAPE) during the 2006-07 school year and determined that the impartial hearing officer lacked jurisdiction to amend the student's grades. The appeal must be dismissed.

The student's eligibility for special education services as a student with a learning disability (LD) is not in dispute in this appeal (Parents Exs. 1 at p. 1; 5 at p. 1; see 34 C.F.R. § 300.8[c][10]; 8 NYCRR 200.1[zz][6]). The hearing record reflects that the student has a diagnosis of phonological dyslexia (Tr. p. 71; Parent Ex. 14 at pp. 3, 10). The hearing record further describes the student as an auditory learner (Dist. Exs. E at p. 4; F at p. 4; G at p. 4; Parent Exs. 2 at p. 4; 5 at p. 6). Strength was noted in the student's auditory and reading comprehension skills, despite his inability to decode all of the words; and in calculation skills (Dist. Exs. E at p. 4; F at p. 4; G at p. 4; Parent Exs. 2 at p. 4; 5 at pp. 3-4). The student demonstrated needs in the areas of single word decoding, reading speed, memory skills, organizational skills, writing and editing skills, requesting help from teachers, use of various accommodations, and development of study strategies and independent use of those strategies (Dist. Exs. D at p. 4; E at p. 4; F at p. 4; G at p. 4; Parent Ex. 5 at pp. 2-6).

By the conclusion of testimony at the impartial hearing on January 31, 2008, the student was attending eleventh grade general education classes at a district school with related services of resource room and indirect consultant teacher services (Dist. Ex. G at p. 1). The student received various supplementary services and accommodations, test accommodations, and assistive

technology accommodations, including access to a laptop computer and a "Kurzweil (3000)" program (Kurzweil)[1] for use in school and at home (Dist. Exs. F at pp. 2-3; G at pp. 2-3).

On September 8, 2006, the CSE met to review the student's program and, by prior agreement with the parent, incorporated the recommendations of a private educational evaluation report in the student's IEP for the 2006-07 school year (Parent Ex. 5). The CSE recommended maintaining the student's eligibility for special education services as a student with an LD (id. at p. 1). The CSE further recommended that the student participate fully in the general education programs with four 40-minute periods of resource room (5:1) over a four-day cycle, and four 40-minute periods of individual special class reading instruction (id. at pp. 1, 6). A "[t]argeted [c]ase [m]anager" was assigned to the student (id. at p. 1). Requirements for program modifications, accommodations and supplementary aids and services in the September 8, 2006 IEP included modified grading, spelling errors discounted for spontaneous writing activities, all academic material read to the student by instructors or through use of the Kurzweil program with reminders to use listening comprehension strategies when listening to academic material, and that the student should not be asked to read orally during whole class activities (id. at p. 2). Requirements for assistive technology devices, services and supports included access to a word processor for any written tasks in excess of one paragraph, after school keyboarding instruction with the special education teacher two days per week, access to a spelling device such as a desk top dictionary and a spell check device (spelling requirements waived for all assignments not measuring spelling), access to the Kurzweil program and/or books on tape, and scanning of all academic materials on the Kurzweil (id.). The September 8, 2006 IEP also required support for school personnel on behalf of the student, specifically for staff training in the use of the Kurzweil (id.). The student's required testing accommodations included directions read on all tests and quizzes due to basic reading weaknesses, extended time (1.5) for the student to check over work and seek clarification if necessary, use of a word processor for all tests involving written tasks in excess of one paragraph, simplified language in directions on all tests and quizzes, tests read (except reading comprehension tests), spelling requirements waived (except for tests measuring spelling), use of a spell check device on all tests and quizzes not measuring spelling, and administration of tests in a location with minimal distractions (tests may be administered in the general education classroom if the location is quiet) (id). On September 8, 2006, the parent signed a student placement authorization form, indicating that she was in agreement with the CSE recommendations for the student regarding classification, and a ten-month program of resource room, 1:1 direct reading instruction, and independent keyboarding for the 2006-07 school year (Parent Ex. 7).

