The University of the State of New York

The State Education Department
State Review Officer

No. 08-103

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 New York City Department of Education

Appearances:
Law Offices of Anton Papakhin, PC, attorneys for petitioner, Anton Papakhin, Esq., of counsel

Michael Best, Special Assistant Corporation Counsel, attorney for respondent, Emily R. Goldman, Esq., of counsel

DECISION

Petitioner (the parent)[1] appeals from the portion of a decision of an impartial hearing officer which denied her request that respondent (the district) be ordered to provide the student with a residential placement at the Judge Rotenberg Educational Center (JRC). The appeal must be sustained in part.

At the time of the impartial hearing in July 2008, the student was enrolled in the district but he attended school infrequently (Tr. p. 18; Parent Ex. I at p. 1). The student's eligibility for special education and related services as a student with an emotional disturbance is not in dispute in this appeal (Parent Ex. C at p. 1; see 34 C.F.R. § 300.8[c][4][i]; 8 NYCRR 200.1[zz][4]).

[1] The student's mother is deceased and he is represented by his legal guardian who has proceeded as the "parent" for purposes of these proceedings (Parent Ex. I at p. 1; see 20 U.S.C. 1401[23][B]; 34 C.F.R. § 300.30[a][3]; 8 NYCRR 200.1[ii][1]).

The hearing record, as relevant to the issues presented in this case, indicates that the student was identified as eligible to receive special education and related services in 2004, and he was initially placed in a 12:1+1 special class with related services of individual counseling (Parent Ex. H at p. 1). The student became eligible after exhibiting "severe acting out behavior," which included conflicts with teachers and peers and "walking out of the classroom" when becoming angry with a teacher (Parent Ex. F at p. 2). The student remained in this placement until he entered high school and the district changed his placement to a 12:1 special class (id.). By the 2006-07 school year, the district recommended placement in a 15:1 special class (id.; Parent Ex. B at p. 1). Although eligible to receive special education and related services, the student was chronically truant for a number of years, including 66 absences for the 2004-05 school year, 84 absences in the 2005-06 school year, and 119 absences in the 2006-07 school year (see, e.g., Parent Exs. G at p. 3; H at p. 2; I at pp. 1, 4).

The student has a history of hospitalizations for psychiatric and substance abuse problems, with the earliest hospitalization noted in the hearing record from February to March 2004 after the student had smoked marijuana, "broke curfew," assaulted his mother, and attempted to set his bedroom ceiling on fire (Parent Exs. F at pp. 1-2; I at p. 3). In October 2004, he was again hospitalized due to behaviors deemed dangerous to himself and others (Parent Ex. G at p. 1). A discharge summary dated November 5, 2004 indicated that the student had reportedly assaulted his mother, habitually smoked marijuana, habitually been truant, broken curfew and had been noncompliant with his psychotropic medication regimen since April 2004 (Parent Ex. G at p. 1). According to the discharge summary, the student became "enraged" after his mother refused to allow him unsupervised possession of certain funds, and the situation escalated requiring police and emergency services intervention (id. at p. 2). The discharge summary further reflected that the student was involved in another incident requiring police intervention to escort him to a psychiatric evaluation, but the student ran away while the police were taking him to a squad car (id. at pp. 1-2).

While hospitalized in October 2004, the student's treatment goals included increasing his ability to adhere to rules of authority figures, to manage his frustration and to return home upon discharge (Parent Ex. G at p. 5). The student made gradual progress toward his treatment goals although he also exhibited oppositional behavior, threatened peers, had one physical altercation with a peer and was noncompliant with medication for a brief period of time (id. at p. 4). Treatment modalities included individual and group psychotherapy three times per week, family therapy once per week, activity therapy daily, and medication (id. at p. 4). The student was diagnosed with, among other things, intermittent explosive disorder, conduct disorder, parent-child relational problems, and cannabis abuse (Parent Exs. F at p. 4; G at p. 6). The student was discharged with recommendations to complete a substance abuse treatment program, comply with medication regimen, and comply with outpatient psychiatric aftercare services (outpatient center) that included both individual and family therapy (Parent Ex. G at p. 6). It was also recommended that the Committee on Special Education (CSE) locate a sufficiently restrictive educational setting that provided the therapeutic services that the student required (id. at p. 6).

