The University of the State of New York

The State Education Department
State Review Officer

No. 08-077

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 Springville-Griffith Institute Central School District

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

DECISION

Petitioner (the parent) appeals from the decision of an impartial hearing officer on the grounds that he failed to decide the issues related to the student's classification and the parent's request for an independent educational evaluation (IEE) to assess the student's need for assistive technology. The parent also asserts that respondent's (the district's) Committee on Special Education (CSE) conducted an improper annual review because it conducted meetings in the absence of the parent, failed to review a pertinent occupational therapy (OT) evaluation, and conducted a reevaluation of the student without parental consent. The district cross-appeals from that portion of the impartial hearing officer's decision that ordered the district to conduct a review of prior evaluations of the student. The appeal must be sustained in part. The cross appeal is dismissed.

The student's educational history is discussed in Application of the Bd. of Educ., Appeal No. 07-087 and will only be briefly discussed here.[1] In 2003, the student was found eligible for special education services and programs as a student with an other health impairment (OHI) (Dist. Ex. 10 at p. 4). The student's medical history includes an ocular motor disorder, conductive hearing loss in the left ear, acute mastoiditis, sinusitis and sensory processing difficulties (Tr. pp. 316-17; Dist. Exs. 1 at pp. 1, 3; 6 at p. 2; 10 at p. 4; 48 at p. 1; Parent Ex. D3 at pp. 5-6).

On November 18, 2005, the district developed an individualized education program (IEP) which recommended that the student receive two 30-minute 1:1 OT sessions per week in a special location and one 30-minute 1:1 OT session per week in his general education classroom (Dist. Ex. 1 at p. 1). The

[1] Several of the evaluative reports introduced at the impartial hearing in this case were previously entered into evidence in the prior hearing and reviewed during the subsequent appeal (compare Dist. Ex. 6 at pp. 19-21, with IHO Decision; see also Parent Exs. D3; D5; D6; Application of the Bd. of Educ., Appeal No. 07-087).

IEP also provided the student with preferential seating to address his left ear hearing loss and allowed for the use of a graphic organizer program entitled Kidspiration to assist the student with his handwriting difficulties (id. at pp. 1-2). The IEP also provided that the student was to receive visual and verbal reminders to encourage him to use his left hand for all tasks (id. at p. 2).

On May 30, 2006, at the annual review/reevaluation meeting for the student's 2006-07 school year, the CSE declassified the student and determined that he was no longer eligible to receive special education services (Tr. pp. 318-19). The student's parent was not present at the May 30, 2006 CSE meeting when the CSE determined to declassify the student (Tr. p. 319; see Application of the Bd. of Educ., Appeal No. 07-087).

On August 15, 2006, the parent had the student evaluated by a private occupational therapist (Tr. p. 319; Parent Ex. D7).[2] The evaluator reported that administration of the Bruininks-Oseretsky Test of Motor Proficiency - Second edition (BOT-2) yielded scores which revealed that the student was functioning in the average range in all of his motor skills (Parent Ex. D7 at p. 2). The evaluator reported that, as measured by the Beery-Buktenica Developmental Test of Visual Motor Integration (VMI), the student demonstrated full ocular range of motion and visual fields, and functional visual tracking (id.). The evaluator determined the results were consistent with previous testing, indicating low average skill with difficulty in planning and directionality of forms (id.). The evaluator also administered the Jordan Left-Right Reversal Test and determined that the student exhibited perceptual and decoding confusion, although he opined that the student made good use of contextual cues to mediate the difficulty (id. at p. 3). Results of administration of a test identified in the hearing record as the "Draw-a-Person" revealed that the student had a moderate degree of difficulty with ideation and planning while drawing (id.). The evaluating occupational therapist opined that the student's test scores indicated that his difficulties did not stem from motor deficits but from perceptual and sensory processing "inefficiencies," which the student accommodated by his poor sitting posture (so he can more closely monitor his work) and his use of contextual cues to better decode written language (id.). The evaluator stated that the student required "ongoing assessment and accommodation" including OT as a direct service to address his educational needs (Parent Exs. B at pp. 11-12; D7 at p. 3). The evaluator recommended that the student continue to receive OT two times per week as well as all recommendations made in his previous evaluation of the student (Parent Ex. D7 at p. 3).[3]

After the OT evaluation was completed, the parent commenced an impartial hearing to challenge the declassification of the student at the May 30, 2006 CSE meeting (Hearing 1) (Tr. p. 320). On June 15, 2007, a decision by an impartial hearing officer (Hearing Officer 1) annulled the declassification (Dist. Ex. 6 at p. 19). Hearing Officer 1 directed the district to reconvene a full CSE within 30 days of the receipt of his order to discuss and resolve the issue of the student's classification (id.). The district appealed Hearing Officer 1's decision to a State Review Officer (Tr. p. 320; Dist. Ex. 10 at p. 2). On

[2] This private evaluation was performed by an occupational therapist who had previously conducted an evaluation and assessment of the student on April 22, 2005 and recommended that the student receive OT twice a week to improve posture, graphomotor skills, and tactile awareness, decrease demand for near and far point copying, and use of the Kidspiration program (Parent Ex. D6 at p. 4).