The CSE reconvened on February 9, 2007 for the student's annual review (Dist. Ex. D). In attendance at the meeting were the CSE chairperson, CSE secretary, school psychologist, special education teacher, regular education teacher, reading teacher, and the student's mother (id. at p. 6). No concerns of the parent were noted in the IEP comments. The CSE did not recommend any changes to the student's program and instead "tabled" the meeting and scheduled to reconvene in June 2007 to discuss the student's program for the 2007-08 school year (id.).

[1] According to the hearing record, the Kurzweil is a program that is commonly used in high schools and colleges nationwide (Parent Ex. 10 at p. 2). Its functions include a text-to-speech function which enables the computer to read text aloud (id.). The text may come from the internet, word files, or e-mail (id.). Text may be scanned on a scanner and converted into text files (id.).

The CSE convened on May 8, 2007 at the parent's request due to her concerns regarding the implementation of the September 8, 2006 IEP (Parent Ex. 6 at pp. 1, 6). In attendance at the meeting were the CSE chairperson, CSE secretary, school psychologist, special education teacher, regular education teacher, guidance counselor, district director of pupil personnel services, the principal, reading teacher, student's mother and an additional parent member (id. at p.6). The IEP comments section reflects that the parent indicated that material regarding a research paper assignment was not read to the student, specifically that the student had downloaded material from the internet and it was not read to him (id.). The district director stated that the district met its obligation to the student through access to the Kurzweil, the typing program, and other assistive technology, as well as through the support of the resource room teacher (id.).

The May 8, 2007 CSE made a recommendation to change the student's testing accommodation of extended time from time and 1/2 to double time (Parent Ex. 6 at p. 7). The comments section of the May 8, 2007 IEP noted that the student could use a laptop computer any time writing was required, except when not allowed by testing requirements (id.). A laptop computer was provided by the district to the student and was dispensed at the close of the meeting (id.). An aide had already scanned English and global history assignments into the Kurzweil for the student (id. at p. 6). The May 8, 2007 IEP indicates that the parent provided signed consent (id. at p. 7).

In an amended due process complaint notice dated July 17, 2007, the parent alleged that the student's 2006-07 IEP was not being properly implemented (Dist. Ex. A).[2] The following specific allegations were raised in the due process complaint notice to support the parent's failure to implement claim: (1) the student was asked to read in front of the class; (2) all academic materials were not read to the student as required by his IEP; (3) keyboarding instruction was not provided two times per week; (4) the student was not provided with the Kurzweil or books on tape; (5) the student's academic material was not scanned into the Kurzweil as required by his IEP; (6) the student was not provided with timely and contemporaneous times for tests, resulting in grades of zero due to lost tests and delays in returning tests to teachers; and (7) tests and quizzes were not administered in a quiet location without distractions (id. at p. 1). The parent also alleged in the amended due process complaint notice that the student was subjected to intimidation and unequal treatment by school staff as a result of his disability, and that the student's parent was subjected to hostility and intimidation by school personnel when attempting to enforce the IEP (id.). As relief, the parent sought an order directing the district: (1) to implement the IEP with consistent services and accommodations; (2) to provide adequately trained and qualified personnel to administer the IEP without hostility or intimidation; (3) to provide the student "with compliance monitoring to insure teachers are following the IEP;" (4) to provide testing in a verbal/spoken format; (5) to ensure that the student is not turned away or simply referred to resource room by any teacher when requesting help; and (6) to amend the student's grades to 80 or above, "reflecting the grades that he would have achieved had the school district provided IEP services as required" (id. at p. 2).