In November 2004, the outpatient center completed an intake record on the student (Parent Ex. F). Among other things, the intake report reflected that the student was receiving substance abuse treatment (id. at p. 2). Diagnostic impressions included a conduct disorder, cannabis abuse, parent child relational problems, rule out a bipolar disorder, as well as problems with the student's primary support group, social environment and school (id. at p. 6).

A psychoeducational reevaluation of the student conducted in December 2005 indicated that the student's overall cognitive functioning was in the borderline range (Parent Ex. D at p. 2). The evaluator noted that the student was not easily distracted, was able to express his thoughts in an age appropriate fashion and sustained an appropriate level of eye contact during the evaluation (id.). She noted that although the evaluation was completed over several sessions and the student did not keep all of his appointments, he was compliant and attempted all tasks presented (id. at p. 1). Among other evaluative testing, the Behavior Assessment System for Children-Second Edition (BASC-II) was administered to assess the student's social/emotional functioning and yielded scores determined to be "at risk" in attitude to school, attitude to teachers and school problems as well as relations with parents (id. at p. 5).

A private psychological evaluation of the student conducted by the outpatient center in September 2006 reflected that the student's overall cognitive functioning was in the extremely low range (Parent Ex. E at p. 2). The evaluator noted that the student appeared to take the evaluation seriously and was cooperative throughout the testing (id. at p. 1). Administration of the Wechsler Intelligence Scale for Children – Fourth Edition (WISC-IV) yielded standard composite scores of 71 in verbal comprehension (borderline), 79 in perceptual reasoning (borderline), 52 in working memory (extremely low), 73 in processing speed (borderline) and a full scale IQ score of 62 (extremely low) (id. at p. 2). The basic reading subtest of the Wechsler Individual Achievement Test (WIAT) was administered and yielded a percentile rank of 2 (extremely low) (id. at pp. 5-6). Although specific projective tests were not named in the report, the evaluator stated that the composite of the student's projective test results indicated that the student experienced mild but chronic stress, had inadequate coping resources, had below average adaptive capacities, had limited tolerance for frustration, had less than average ability to persevere and had ongoing "life stressors" as opposed to situational or transient concerns (id. at p. 6). The student reportedly displayed an adaptive capacity to think logically and coherently, was at risk for being emotionally withdrawn, showed less than average psychological complexity as compared to his peers, had a limited capacity to form close attachments to other people and did not pay sufficient attention to himself (id. at pp. 7-8). The student's multiaxial diagnoses included a conduct disorder, a bipolar disorder and cannabis abuse, borderline intellectual functioning, and notation of a parent/child conflict (id. at p. 8). The evaluator recommended that the student be placed in a residential program as well as continue psychopharmacology, participate in weekly individual psychotherapy, and attend a small, academic setting with academic and emotional support (id.).

On January 8, 2008, the student was admitted to a psychiatric hospital as a result of an escalation in the student's mood dysregulation and aggression (Parent Exs. J at p. 1; P at p. 3). A discharge summary dated January 29, 2008 noted that precipitant events included the death of the student's mother, conflicts with his aunt/legal guardian regarding his failure to participate in school, chronic marijuana abuse, an arrest for possession of marijuana, and noncompliance with an outpatient substance abuse program (Parent Ex. J at p. 2). The student received Diagnostic and Statistical Manual of Mental Disorders—Fourth Edition (DSM-IV) diagnoses of mood disorder-

not otherwise specified, cannabis dependence, and alcohol abuse, but personality disorder diagnoses were deferred (id. at p. 1). Treatment modalities indicated in the discharge summary included individual and group therapy, substance abuse group, education, medication, recreation therapy, psychodrama and art therapy (id.). The student was described as guarded and angry, needing frequent limit setting and redirection in order to comply with unit routines and rules, and was at times a negative influence on the therapeutic community, as well as was argumentative and disrespectful with staff (id. at p. 3). The discharge summary reflected that there were two instances in which the student became agitated and verbally threatened staff, but he was able to deescalate before acting on the threats (id.). Over time, the student demonstrated improvements in his mood dysregulation, became compliant with his blood work and medication regime, accepted the recommendation for outpatient rehabilitation, and was discharged after 21 days (id. at pp. 1, 3).