[3] The evaluator did not specify whether he was recommending group or individual OT sessions.

September 17, 2007, the district's appeal was dismissed and Hearing Officer 1's decision was upheld by a State Review Officer (Application of the Bd. of Educ., Appeal No. 07-087).

By letter dated October 1, 2007, the district scheduled a CSE meeting for October 16, 2007 (Dist. Ex. 9 at p. 1). The letter indicated that the purpose of the scheduled meeting was for an "annual review" (id.).

Prior to October 16, 2007 CSE meeting, the district's director of special education and student services (director of special education) met with the student's regular education teacher, occupational therapist, special education teacher, and a school psychologist (Tr. pp. 29-30). The group prepared a draft IEP to help guide the discussion at the future CSE meeting (Tr. pp. 29-30; Parent Ex. A). The student's parent was not present at this meeting (Tr. p. 55); however, the district mailed a copy of the draft IEP to the parent (Tr. p. 31; Parent Ex. F1 at pp. 3-4).

At the October 16, 2007 CSE meeting, the parent participated via telephone (Parent Ex. F1 at pp. 1-2). The parent indicated that she had not received the draft IEP and that she wanted a copy of it (Tr. p. 32; Dist. Ex. 15 at p. 1; Parent Ex. F1 at pp. 3-5).[4,5] The parties agreed to reschedule the CSE meeting for October 23, 2007, so that the parent could review a copy of the draft IEP (Parent Exs. C6; F1 at p. 5; see also Dist. Ex. 16).

On October 23, 2007, the CSE reconvened to develop an IEP for the student for the 2007-08 school year (Tr. pp. 33-34). The parent again participated in the meeting by telephone (Dist. Ex. 19; Parent Ex. G1 at p. 2). A parent advocate also participated by telephone (Dist. Ex. 18 at p. 1; 19 at p. 1; Parent Ex. G1 at p. 3). At the October 23, 2007 CSE meeting, the parent expressed her disagreement with several of the CSE members' opinions about the student's present educational abilities (Parent Ex. G1 at pp. 4-7). The parent stated that the CSE was denying her the ability to participate and that she would remain silent for the remainder of the CSE meeting (Dist. Ex. 21 at p. 2; Parent Ex. G1 at pp. 4-7). Thereafter, the parent did not directly participate in the discussions (id. at pp. 7-25). However, the parent's advocate participated on the parent's behalf (id.). The meeting ended before any consensus was reached when the parent's advocate informed the CSE that the parent disagreed with the draft IEP, that the CSE could proceed with the meeting without the parent if they so chose, and then ended the telephone call (Tr. p. 38; Parent Ex. G1 at p. 25).

On October 24, 2007, the district telephoned the parent and left a message requesting that she provide her dates of availability for another CSE meeting (Dist. Ex. 25 at p. 1). On the same day, the district scheduled a CSE meeting for November 1, 2007 (Dist. Exs. 23; 25 at p. 1). The parent informed the district that she was not available on November 1, 2007 (Dist. Ex. 25 at p. 1). The district rescheduled the meeting for November 20, 2007, a day that the parent had indicated that she was available (Dist. Exs. 23; 24; 25 at p. 1).

[4] Although the district offered to fax the draft IEP to the parent, the parent stated that her fax machine could not receive faxes; it could only send them (Parent Ex. F1 at p. 4).

[5] On the day of the October 16, 2007 CSE meeting, the parent requested that the additional parent member and the district's recording secretary be excused from the CSE meeting (Dist. Ex. 14 at p. 1; Parent Ex. F1 at pp. 2-3). The district complied with both requests (id.).

On November 19, 2007, one day prior to the scheduled CSE meeting, the district placed a telephone call to the parent and left a message on her answering machine to remind her about the scheduled November 20, 2007 CSE meeting (Tr. p. 304; Dist. Exs. 29; 36). On November 20, 2007, the district again telephoned the parent and left a message indicating that if the parent did not call back, the district would proceed with the CSE meeting in the parent's absence (Tr. pp. 306-07; Dist. Exs. 29; 36). The parent did not return this phone call and the CSE opted to proceed with the meeting in the absence of the parent (Tr. p. 41; Dist. Ex. 34).