The CSE convened on August 15, 2007 for the student's annual review (Parent Ex. 2 at p. 1). In attendance at the CSE meeting were the CSE chairperson, CSE secretary, special education teacher, reading teacher, regular education teacher, principal, student's mother and an additional

[2] The amended due process complaint notice does not indicate which IEP is at issue (see Dist. Ex. A). A review of the hearing record reveals that the September 8, 2006 IEP governing the 2006-07 school year is at issue.

parent member (id. at p. 6). The student's resource room teacher indicated that the student used his test modifications and that he continued to require extended time, separate location and tests read (id.). The resource room teacher believed that the student did not require double time and she recommended time and 1/2 (id.). The resource room teacher and the English teacher indicated that the student did not use the word processor (id.). The resource room teacher indicated that typing responses would hinder the student's progress due to his weak typing skills (id.). The principal believed that the student did not require a word processor for testing (id.). The parent suggested that the student be allowed to provide responses orally, rather than write them, but the principal and the resource room teacher did not feel that this was an appropriate accommodation (id.). The parent requested that a keyboarding class be provided outside of school hours and the CSE denied that request (id.).

For the 2007-08 school year, the CSE recommended resource room (5:1) two times per four-day cycle for 80 minutes (Parent Ex. 2 at p. 1). Although the reading specialist stated that the student did not require a reading specialist to continue with further reading instruction, the district agreed to provide materials and a contact person for the mother to borrow a reading program for use with the student at home (id. at p. 6). The August 15, 2007 IEP contained recommendations that the student receive the following testing modifications: directions read for all tasks, spelling requirements waived (except those for tests that measure spelling), location with minimal distractions, and grammatical errors forgiven for all tests that do not measure grammar (id.). The August 15, 2007 IEP stated that the student would complete tests after school when he required extended time (id.). The August 15, 2007 IEP contained an additional program modification that the student should not be asked to read aloud during whole group activities, but may volunteer to read (id. at p. 2).

Regarding assistive technology, the August 15, 2007 IEP indicated that the student would receive access to a word processor provided through classroom computers and the continued use of a laptop computer, access to a spelling device, and access to the Kurzweil program and/or books on tape (Parent Ex. 2 at p. 2). The August 15, 2007 IEP also indicated that all academic material would be scanned for the student so that he may listen to it and that all tests, classroom assignments and all required research sources independently obtained by the student, as well as trade books, textbooks and homework would be read to the student by staff or through the use of the Kurzweil (id. at p. 6).

On August 15, 2007, the parent signed a student placement authorization form, indicating that she was in agreement with the CSE recommendations for the student regarding classification, and a ten-month program of resource room (5:1) two times per week per four day cycle for 80 minutes (Parent Ex. 8).

On September 27, 2007, the CSE convened for a requested review specifically to assess the student's assistive technology needs (Dist. Ex. E at pp. 1, 6). In attendance at the meeting were the CSE chairperson, school psychologist, two special education teachers, a regular education teacher, guidance counselor, principal, teacher assistant, school counseling intern and the student's mother (id. at p. 6).[3] The comments section of the September 27, 2007 IEP indicated that the parent believed that the student did not need a speaking dictionary or a spell check device because

[3] An additional parent member was in attendance at the meeting, but the parent requested that the parent member be excused from the meeting and signed a waiver notice (Dist. Ex. E. at p. 6).

he had access to the same technology on the Kurzweil (id. at p. 6). The CSE agreed to modify the student's IEP to delete the speaking dictionary and the spell check device, and to add the requirement that class notes be scanned into the Kurzweil on a weekly basis (id. at pp. 2, 6).

Testimony at the impartial hearing began on October 15, 2007 and continued on October 16, 2007 (IHO Decision at p. 1). At the impartial hearing on October 15, 2007, the parties had an off the record discussion regarding possible settlement, which was then summarized on the record by the parties (Tr. pp. 37-38). A proposed resolution that was agreeable to both parties included the addition to the student's IEP of indirect consultant teacher services, remedial reading instruction, provision of class notes for scanning on the Kurzweil, keyboarding instruction at an outside location and review of the student's social studies grade from the 2006-07 school year (Tr. pp. 38-44). The parties agreed to attend a CSE meeting for consideration of points at issue (Tr. pp. 52-53).