In a letter dated March 4, 2008, the parent notified the CSE that she wanted to have the student reevaluated in order to obtain placement in a residential treatment facility (Parent Ex. P at p. 2). Her letter summarized the events leading up to the student's reevaluation, including his psychiatric diagnoses, hospitalizations, substance abuse problems, behavioral problems, and chronic truancy (id. at p. 3). The parent noted that the student did not comply with his agreement to complete a substance abuse rehabilitation program, and that he had left that facility without permission on February 7, 2008 (id.). According to the parent, the rehabilitation program contacted the Administration for Children's Services (ACS), which reviewed the student's records, concluded that the student needed a residential treatment facility and arranged for the student to remain in a temporary shelter (id.).[2]

A psychoeducational evaluation was conducted by the district on April 1, 2008 and April 18, 2008 as part of the student's triennial reevaluation (Parent Ex. H at p. 1).[3] The evaluation report referred to the student's file for more information regarding his developmental history, social history and hospitalizations (id.). The school psychologist indicated that the student had a history of excessive truancy and had been suspended for "near altercations" (although no violent incidents); using inappropriate language; oppositional, disrespectful, insubordinate behaviors; and "defying and disobeying the lawful authority of school personnel and safety agents" (id. at p. 2). At the time he was evaluated, the student had missed 108 out of 139 school days in the 2007-08 school year (id. at p. 2; I at pp. 1, 4). During the interview portion of the evaluation, the student indicated that he did not like school, had recently been hospitalized, had been arrested approximately four times for gambling and possession of marijuana, and was noncompliant with medication that he was prescribed to address his behavioral problems (Parent Ex. H at p. 3).

The school psychologist reported that the student was compliant and cooperative but unmotivated during the evaluation, and he appeared to understand the directions, had intact expressive and receptive language skills and was able to focus during the testing sessions (Parent Ex. H at pp. 3, 4). Administration of the Wechsler Adult Intelligence Scale-III (WAIS-III) yielded a full scale IQ score of 79 (borderline range), a verbal IQ score of 79 (borderline range) and a performance IQ score of 84 (low average range) (id. at p. 4). An assessment of the student's

[2] The parent stated that ACS was unable to provide a residential placement for the student (Tr. p. 150).

[3] The resultant individualized education program (IEP) indicated that the review occurred as a result of the parent's request (Parent Ex. C at p. 2).

academic abilities included administration of the Woodcock-Johnson Tests of Academic Achievement – Third Edition (WJ-III) which yielded a broad reading score at the fourth percentile (borderline range) and a broad math score at the second percentile (borderline range) (id. at p. 11). The student's social/emotional functioning was assessed using the BASC-II which yielded student responses suggesting that he had clinically significant scores in attitude toward school and relations with parents (id. at pp. 8, 12). The student's responses to the Tell Me A Story (TEMAS) stimulus cards were reportedly brief in that the student "just described" what was on the cards and did not tell a story (id. at p. 8). The school psychologist opined that the student's responses suggested that, in social situations, the student "shows an inconsistent ability to see the consequences that may result from his actions" and "may know the value in delaying gratification as well as an understanding that one may have to work to improve one's life, however these are not skills he practices . . . in his own life" (id.). The school psychologist provided a list of strategies to assist in the student's academic instruction and she recommended that the student be considered for a vocational program and receive counseling services to address school attendance and negativity toward school (id. at p. 9).