The IEP that was prepared as a result of the November 20, 2007 CSE meeting classified the student as OHI, recommended one 30-minute individual session of OT in the general class setting, two indirect 30-minute OT consults per month, preferential seating to accommodate the student's hearing loss, and the use of a seat cushion to allow for increased movement while in a seated position (Tr. pp. 252-53; Dist. Ex. 34 at pp. 1-2).[6] The OT recommendation on the November 20, 2007 IEP reflected a reduction in the frequency and duration of OT services that the student had been receiving pursuant to the November 18, 2005 IEP (compare Dist. Ex. 1 at p. 1, with Dist. Ex. 34 at pp. 1-2).

By letter dated November 20, 2007, the parent advised the district's director of special education that she had waited for the district's telephone call so that she could participate in the November 20, 2007 CSE meeting, but that a telephone call never occurred (Dist. Ex. 35 at p. 1).[7] The letter also requested copies of the CSE meeting sign-in sheet, tape recording, minutes and all evaluations or information reviewed by the CSE (id. at p. 2).

By letter dated November 21, 2007, the district's director of special education responded that the November 20, 2007 IEP would be annulled and another CSE meeting would be scheduled to develop an IEP with parental participation (Dist. Ex. 36). The letter indicated the district's dates of availability and inquired as to the parent's availability on those dates (id.).

By letter dated November 24, 2007, the parent wrote to the district and requested a copy of the November 20, 2007 IEP, asserting that only an impartial hearing officer could annul the CSE's recommendations made on that IEP (Dist. Ex. 37). The parent did not provide the dates of her availability (id.).

[6] In her testimony at the impartial hearing, the district's occupational therapist clarified that the two indirect 30-minute OT consults would occur between the occupational therapist and the student's teacher and not with the student directly (Tr. pp. 252-53).

[7] At the impartial hearing, the parent testified that on November 20, 2007 she telephoned the CSE prior to the meeting and was told that she would be called back once all of the CSE members arrived (Tr. pp. 328-29). At the impartial hearing, the parent also conducted a cross-examination of the district secretary who had made the telephone calls to the parent (Tr. pp. 304-13). The secretary testified that on the date of the November 20, 2007 CSE meeting, the parent had two telephone numbers and that the secretary was unsure which of the two numbers she had telephoned to leave these messages (Tr. pp. 304-10).

By letter dated November 28, 2007, the director of special education responded to the parent's November 24, 2007 letter, informed the parent that the November 20, 2007 IEP had been annulled and that none of the CSE's recommendations had been sent to the board of education for approval (Dist. Ex. 38). The November 28, 2007 letter reiterated the district's dates of availability for a CSE meeting and requested that if the parent was unavailable on the proposed dates, that she provide alternative dates and times (id.).

By letter dated December 4, 2007, the parent indicated that she was not available on the dates proposed by the director of special education, that she was waiting for copies of the records she had previously requested in her November 24, 2007 letter and that she would not provide the dates of her availability until she had an opportunity to review the educational records (Dist. Ex. 39 at p. 1).

By letter dated December 7, 2007, the director of special education responded to the parent's December 4, 2007 letter, provided additional dates of the district's availability, and again requested that if the parent was unavailable on the proposed dates that she provide the dates she would be available (Dist. Ex. 40).

By letter dated December 13, 2007, the director of special education wrote to the parent that she considered the parent's failure to provide available dates for a CSE meeting as an indication that the parent did not want the meeting to be rescheduled (Dist. Ex. 41). The letter also indicated that the district would be sending out a "prior notice letter" and a finalized IEP to the parent (id.). However, the letter indicated that the district would still be willing to schedule a program review meeting to allow the parent to provide additional input to the CSE (id.).

The parent commenced an impartial hearing via a due process complaint notice dated December 21, 2007 (Dist. Ex. 50). The due process complaint notice alleged that on December 12, 2007, the student had attempted to attend his OT session, but was instructed by the district's occupational therapist that he was to return to his classroom because his OT recommendation had been changed and he would no longer receive OT three times per week (id.). The parent alleged that the implementation of the reduced OT services continued the following week despite the representation made by the director of special education that the November 20, 2007 IEP had been annulled (id. at p. 3). The due process complaint notice also alleged, among other things, that the district failed to: (1) provide proper notice of the CSE meeting to the parent; (2) provide prior written notice to the parent; (3) schedule the CSE meeting at a mutually convenient time; (4) convene a properly composed CSE; (5) conduct an appropriate annual review; (6) properly evaluate the student; and (7) properly review the student's evaluations including the student's independent evaluations (id. at pp. 4-5). The parent requested, among other things, a sensory diet/sensory integration therapy, an independent assistive technology evaluation, daily resource room services, compensatory education, a change in classification from OHI to hearing impaired or multiple disabilities, and pendency under the November 18, 2005 IEP (id. at pp. 6-7).[8]

[8] By letter dated January 2, 2008, the district denied the claims made by the parents in the due process complaint notice (Dist. Ex. 51).