The CSE convened on November 1, 2007 for a program review at the request of the impartial hearing officer as an intermediary step in resolving concerns presented by the parent as part of the impartial hearing (Dist. Ex. F at pp. 1, 6). In attendance at the meeting were the district director of pupil services, CSE chairperson, CSE secretary, school psychologist, two special education teachers, a regular education teacher, guidance counselor, reading teacher, principal and both the district's and parent's attorneys (id. at p. 6).[4]

At the November 1, 2007 CSE meeting, the reading teacher indicated that 1:1 instruction did help the student, but she did not feel that he needed 1:1 instruction daily and she believed that the reading instruction could be incorporated into his resource room service along with the IEP goals (Dist. Ex. F at p. 7). The CSE reached consensus that 30 minutes of the student's resource room time would be dedicated to reading instruction (id. at p. 8). The parent and her attorney indicated their agreement with this recommendation as it would not require changes to the student's schedule (id.). It was also agreed that indirect consultant teacher services would be added to the student's IEP two times in a four-day cycle for 40 minutes, to assure that the IEP would be implemented as promised (id.). The parent accepted the CSE's recommendation that the student attend a keyboarding class at a non-district program (id.). The director of special education indicated that the district would reimburse the parent for tuition and mileage to this non-district program (id.).

It was agreed that the November 1, 2007 CSE meeting would conclude and resume the following day to discuss how the IEP goals should be revised (id.). The CSE reconvened on November 26, 2007 for a program review and continuation of the November 1, 2007 CSE meeting (Dist Ex. G at pp. 1, 6).[5] In attendance at the meeting were the district director of pupil services, CSE chairperson, CSE secretary, school psychologist, two special education teachers, a regular

[4] The additional parent member was in attendance at the meeting, but the parent requested that the parent member be excused from the meeting and signed a waiver notice (Dist. Ex. F. at p. 6).

[5] The comments section of the November 26, 2007 IEP noted that the parent's attorney cancelled the proposed November 2, 2007 continuation of the November 1, 2007 CSE meeting due to a scheduling conflict (Dist. Ex. G at p. 6).

education teacher, guidance counselor, reading teacher, principal and attorneys for the district and the parent (id. at p. 6).[6]

At the November 26, 2007 CSE meeting, goals were reviewed and revised (Dist. Ex. G at pp. 6-7). A digital recorder was added to the assistive technology portion of the November 26, 2007 IEP (id. at p. 7). The district agreed to purchase a recorder for the student's use in school (id.). It was further agreed that recordings could be transferred to the laptop if the student wanted them for home use (id.). Services on the November 26, 2007 IEP included indirect consultant teacher services for two 40-minute periods over a four day cycle, two 80-minute periods of resource room over a four day cycle, a keyboarding class at a local college and mileage reimbursement (id.). Notations included the requirement that a hard copy of all class notes be scanned on the Kurzweil (id. at p. 2). The November 26, 2007 IEP comments section indicated that the parent signed consent for the proposed changes (id. at p. 7).

The parties also agreed to meet on another date with the principal and others to review the student's social studies grade during the 2006-07 school year (Tr. pp. 39-40, 43-44), but after a subsequent meeting was held to review that grade, it was determined that there was insufficient evidence to substantiate a claim for a grade change (Tr. pp. 39-40, 43-44, 612-617; Parent Ex. 15).

The impartial hearing continued on December 20, and December 21, 2007, and testimony was completed on January 31, 2008 (IHO Decision at p. 1). The impartial hearing officer issued a decision dated June 12, 2008 in which he determined that the parent did not meet her burden to demonstrate that the district "unduly delayed" in complying with the September 8, 2006 IEP or "materially failed" to implement the recommended program and services for the student, such that he was denied a FAPE (id. at p. 12). The impartial hearing officer also determined that the evidence did not support the parent's contention that the district discriminated against the student or created a hostile environment for him to learn, resulting in a denial of a FAPE or a deprivation of educational opportunity (id. at pp. 17, 21). The impartial hearing officer proceeded to address the remedies proposed by the parent in her amended due process complaint notice. As to the 2006-07 school year, the impartial hearing officer found that, even if there was sufficient evidence for a finding that the student was denied a FAPE and educational opportunity because his September 8, 2006 IEP was not appropriately implemented, or because the district discriminated against the student, the remedy sought – a grade change – was not an appropriate remedy (id. at p. 21). The impartial hearing officer found that any implementation problems which surfaced during the 2006-07 school year were addressed by the district at the May 8, 2007 CSE meeting and by the parties agreement and implementation in the November 26, 2007 IEP (id.). Accordingly, the impartial hearing officer denied the parent's request for an order directing the district to comply with the student's September 8, 2006 IEP and all other related relief with respect to the program and services the student received as described in the parent's amended due process complaint notice (id.). The request for a grade change in the parent's amended due process complaint notice was also denied (id. at p. 23).