In May 2008, a district social worker completed a social history that reflected the student's history of psychiatric and substance abuse hospitalizations, diagnoses and outpatient services and subsequent one month stay at the temporary shelter (Parent Ex. I at p. 2; see Parent Exs. E; F; G; J). The social history noted that after beginning a GED (high school equivalency) program, the student came home on March 7, 2008 and began attending another GED program on March 20, 2008,[4] which he attended for two or three days (Parent Ex. I at p. 2). The parent thereafter enrolled the student in a "day rehabilitation program" on March 31, 2008, but he only attended twice (id. at p. 2). According to the social history, the student saw a therapist at an outpatient psychiatric center once per week (id. at p. 3).

At the time the social history was obtained, the parent indicated that the student's decision making ability was impaired, he could not avoid environmental temptations and his history of truancy indicated that he would not follow through on attending any non-mandated free standing program (Parent Ex. I at p. 3). She opined that the student was unable to understand the consequences of his behavior and she questioned his ability to complete a GED program with his full scale IQ score of 62 (id.). The student's attendance history, as reflected in the social worker's report, confirmed excessive truancy through the 2007-08 school year and although he was enrolled in the district's high school from July 2005 until the date of evaluation, he had accrued only 1.58 credits toward graduation (id. at p. 4).

In a letter dated May 22, 2008, the program director of the outpatient center informed the parent that although the student had been treated since October 2004, he had not successfully responded to the level of care that he had been provided and he needed a "higher level of care" (Parent Ex. K at p. 1). The director opined that residential treatment was the only viable option that would address the student's academic and behavioral needs (id.).

On May 23, 2008, the CSE convened to develop an appropriate individualized education program (IEP) for the student for the remainder of the 2007-08 school year and for the 2008-09

[4] Although the social history indicates the date as March 2007, it appears to be a typographical error.

school year (Parent Ex. C at p. 2). CSE meeting attendees included the parent, the parent's attorney, the director of the outpatient center, a district representative, a school psychologist, a school social worker, a special education teacher and an additional parent member (id.). Among other things, the resultant May 2008 IEP reflected that cognitive and projective testing showed that the student had difficulty seeing the consequences of his actions and, although he appeared to understand social rules and judgment, he did not practice those in his daily life (id. at p. 5). Five counseling goals with sixteen short term objectives addressing the student's social/emotional needs were included in the IEP (id. at pp. 9-12) and the student's social/emotional management needs indicated on the May 2008 IEP included counseling to address truancy and relationships with authority figures as well as a behavior plan (id. at p. 6). The May 2008 IEP recommended a 10-month placement in a 15:1 special class with counseling services (id. at p. 1).

In a due process complaint notice dated May 23, 2008, the parent sought an impartial hearing alleging that the student had aggressive and runaway behaviors, which indicated he required a residential program that would prevent him from leaving the premises (Parent Ex. A at p. 1). The parent indicated that she had researched JRC, JRC had reviewed the student's file and determined that the school could meet his severe aggressive and runaway behaviors, and the parent believed JRC was the least restrictive environment for the student (id. at p. 2). As relief, the parent requested that the district be ordered to place the student at JRC for the remainder of the 2007-08 school year and for the 2008-09 school year (id.). In the alternative, the parent requested direct funding of the student's placement from the district (id.). The parent also requested compensatory education in the form of continued residential placement of the student at JRC for the 2009-10, 2010-11 and 2011-12 school years (id.).

An impartial hearing was conducted over the course of two days in July 2008. In a decision dated August 19, 2008, the impartial hearing officer concluded that the district failed to offer the student a free appropriate public education (FAPE) because the goals in the May 2008 IEP were not developed at the CSE meeting and because the district did not offer the student a residential placement prior to the May 2008 CSE meeting (IHO Decision at p. 3). The impartial hearing officer also determined that JRC was not appropriate for the student because none of the witnesses at the impartial hearing had interviewed the student; a behavioral clinician at JRC stated that the student was "high functioning," which was inconsistent with psycho-educational reports indicating that the student was in the borderline range of functioning; the assistant academic director at JRC had only briefly reviewed the student's IEP; and the director of clinical services at JRC had only reviewed a psychiatric evaluation (id. at p. 4).[5] The impartial hearing officer annulled the May 2008 IEP and remanded the matter to the district's "Community Based Support Team" to locate an appropriate residential placement for the 2008-09 school year (id. at pp. 3-5).