On January 3, 2008, the director of special education forwarded a copy of the November 20, 2007 IEP to the parent and summarized the recommendations made by the CSE (Dist. Ex. 42 at pp. 1, 2).[9] Thereafter, by letter dated January 9, 2008, the director of special education informed the parent that the board of education had met on the previous day and had approved the November 20, 2007 IEP (Dist. Ex. 43). Included with the letter was another copy of the November 20, 2007 IEP (id.).[10]

The impartial hearing commenced on April 24, 2008 and ended on May 8, 2008, after two days of testimony (Hearing 2) (Tr. pp. 1, 188). By decision dated June 20, 2008, the impartial hearing officer (Hearing Officer 2) annulled the November 20, 2007 IEP and ordered the district to reconvene a full CSE within 30 days of the receipt of his order to discuss and resolve the issue of an appropriate program and placement for the student (IHO Decision at pp. 16-17). Hearing Officer 2 further ordered the district to review "all existing current evaluations" provided by the parent and/or relevant to the student and known to the district, including both OT evaluations by the independent occupational therapist, the evaluation by the behavioral optometrist, and the evaluation by the audiologist (IHO Decision at p. 17; see Parent Exs. D3; D5; D6; D7).

On appeal, the parent asserts that despite Hearing Officer 1's order in his June 15, 2007 decision that the district reconvene the full CSE to discuss and resolve the issue of the student's classification, the issue of classification was not addressed at any of the CSE meetings held in 2007. The parent also asserts that Hearing Officer 2 erred in declining to address the issue of classification by ruling that the issue was not raised in the parent's due process complaint notice. The parent further asserts that Hearing Officer 2 erred in finding that the district did not violate State regulations when it proceeded with the November 20, 2007 CSE meeting in the absence of the parent. Additionally, the parent asserts that the district conducted an improper annual review because it conducted CSE meetings in the absence of the parent, conducted a reevaluation of the student without parental consent, and failed to adequately review all evaluations, including the independent OT evaluation from August 15, 2006. The parent requests, among other things, that a State Review Officer annul Hearing Officer 2's decision regarding the issues raised in her petition, and that a State Review Officer order that: (1) the district significantly impeded the parent's opportunity to participate in the formulation of the student's program and failed to offer the student a free appropriate public education (FAPE); (2) the district review and discuss the student's classification; (3) the student be allowed to undergo an independent assistive technology evaluation at public expense; and (4) the district reconvene the CSE upon appropriate notice to the parent to resolve the issue of an appropriate program and placement for the student. The parent attached additional evidence to her petition for consideration by a State Review Officer.

[9] On January 9, 2008, the district sent a letter to the parent indicating that the IEP contained an error regarding the student's next reevaluation date (Parent Ex. C7). On January 17, 2008, a corrected copy of the January 3, 2008 letter was sent to the parent (Dist. Ex. 44).

[10] On January 23, 2008, a corrected copy of the January 9, 2008 letter was sent to the parent (Dist. Ex. 45). The letter corrected a typographical error (id.).

The district's answer asserts that the parent's additional evidence submitted with her petition is not necessary for a State Review Officer to render a decision and involves an incident that was not the subject of the impartial hearing at issue. The district also cross-appeals and asserts that Hearing Officer 2 erred by ordering the CSE to review formal evaluations that were previously reviewed by the CSE at prior meetings.

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[11] 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]; 8 NYCRR 200.5[j][[4][ii]; E.H. v. Bd. of Educ., 2008 WL 3930028 [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]; see 8 NYCRR 2005[j][4][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the student 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,

[11] 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]).

346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192).

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs, establishes annual goals related to those needs, and provides for the use of appropriate special education services (Application of a Student with a Disability, Appeal No. 08-050; 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).

The New York State Legislature amended the Education Law to place the burden of proof upon the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement would continue to have the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c], as amended by Ch. 583 of the Laws of 2007). The amended statute took effect for impartial hearings commenced on or after October 14, 2007 (see Application of a Student with a Disability, Appeal No. 08-030; Application of the Bd. of Educ., Appeal No. 08-029; Application of the Bd. of Educ., Appeal No. 08-018). Here, the parent's due process complaint notice was dated December 21, 2007 (Dist. Ex. 50). Accordingly, the district had the burden of proof to demonstrate that it offered the student a FAPE for the 2007-08 school year.

Preliminarily, I note that the parent has not appealed the portion of Hearing Officer 2's decision which denied her request for compensatory education (IHO Decision at p. 16). Similarly, the district has not appealed the Hearing Officer 2's determination that the district failed to provide prior written notice nor has it appealed the annulment of the November 20, 2007 IEP (id. at pp. 11-12). An impartial hearing officer's decision is final and binding upon the parties unless appealed to the State Review Officer (34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[k]). Consequently, these parts of Hearing Officer 2's decision are final and binding (Application of a Student with a Disability, Appeal No. 08-046; Application of the Dep't of Educ., Appeal No. 08-025; 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).