The parent appeals, contending that the improper implementation of the student's IEP and other "procedural inadequacies" impeded the student's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision making process regarding the provision of a

[6] The parent requested that an additional parent member not be invited to attend and signed a waiver (Dist. Ex. G at p. 6).

FAPE, or caused a deprivation of educational benefits. The parent also contended that the district failed to provide the student with a FAPE in compliance with the September 2006 settlement.[7]

The parent also contends that the findings of the impartial hearing officer and his conclusions of law were inaccurate, improper and against the weight of the evidence. The parent's specific claims of error include: (1) that the impartial hearing officer incorrectly found that the parent did not seek the district's compliance with the September 8, 2006 IEP until April 2007; (2) that the impartial hearing officer erred in describing the September 8, 2006 IEP "recommendations" as IEP "requirements"; (3) that the impartial hearing officer erred in his findings regarding a social studies re-test in that the impartial hearing officer improperly ignored the credible testimony of the parent and the student and credited the inconsistent testimony of the student's social studies teacher; (4) that by crediting any testimony of the student's social studies teacher, the impartial hearing process was rendered unfair; and (5) that the impartial hearing officer incorrectly found that the district and parent reached an agreement in October and November 2007. The parent further alleges that a letter written by the student's social studies teacher to the superintendent alleging academic fraud by the student was never provided to the parent, nor disclosed as part of the student's record, rendering all meetings and subsequent CSE meetings fraudulent. As relief, the parent seeks an order reversing the decision of the impartial hearing officer.

In its answer, the district denies the parent's allegations that the September 8, 2006 IEP was not properly implemented and that the student was denied a FAPE. The district also denies that the decision of the impartial hearing officer contained deficiencies and contends that the impartial hearing officer correctly dismissed the parent's claims. The district's affirmative defenses include that the petition fails to clearly indicate the reasons for challenging the impartial hearing officer's decision and indicate relief sought under 8 NYCRR 279.4(a), and that the appeal is moot. As to the parent's relief sought, pertaining to amendment of the student's grades, the district contends that a grade change is not an available form of relief in the instant proceeding.

After the district filed its answer, the parent served a "Reply Memorandum," which raises an initial procedural issue on appeal. Pursuant to the State regulations, a reply is limited to any procedural defenses interposed by respondent or to any additional documentary evidence served with the answer (8 NYCRR 279.6). In this case, the parent's reply does not respond either to procedural defenses interposed by the district or address additional documentary evidence, as none was served with the answer; therefore, I will not consider the reply (Application of a Student with a Disability, Appeal No. 08-031; Application of a Student with a Disability, Appeal No. 08-028; Application of a Student Suspected of Having a Disability, Appeal No. 08-002; Application of a Child with a Disability, Appeal No. 06-046; Application of a Child with a Disability, Appeal No. 04-064; Application of a Child with a Disability, Appeal No. 02-009; 8 NYCRR 275.14[a], 279.6).

Upon review of this appeal, there is a threshold issue that must be addressed. The district argues that the parent's assertions regarding the implementation of the student's September 8, 2006

[7] I note that there is no reference to enforcement of a settlement agreement in the amended due process complaint notice, nor did the impartial hearing officer make any determinations with regard to this issue. Therefore, I do not reach this issue on appeal (see Application of the Bd. of Educ., Appeal No. 07-031; Application of a Child with a Disability, Appeal No. 07-072).