The parent appeals, contending that the impartial hearing officer correctly determined that the district failed to offer the student a FAPE and that the student required a residential placement. However, the parent argues that the impartial hearing officer erroneously determined that JRC was not appropriate for the student and remanded the matter to the Community Based Support Team. Specifically, the parent claims that JRC can meet the student's needs and the impartial hearing

[5] The impartial hearing officer also noted that the district did not have the results of a July 2008 psychiatric report at the time of the May 2008 CSE meeting (IHO Decision at p. 4).

officer erred by finding that JRC will not meet the students needs based on certain "credibility" findings with respect to the testimony of a witness from JRC. The parent also asserts that the impartial hearing officer improperly required the parent to prove, by a standard higher than preponderance, that JRC was appropriate for the student. According to the parent, the impartial hearing officer's reliance upon the "high functioning" rationale was taken out of context, and that "high functioning," as used by the witness from JRC, included students with average and low average to borderline IQs. As relief, the parent seeks (1) reversal of the impartial hearing officer's decision that JRC was not appropriate for the student; (2) an order that the district place the student in JRC for the 2008-09 school year; and (3) compensatory education in the form of continued placement at JRC.[6]

In its answer, the district denies most of the parent's substantive allegations. The district argues that the parent failed to present any proof that JRC was appropriate in terms of discussion of specific methodologies that would meet the needs of the student. The district asserts that there was no evidence that JRC would provide the student with "actual therapeutic counseling" and that it is impossible to determine how JRC would address the student's emotional disturbance, aside from behavioral modification. According to the district, the parent abandoned her compensatory education claims, the impartial hearing officer did not find a gross violation of the Individuals with Disabilities Education Act (IDEA) to support a compensatory education claim, and there is no indication that a compensatory education remedy is appropriate or permissible with regard to this student.

In a reply, the parent asserts that her compensatory education claims have not been "waived," that the district failed to file a response to her due process complaint notice, the parent did not withdraw her request, and the issue was the subject of extensive testimony. The parent contends that it would be "inequitable" to determine that her compensatory education claims have been waived.

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]; see generally Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]).

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

[6] According to the parent, the district has not convened a CSE meeting to change the program recommendation to a residential school and the student is not receiving special educational services or treatment.

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 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 Bd. of Educ., Appeal No. 08-070; 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).

In determining an appropriate placement in the LRE, the IDEA requires that students with disabilities be educated to the maximum extent appropriate with students who are not disabled and that special classes, separate schooling or other removal of students with disabilities from the general educational environment may occur only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily (20 U.S.C. § 1412[a][5][A]; see 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.6[a][1]; P. v. Newington Bd. of Educ., 2008 WL 4509089, at *7 [2d Cir. Oct. 9, 2008]; Oberti v. Bd. of Educ., 995 F.2d 1204, 1215 [3d Cir. 1993]; Watson v. Kingston

City Sch. Dist., 325 F. Supp. 2d 141, 144 [N.D.N.Y. 2004]; Mavis v. Sobel, 839 F. Supp. 968 at 982 [N.D.N.Y. 1993]). The placement of an individual student in the LRE shall "(1) provide the special education needed by the student; (2) provide for education of the student to the maximum extent appropriate to the needs of the student with other students who do not have disabilities; and (3) be as close as possible to the student's home" (8 NYCRR 200.1[cc]; 8 NYCRR 200.4[d][4][ii][b]; see 34 C.F.R. § 300.116). Consideration is also given to any potential harmful effect on students or on the quality of services that they need (34 C.F.R. § 300.116[d]; 8 NYCRR 200.4[d][4][ii][c]). Federal and State regulations also require that school districts ensure that a continuum of alternative placements be available to meet the needs of students with disabilities for special education and related services (34 C.F.R. § 300.115; 8 NYCRR 200.6). The continuum of alternative placement includes instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions; and the continuum makes provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement (34 C.F.R. § 300.115[b]).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for the 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 (Burlington, 471 U.S. at 370-71; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra, 427 F.3d at 192). "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).