I will now address the district's affirmative defense raised in its answer that objects to the parent's attempt to introduce nine new exhibits attached to her petition. The nine exhibits include six letters (two from the parent and four from the district's director of special education); a prescription notice for one of the parent's other children; proof that the prescription for this child was filled; and a jury summons. Generally, documentary evidence not presented at a hearing may be considered in an appeal from an impartial hearing officer's decision if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary to enable a State Review Officer to render a decision (Application of a Student with a Disability, Appeal No. 08-030; Application of a Child

Suspected of Having a Disability, Appeal No. 07-042; Application of a Child with a Disability, Appeal No. 06-058; Application of a Child with a Disability, Appeal No. 05-020). While the exhibits could not have been offered at the time of the impartial hearing, they are not necessary for my review and I decline to accept them.

I now turn to the parent's assertion that the district failed to obtain her consent prior to what the parent has claimed was a reevaluation by the district's psychologist. The hearing record reveals that the district desired to further evaluate the student, requested parental consent to reevaluate the student, that the parent refused to consent and the district opted to have the school psychologist review existing documents and prepare a summary report (Tr. pp. 267-71; Dist. Exs. 48; 55; 58). Parental consent is not required before reviewing existing data as part of an evaluation or a reevaluation or administering a test or other evaluation that is administered to all students unless, before administration of that test or evaluation, consent is required of parents of all students (34 C.F.R. § 300.300[d][1]; 8 NYCRR 200.5[b][1][i]). As such, I decline to disturb Hearing Officer 2's determination that parental consent was not required to review the student's existing evaluative data (IHO Decision at p. 15).

I now turn to the parent's assertion that the district's preparation of a draft IEP prior to the November 20, 2007 CSE meeting was improper and that she was denied an opportunity to participate in the preparation of this document. It is permissible under the IDEA for school district personnel to bring a draft IEP to the IEP meeting, provided that the parents are informed it is a draft subject to review and the parents have the opportunity to make objections and suggestions (see Nack v. Orange City Sch. Dist., 454 F.3d 604, 610 [6th Cir. 2006] ["predetermination is not synonymous with preparation"]; C. S. v. Rye City Sch. Dist., 454 F.Supp. 2d 134 [S.D.N.Y. 2006] [a school district should not be precluded from suggesting an outcome at a CSE meeting]; Application of a Child with a Disability, Appeal No. 06-102; Application of a Child with a Disability, Appeal No. 05-087; Application of a Child with a Disability, Appeal No. 02-029; Application of a Child with a Disability, Appeal No. 01-073). Moreover, conversations about possible recommendations for a student, prior to a CSE meeting, are not prohibited as long as the discussions take place with the understanding that changes may occur at the CSE meeting (see Danielle G. v. Dep't of Educ., 2008 WL 3286579, *5-*6 [a CSE's preconference to discuss a student's case did not deprive the parents of meaningful participation in the formulation of an IEP]).

In this case, the hearing record reveals that the district afforded the parent multiple opportunities to participate at the CSE meetings held during the 2007-08 school year in order to allow her to participate in the formulation of the student's IEP (Dist. Exs. 9; 16; 17; 18 at pp. 1, 4; 22; 23; 24; 26; 29; 36; 38; 40; 41; Parent Exs. F1 at p. 5; G1 at pp. 4-7). The district attempted to forward a copy of its draft IEP to the parent before the October 16, 2007 CSE meeting (Tr. pp. 30-31). According to the parent, the draft IEP was not received by the parent and the October 16, 2007 CSE meeting was adjourned so that the parent could have the opportunity to review this document (Parent Ex. F1 at pp. 3-5). At the October 23, 2007 CSE meeting, the parent and her advocate actively participated and voiced their objections to the CSE's recommendations (Parent Ex. G1 at pp. 1-7). When the district was unable to reach the parent in order to gain her participation at the November 20, 2007 CSE meeting, the district offered to annul the November 20, 2007 IEP and afforded the parent several opportunities to meet with the CSE to provide input regarding the student's educational program (Dist. Exs. 9; 16; 23; 24; 25 at p. 1; 36; 38; 40; 41; Parent Exs. F1 at p. 5; G1 at pp. 4-7). I find that under these circumstances, there is inadequate evidence to conclude that the district prevented the parent from meaningfully participating in the formulation of the student's IEP.