IEP have become moot due to the passage of time, superseding IEPs, and resolutions reached by the parties. I agree with the district's contention.

It is established that 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). 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 a Child with a Disability, Appeal No. 07-139; Application of the Bd. of Educ., Appeal No. 07-028; Application of a Child with a Disability, Appeal No. 06-070; Application of a Child with a Disability, Appeal No. 04-007). However, a claim may not be moot despite the end of a school year for which the student's IEP was written, if the conduct complained of is "capable of repetition, yet evading review" (see Honig v. Doe, 484 U.S. 305, 318-23 [1988]; Lillbask, 397 F.3d at 84-85; Daniel R.R., 874 F.2d at 1040; Application of a Child with a Disability, Appeal No. 04-038).

The exception applies only in limited situations (City of Los Angeles v. Lyons, 461 U.S. 95, 109 [1983]), and is severely circumscribed (Knaust v. City of Kingston, 157 F.3d 86, 88 [2d Cir. 1998]). It must be apparent that "the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration" (Murphy v. Hunt, 455 U.S. 478, 482 [1982]; see Knaust, 157 F.3d at 88; Application of a Child with a Disability, Appeal No. 07-139). Controversies are "capable of repetition" when there is a reasonable expectation that the same complaining party would be subjected to the same action again (Weinstein v. Bradford, 423 U.S. 147, 149 [1975]; see Hearst Corp., 50 N.Y.2d at 714-15; Application of a Child with a Disability, Appeal No. 07-139). To create a reasonable expectation of recurrence, repetition must be more than theoretically possible (Murphy, 455 U.S. at 482; Russman v. Bd. of Educ., 260 F.3d 114, 120 [2d Cir. 2001]; Application of a Child with a Disability, Appeal No. 07-139). Mere speculation that the parties will be involved in a dispute over the same issue does not rise to the level of a reasonable expectation or demonstrated probability of recurrence (Russman, 260 F.3d at 120; Application of a Child with a Disability, Appeal No. 07-139). Mootness may be raised at any stage of litigation (In re Kurtzman, 194 F.3d 54, 58 [2d Cir. 1999]; Application of a Child with a Disability, Appeal No. 07-139).

In determining whether the appeal is moot, it is significant that the parent's concerns regarding the implementation of the September 8, 2006 IEP were addressed by the parties at multiple subsequent CSE meetings. At the May 8, 2007 CSE meeting, the student's IEP was amended to add use of a district laptop computer at home, which had the Kurzweil and Mavis Beacon keyboarding programs installed; extended time for tests on the IEP increased to double time and provision of an aide to scan materials for the student (id. at pp. 6-7). The CSE offered to add a reader to the student's IEP, which the parent declined to accept (Tr. pp. 184-86, 227-28;

Parent Ex. 6 at p. 6). Teachers were also reminded of their responsibilities to read all academic materials or provide for scanning into the Kurzweil by the CSE Chairperson (Tr. pp. 524-525).

Additionally, on October 15, 2007, the hearing record reflects that the parties informally agreed that it was possible to resolve the parent's IEP implementation concerns by adding the following accommodations and services to the student's IEP: indirect consultant teacher services; remedial reading instruction; provision of class notes for scanning on the Kurzweil, and keyboarding instruction at an outside location (Tr. pp. 38-44). The district also agreed to review the student's social studies grade from the 2006-07 school year (Tr. pp. 39-40, 43-44). The CSE then met on November 26, 2007 and added the agreed upon services to the IEP (Tr. pp. 335-340; Dist. Ex. G). A meeting was also held to review the student's grades, but after the meeting it was determined that there was insufficient evidence to substantiate a claim for a grade change (Tr. pp. 340, 612-617; Parent Ex. 15).

I agree with the impartial hearing officer that upon the district's agreement on October 15, 2007 to add specific services and the incorporation of those services into the November 26, 2007 IEP, all prospective claims for relief regarding compliance with the student's 2006-07 IEP were rendered moot (IHO Decision at p. 23). I further find that the hearing record does not support an argument that an exception to the mootness doctrine exists in this case.