The New York State Legislature amended the Education Law to place the burden of production and persuasion upon the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of production and persuasion regarding the appropriateness of such placement (Educ. Law § 4404[1][c], as amended by Ch. 583 of the Laws of 2007). The amended statute took effect for impartial hearings commenced on or after October 14, 2007 (see Application of the Bd. of Educ., Appeal No. 08-016).

At the outset, I note 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. § 300.514[a]; 8 NYCRR 200.5[k]). In this case, the district has not appealed any portion of the impartial hearing officer's decision, consequently, the impartial hearing officer's determination that the district failed to offer the student a FAPE and order directing that the district provide the student with a residential placement for the 2008-09 school year is final and binding upon the parties (Application of a Student with a Disability, Appeal No. 08-077; Application of the Dep't of Educ., Appeal No. 08-017).

I will turn next to the parent's assertion that the impartial hearing officer should have specifically ordered the district to place the student at JRC. In general, the IDEA requires parental participation in determining the educational placement of a child (see 34 C.F.R. §§ 300.116, 300.327, 300.501[c]); however, the assignment of a particular school is an administrative decision provided it is made in conformance with the CSE's educational placement recommendation (White v. Ascension Parish Sch. Bd., 343 F.3d 373, 379 [5th Cir. 2003]; see Veazey v. Ascension Parish Sch. Bd., 2005 WL 19496 [5th Cir. Jan. 5, 2005]; A.W. v. Fairfax Co. Sch. Bd., 372 F.3d 674, 682 [4th Cir. 2004]; Concerned Parents & Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751, 756 [2d Cir. 1980]; Application of a Child with a Disability, Appeal No. 07-049; Application of the Bd. of Educ., Appeal No. 99-90; Application of a Child with a Disability, Appeal No. 96-51; Application of a Child with a Disability, Appeal No. 93-5; but see A.K. v. Alexandria City Sch. Bd., 484 F.3d 672 [4th Cir. 2007]). The United States Department of Education (USDOE) recently noted that it "referred to 'placement' as points along the continuum of placement options available for a child with a disability, and 'location' as the physical surrounding, such as the classroom, in which a child with a disability receives special education and related services" (Placements, 71 Fed. Reg. 46588 [August 14, 2006]).[7,8] This view is consistent with the opinion of the USDOE's Office of Special Education Programs (OSEP), which indicates that the assignment of a particular school is an administrative decision provided it is made in conformance with the CSE's educational placement recommendation (Letter to Veasey, 37 IDELR 10 [OSEP 2001]; Application of a Child with a Disability, Appeal No. 07-049).

Here, the parent's requested relief in the form of placement at JRC is inextricably intertwined with the parties' dispute at the impartial hearing over the type of placement that is appropriate for the student. While the dispute over residential placement has been resolved in the parent's favor, one of the remaining issues is whether the district should be afforded administrative flexibility in the specific task of providing a particular residential program. The evidence in the hearing record shows that the parent specifically requested that the CSE place the student in a residential setting (Parent Ex. P at p. 2). While the district personnel at the CSE meeting did not believe that the student's needs warranted a residential placement, it does not appear that their specific reasons were disclosed to the parent (Tr. p. 158). The school psychologist testified that, in reviewing the case, she initially thought the student may require a residential placement, but that after considering input from her supervisor and another district employee, neither of whom attended the May 2008 CSE meeting, she concluded that a residential placement for the student would not be appropriate (Tr. pp. 19-21; Parent Ex. C at p. 2). The May 2008 IEP is devoid of any indication that alternatives to the 15:1 special class placement recommended by the CSE were considered at the May 2008 CSE meeting (see Tr. p. 161; Parent Ex. C), and the school psychologist testified that she wrote the goals and objectives for the student after the CSE meeting

[7] The federal and state continuums of alternative placement options are identified in 34 C.F.R. § 300.115 and 8 NYCRR 200.6.