I now turn to the issue of whether it was proper for the district to conduct the November 20, 2007 CSE meeting in the absence of the parent. The IDEA sets forth procedural safeguards that include providing parents an opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child" (20 U.S.C. § 1415[b][1]). Parents of a child with a disability are mandated team members of a CSE (8 NYCRR 200.3[a]; see also 34 C.F.R. § 300.321[a][1]). Federal and State regulations governing parental participation require that school districts take steps to ensure that parents are present at their child's CSE meetings or are afforded the opportunity to participate (34 C.F.R. § 300.322[a]; 8 NYCRR 200.5[d]; see Mr. M v. Ridgefield Bd. of Educ., 2007 WL 987483 [D. Conn. Mar. 30, 2007]). If parents are unable to attend a CSE meeting, the school district must use other methods to ensure parent participation, including individual or conference telephone calls (34 C.F.R. §§ 300.322[c], 300.328; see 8 NYCRR 200.5[d][1][iii]). A CSE meeting may be conducted without a parent in attendance if the school district is unable to convince the parents that they should attend (34 C.F.R. § 300.322[d]; see 8 NYCRR 200.5[d][3]). The school district must keep a record of its attempts to arrange a mutually agreed upon time and place, such as telephone call records, correspondence, and detailed records of visits made to the parents' home or place of employment and the results of those visits (34 C.F.R. § 300.322[d]; see 8 NYCRR 200.5[d][3] - [4]; see Application of a Child with a Disability, Appeal No. 07-017; Application of a Child with a Disability, Appeal No. 03-082).

Hearing Officer 2 determined that the district properly proceeded with the November 20, 2007 CSE meeting in the absence of the student's parent (IHO Decision at p. 13). Given the totality of the circumstances presented in this case, I am not persuaded to disturb his decision on this issue.

The district asserts that its decision to move forward with the November 20, 2007 CSE meeting in the parent's absence was due to the fact that the parent has "repeatedly demonstrated efforts to thwart and/or delay the CSE process" (Dist. Mem. of Law at p. 10). The district points to the parent's lack of cooperation at the October 23, 2007 CSE meeting as being illustrative of this assertion. The minutes from the October 23, 2007 CSE meeting reveal that due to her disagreement with the CSE's recommendations, the parent stated that "I will remain silent for the remainder of this committee meeting because you have denied my participation" (Parent Ex. G1 at pp. 6-7). The district asserts that the parent took an active role in the October 23, 2007 CSE meeting. I agree. The minutes from the October 23, 2007 CSE meeting reveal that the adjournment of the meeting occurred not because the district denied the parent the opportunity to participate in the creation of the student's IEP as the parent has argued, but because the parent deliberately refused to participate and prematurely terminated the meeting (Parent Ex. G1 at pp. 6, 8). I find that the district's decision to adjourn the October 23, 2007 CSE meeting to another date did not deny the parent meaningful opportunity to participate in the meeting and did not deny the student a FAPE.

The hearing record shows that the district made several attempts to arrange a mutually agreed upon time for the CSE to reconvene, scheduling CSE meetings four times during the 2007-08 school year (Dist. Exs. 9; 16; 23; 24). Before each of these scheduled CSE meetings, the district provided written notice to the parent (id.). The hearing record also reveals that the district left messages for the parent prior to the CSE meetings in order to encourage her participation at the meetings (Dist. Exs. 17 at p. 1; 25 at p. 1; 29 at p. 1). After the October 16 and October 23, 2007 CSE meeting dates, the district made attempts to determine the dates that the parent would be available so that another CSE meeting could be scheduled (Dist. Exs. 25 at p. 1; Parent Ex. F1 at p. 5). Additionally, even after the CSE opted to proceed in the parent's absence on November 20, 2007, and after the IEP had been prepared, the director of special education agreed to annul the meeting and again attempted to reschedule the CSE

meeting so that the meeting would include the parent (Dist. Exs. 36; 38; 40; 41). Moreover, despite the district's willingness to provide the dates of its availability to hold a CSE meeting and their repeated requests for the parent to provide her dates of availability, the parent did not provide the district with her availability for a CSE meeting (Dist. Exs. 36; 37; 38; 39; 40; 41).[12]

In light of the factual circumstances in this case, including the significant amount of information in the hearing record detailing the district's efforts to include the parent in the CSE process, and of the parent's refusal to cooperate at the October 23, 2007 CSE meeting and in rescheduling the CSE meeting, I find that the district did not deny a FAPE to the student by proceeding with the November 20, 2007 CSE meeting without the parent (see Dist. Exs. 9; 16; 17; 18; 22; 23; 24; 26; 29; 33; 36; 38; 40; 41; Parent Exs. F1 at p. 5; G1 at pp. 4-7).

I turn next to the parent's contention that the Hearing Officer 2 erred in failing to address the issue of the student's classification at the impartial hearing. In his decision, Hearing Officer 2 declined to address the issue of the student's classification because he found that the issue was not properly raised by the parent in her due process complaint notice (IHO Decision at p. 14). However, the hearing record demonstrates that the issue of the student's classification was raised by the parent in her due process complaint notice (Parent Ex. 50 at pp. 4, 6-7). Therefore, I find that Hearing Officer 2 erred in declining to issue a finding regarding the student's classification.