Therefore, the only claim for relief in the July 17, 2007 amended due process complaint notice that survives dismissal due to mootness is the request that the student's grades be amended to 80 or above, "reflecting the grades that he would have achieved had the school district provided IEP services as required" (Dist. Ex. A at p. 2). A review of the hearing record reveals that it was the parent's desire to have the student's social studies grade changed (Tr. pp. 39-40, 43-44, 228, 584-590), and that no other specific evidence was presented in support of changing the student's grades in other academic subjects.

The Individuals with Disabilities Education Act (IDEA) provides for impartial hearings and State-level reviews in matters relating to the identification, evaluation or educational placement of students, or the provision of a FAPE (20 U.S.C. § 1415[b][6][A]; 8 NYCRR 200.5[i][1], [j][1]). However, a separate portion of the IDEA (20 U.S.C. § 1417[c]) requires the Secretary of Education to promulgate regulations for the protection of the rights and privacy of parents and students in accordance with the provisions of the Family Educational Rights and Privacy Act (FERPA) (see 20 U.S.C. § 1232g). The relevant federal regulations under the IDEA (34 C.F.R. §§ 300.567-570), prescribe a specific procedure for challenging alleged inaccuracies in a student's educational records. Upon the request of a parent, a school district must render a decision and then provide an opportunity for a hearing to challenge information in a student's records (id.). However, the IDEA regulations (34 C.F.R. § 300.570) provide that such hearings are to be conducted in accordance with the procedures specified in 34 C.F.R. § 99.22, rather than the hearing procedures for other kinds of claims asserted under the IDEA, which are to be conducted pursuant to 34 C.F.R. §§ 300.506-510. If, after a hearing, a board of education declines to amend a student's records, the student's parents have the right to place a statement disagreeing with the board's decision in the student's records (see 34 C.F.R. § 300.569[b]; see also Application of the Dep't of Educ., Appeal No. 05-036; Application of a Child with a Disability, Appeal No. 01-099; Application of a Child with a Disability, Appeal No. 94-9). Based on the above, I find that in this case, the parent did not follow the proper procedure to effectuate a grade change by

filing a due process complaint notice for an impartial hearing; therefore, their claim for an order directing the district to change the student's grade is denied.

Although the appeal is dismissed based upon the aforementioned findings regarding mootness and jurisdiction, the facts and conclusions of law made by the impartial hearing officer regarding the merits of the parent's due process complaint notice are supported by the evidence and should be upheld.

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[8] 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]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). While school districts are required to comply with all IDEA procedures, not all procedural errors render an IEP legally inadequate under the IDEA (Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if a procedural violation is alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; 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

[8] 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]).

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).

I have reviewed the entire hearing record, the impartial hearing officer's decision and the parties' arguments. The impartial hearing officer's decision is thorough and well-reasoned. The impartial hearing officer conducted the impartial hearing in a manner consistent with the requirements of due process (34 C.F.R. §§ 300.514[b][2][ii]; N.Y. Educ. Law § 4404[2]). The impartial hearing officer's decision demonstrates that he carefully reviewed the evidence in the hearing record and the parent's allegations, and applied a proper legal analysis. The impartial hearing officer's factual findings are supported by the hearing record and I adopt them. I find that there is no need to modify the determinations of the impartial hearing officer. The impartial hearing officer correctly determined that any implementation failures related to the 2006-07 IEP were either: 1) offset by the provision of alternative services; 2) timely corrected; or 3) did not rise to the level of a denial of a FAPE. He correctly determined that the evidence does not support a finding that the district created a hostile learning environment for the student, resulting in a denial of a FAPE or a deprivation or educational opportunity. Lastly, he correctly determined that the parent's 2006-07 IEP implementation claims had become moot and that the parent's requested remedy of a grade change was inappropriate.

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

THE APPEAL IS DISMISSED.

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

PAUL F. KELLY
STATE REVIEW OFFICER