[8] The USDOE previously discussed "location" regarding the 1997 amendments to the IDEA, which for the first time required an IEP to identify the "location" of services. In discussing this provision of the 1997 amendments, the USDOE noted that "[t]he 'location' of services in the context of an IEP generally refers to the type of environments that is the appropriate place for provision of the service. For example, is the related service to be provided in the child's regular classroom or in a resource room?" (Content of IEP, 64 Fed. Reg. 12594 [March 12, 1999]). Current provisions requiring that the location of services be identified on an IEP are found at 20 U.S.C. § 1414[d][1][A][i][VII]; 34 C.F.R. § 300.320[a][7]; 8 NYCRR 200.4[d][2][v][b][7]).

(Tr. pp. 63-64). The parent testified that the parties also met for a resolution session and, while the parent identified JRC as a possible residential program, the district would not consider a residential placement and did not discuss alternatives to the CSE's recommended placement (Tr. pp. 162-63). Furthermore, the hearing record does not contain a response by the district to the parent's due process complaint notice or prior written notice to the parent indicating why the district disagreed with the parent's suggestions (Parent Ex. A; see 34 C.F.R. §§ 503[a][2], [b][2]-[3], [6]-[7], 508[e][1]; 8 NYCRR 200.1[oo], 200.5[a][3], [i][4]. Moreover, the district has adopted a particularly troubling position on appeal, indicating that it "[d]enies knowledge or information sufficient to form a belief" with respect to the parent's allegations in the petition that the district was not implementing the impartial hearing officer's order directing a residential placement, a CSE meeting had not been convened, and the student was not receiving any meaningful educational placement or services (Pet. ¶¶ 64, 65; Answer ¶¶ 64, 65). In view of the district's actions in this case as presented in the hearing record as well as the district's unresponsiveness on appeal regarding the provision of educational services to the student in the form of a residential placement, I find that, under the unique facts of this case, there is no justification for allowing the district the flexibility typically accorded to administrative decision making in implementing the student's placement, and therefore, I will examine whether it is appropriate to resort to the extraordinary measure of intervening in the implementation of the student's special education services by ordering the district to provide the student with a residential placement specifically at JRC.[9]

In support of her argument that JRC is an appropriate residential placement for the student, the parent asserts that JRC is an "approved school" for students with an emotional disturbance (see, e.g., Tr. p. 7; Parent Ex. A at p. 2).[10] Under State law, the Commissioner of Education may approve the provision of "special services or programs" to students with disabilities through a variety of methods, including contracts entered into by boards of education of public schools and "private residential schools . . . which are outside the state" (Educ. Law §§ 4401[2][h], 4402[2][a]; see 8 NYCRR 200.1[d], 200.7). Although a particular private school may meet the Commissioner's criteria for approval to provide special education programs and services to students with a disability, it is the individualized needs of a student with a disability that will ultimately "determine which of such of services shall be rendered" by an approved private provider (Educ. Law § 4402[2][a]). Thus, while JRC may be approved to provide special education and related services to students with an emotional disturbance, the district may only be directed to contract with JRC if such direction would be consistent with the student's individualized needs.

Although the impartial hearing officer determined that JRC was not an appropriate educational placement for the student, for the reasons described below, I disagree. With regard to the impartial hearing officer's rationale that none of the witnesses from JRC actually interviewed or met with the student (IHO Decision at p. 4), the hearing record shows that JRC staff had ample information to determine whether the student could be appropriately placed at the school, and the

[9] As a general principle, direct intervention in the administrative aspects of implementation of a student's IEP through the impartial hearing process is a highly inefficient manner of delivering special education services and should be avoided where possible; however, in extreme cases there may be little recourse if there has been a breakdown in a district's administrative process and where, as here, it is demonstrable that the deprivation of special education services is likely to continue as a result.