After Hearing Officer 1 ordered a remand to the CSE, the issue of classification was raised at the October 23, 2007 CSE meeting by the parent's advocate (Parent Ex. G1 at pp. 7-8, 9-10). The parent's advocate questioned the district's decision to schedule a CSE meeting for an annual review asserting that Hearing Officer 1 did not order the district to schedule an annual review (id.). The district's director of special education maintained that the decision from Hearing Officer 1 had stated that "we're supposed to …[h]ave an annual review because the declassification should [sic] no longer holds through" (id. at pp. 9-10). The director of special education stated further that the student "is still classified as a child with Other Health Impairment and we are to set up an appropriate program for him this year" (id.). When the advocate pressed the matter further and inquired if the director of special education had reviewed the prior decision from the Office of State Review, the director of special education replied that she had (id. at p. 10). The advocate then inquired as to whether the CSE was reviewing these two decisions (id.). The director replied "[t]he committee does not review them. I give them the information" (id.).

[12] By letter dated December 4, 2007, the parent refused to provide her dates of availability for a CSE meeting until she received and reviewed copies of the student's educational records (Dist. Ex. 39 at p. 1). The hearing record reveals that the parent had previously been more willing to work with the district regarding her dates of availability (Dist. Ex. 25 at p. 1; Parent Ex. C4; F1 at p. 5).

I find that both the CSE and Hearing Officer 2 failed to address the classification issue. Hearing Officer 1 previously ordered that this issue be resolved by the CSE, but the CSE failed to consider it. As such, I remand this case back to the CSE to discuss the issue of whether the student is eligible for special education services. Moreover, in light of the parent's request in the December 21, 2007 due process complaint notice to have the student's classification changed from OHI to either hearing impaired or multiple disabilities, if the student is deemed to be eligible for special education services, then the CSE must then address whether the student's classification should be changed (Dist. Ex. 50 at pp. 6-7).

I now turn to the district's cross-appeal which contends that Hearing Officer 2 erred in ordering that the CSE review formal evaluations previously reviewed by the CSE at prior CSE meetings. 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 Bd. of Educ., Appeal No. 08-016; Application of the Dep't. of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 07-008; Application of the Bd. of Educ., Appeal No. 06-076; Application of a Child with a Disability, Appeal No. 06-059; Application of the Bd. 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). With certain exceptions, a student's IEP is required to be reviewed periodically, but not less frequently than annually, and revised as appropriate (20 U.S.C. § 1414[d][4][A]; 34 C.F.R. § 300.324[b][1][i]; see also Educ. Law § 4402[2]; 8 NYCRR 200.4[f]). The CSE is required to develop an IEP that accurately reflects the student's special education needs (34 C.F.R. § 300.306[c][2]; 8 NYCRR 200.4[d][2]). Incumbent with that duty is the mandate that the IEP "shall report the present levels of academic achievement and the functional performance and indicate the individual needs of the student." (8 NYCRR 200.4[d][2]; see 34 C.F.R. § 300.320 [a][1]). Moreover, a CSE is required to "consider" information about the student provided to, or by, the parents (8 NYCRR 200.4[f][2][ii]; Application of a Child with a Disability, Appeal No. 07-139).

Proper consideration of all of the evaluative information is also important in order to determine whether the student needs to be reevaluated. A reevaluation of the student is required if the school district "determines that the educational or related service needs, including improved academic achievement and functional performance, of the child warrant reevaluation" or upon request of the student's parents or teacher (20 U.S.C. § 1414[a][2][A][i]-[ii]; see 34 C.F.R. § 300.303[a]; 8 NYCRR 200.4[b][4]; see also Perricelli, 2007 WL 465211, at *10-11). Unless otherwise agreed to by the parent and the school district, a reevaluation must be conducted at least once every three years and not more than once per year (20 U.S.C. § 1414[a][2][B]; see 34 C.F.R. § 300.303[b]; 8 NYCRR 200.4[b][4]). "[T]he reevaluation shall be sufficient to determine the student's individual needs, educational progress and achievement, the student's ability to participate in instructional programs in regular education and the student's continuing eligibility for special education" (8 NYCRR 200.4[b][4]; see also Perricelli, 2007 WL 465211, at *11). Further, as part of its reevaluation, a school district is required to review existing evaluative data with respect to a student with a disability and determine whether additional data is necessary (20 U.S.C. § 1414[c][1][A] and [B]; 34 C.F.R. § 300.305; 8 NYCRR 200.4[b][5]).

Hearing Officer 2 ordered the district to review all existing current evaluations provided by the parents and/or relevant to the student and known to the district (IHO Decision at p. 17). Hearing Officer 2 also found that the district failed to sufficiently consider the most recent evaluations, in particular the private occupational therapist's August 15, 2006 report (id. at pp. 14-15). The hearing record reveals that the August 15, 2006 OT report was created at the parent's request and in response to the CSE's May 30, 2006 decision to declassify the student (Tr. p. 319). A review of the hearing record does not reveal any evidence to suggest that the August 15, 2006 OT report was discussed or considered at the October 16, October 23, or November 20, 2007 CSE meetings (see Parent Exs. F1; G1; H1). Although both the private occupational therapist who prepared the report and the district's occupational therapist testified about the report at that prior impartial hearing concerning the 2006-07 school year, at the time of the impartial hearing in this case, the district's occupational therapist could not remember if she had seen the report (Tr. p. 246; Dist. Ex. 1 at p. 4; Parent Exs. B at pp. 10-11; J at pp. 7-8). Under the circumstances of this case, the parent's refusal to participate at the October 23, 2007 meeting, and her subsequent lack of participation at the November 20, 2007 meeting made it difficult for her to ensure that the August 15, 2006 report was sufficiently addressed. Moreover, it is unclear whether the CSE's failure to consider the August 15, 2006 report would have had any impact on the CSE's recommendations made in the November 20, 2007 IEP. However, it is the CSE's responsibility to properly consider all of the evaluative information. Although this report did not exist at the time of the CSE's May 30, 2006 meeting, the OT report became known to the district through testimony at Hearing 1 (Parent Ex. J at pp. 7-8). Despite the district's knowledge about this report, it appears that the report has never been considered by the CSE (see Parent Exs. F1; G1; H1). A CSE is required to "consider" information about the child provided to, or by, the parents (8 NYCRR 200.4[f][2][ii]). Therefore, I agree with Hearing Officer 2 that the CSE should have considered the August 15, 2006 report and direct that the CSE review and consider not only the August 15, 2006 evaluation, but any relevant reports provided by the parent. I also encourage the parent to provide any reports in her possession to the district, remind both parties that formulating an IEP is a collaborative effort (Schaffer, 546 U.S. at 53), and I encourage the parties to work cooperatively.[13]

I now turn to the parent's request for an independent assistive technology evaluation. Federal and State regulations provide that a parent has the right to obtain an IEE at public expense if the parent disagrees with an evaluation obtained by the school district (34 C.F.R. § 300.502[b][1]; 8 NYCRR 200.5[g][1]). If a parent requests an IEE at public expense, the school district must, without unnecessary delay, ensure either that an IEE is provided at public expense or initiate an impartial hearing to show that its evaluation is appropriate or that the evaluation obtained by the parent does not meet the school district criteria (34 C.F.R. § 300.502[b][2]; 8 NYCRR 200.5[g][1][iv]). If an impartial hearing officer finds that a school district's evaluation is appropriate, a parent may not obtain an IEE at public expense (34 C.F.R. § 300.502; 8 NYCRR 200.5[g]; Application of a Child with a Disability, Appeal No. 07-126; Application of a Child with a Disability, Appeal No. 06-067; Application of the Bd. of Educ., Appeal No. 05-009; Application of a Child with a Disability, Appeal No. 04-082; Application of a Child with a Disability, Appeal No. 04-027).

[13] I concur with Hearing Officer 2 that when the CSE reconvenes it should specifically consider the evaluations provided by the parent, including the OT evaluations conducted on April 22, 2005 and August 15, 2006, the evaluation conducted by the behavioral optometrist on March 1, 2005, and the central auditory processing evaluation conducted on February 22, 2005. I also encourage the parent to consent to any appropriate evaluation sought to be conducted by district personnel.

The hearing record reveals that the parent's due process complaint notice requested an independent assistive technology evaluation at public expense (Dist. Ex. 50 at p. 6). The parent also requests an IEE on appeal. Hearing Officer 2 found that there was no testimony or evidence in the hearing record to suggest that such an evaluation was required (IHO Decision at p. 16). I agree with Hearing Officer 2 that there is no testimony or evidence in the hearing record regarding the need for such an evaluation. If the district declined the parent's request to conduct the assistive technology evaluation then at the impartial hearing, it should have provided a rationale for why such an evaluation was not required as required by the State regulations. I direct the district to consider whether an assistive technology evaluation is necessary and to follow the procedures contained in the State regulations with regard to a parent's request for an IEE.

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

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS APPEAL IS DISMISSED.

IT IS ORDERED that the district's CSE shall reconvene to address the issue of whether the student is eligible for special education services, and if so, to address the student's classification within 30 calendar days from the date of this decision; and

IT IS FURTHER ORDERED that the CSE when it convenes must consider whether an independent assistive technology evaluation is warranted.

Dated: **Albany, New York**
September 8, 2008

PAUL F. KELLY
STATE REVIEW OFFICER