[10] The district does not dispute the parent's assertion that JRC is an "approved" school.

witness from JRC had appropriate credentials and experience to interpret that information. Testimony by the behavioral clinician at JRC reflects that he held a masters degree in clinical psychology with a focus in applied behavior analysis (ABA), a license to practice psychology and an internship and full time professional experience working with children with behavior disorders prior to the four years that he had been at JRC (Tr. pp. 73-75). JRC's behavioral clinician testified that he had a case load of 15-20 students, most of whom were high functioning students with an emotional disturbance and that he had "somewhat specialized …within JRC's population, [providing services to] males with conduct disorder, bipolar disorder and borderline to higher I.Q.'s " (Tr. p. 76). He testified that he also reviews the files of potential students' and presents his opinion regarding the appropriateness of the JRC program to meet those students' needs, and has worked with the admissions department at the approved school and with prospective clients and families (Tr. p. 77). The behavioral clinician from JRC further testified that he had reviewed the student's records in the instant case (Tr. p. 93) and during the impartial hearing he responded to questions with detailed information regarding the student's history of mood disorder, aggressive and impulsive behavior such as fire setting, alcohol and marijuana abuse, assaulting his mother and repeated hospitalizations and non-compliance with rehabilitation programs and medication (Tr. pp. 93-94). He opined that all of the above suggested that a highly structured residential facility was necessary for the student (id.). Additionally, JRC's director of clinical services, who holds a doctorate in psychology and has more than eighteen years of experience, testified that after reviewing the student's psychiatric evaluation, he believed that the student would fit very well at JRC based on the student's age and his exhibited behavior problems (Tr. pp. 172, 174). In light of the behavioral clinician's ability to thoroughly discuss the student's history and needs, as well as the additional review conducted by the director of clinical services, I find that the JRC staff was sufficiently qualified and familiar with the student's needs to render a determination regarding the appropriateness of the school for this student without the necessity of personally meeting with the student in advance.

Although the impartial hearing officer indicated that the individual, who was the assistant director of education at JRC in April 2008, "only briefly reviewed" the student's IEP (Tr. pp. 184-85; IHO Decision at p. 4), the hearing record reveals that she was able to demonstrate ways in which JRC could meet the student's academic needs regarding class size and staffing ratios, class profile factors of age, the student's functional level and current behavior, the student's need for one-to-one and group instruction and the academic management needs listed on the IEP (Tr. pp. 185-87, 190-91). She testified with specific examples of reading programs and teaching strategies that were used at JRC including a phonics program, the James Hamm Reading Series, the Michael Maloney Reading Series, a writing program called the Morningside curriculum, the "repeated reading" strategy, "precision teaching" which works towards mastery and fluency and customized computer software that has built-in positive rewards based on the student's performance (Tr. pp. 188-91). She also testified with regard to her responsibilities, which included overseeing the teachers' responsibilities in the classrooms, meeting with students, working 1:1 with students, ensuring that students were receiving services correctly, and overseeing progress reports, report cards and the IEP process (Tr. p. 185). In light of the information that she reviewed and her familiarity with academic programs, strategies and resources available at JRC, I find that the assistant director of education was able to determine whether JRC could appropriately address the student's academic needs.

With regard to the impartial hearing officer's finding that JRC was not appropriate because of the student's borderline range of functioning, the behavioral clinician used the term "high functioning" to describe the student's good repertoire of verbal skills, the ability of the student to discuss the role of his behavior during behavioral counseling, his motivation and willingness to implement behavioral strategies to improve his own behavior and his insight into how his behavior contributes to the problems (Tr. pp. 106-07). Notably, in describing the student as high functioning, the behavioral clinician was not referring to the student's overall cognitive abilities, and he stated that JRC also serves students ranging from "borderline to higher I.Q.'s," including individuals with mental retardation and developmental disabilities (Tr. p. 76).[11] This "borderline" range of cognitive levels described by the behavioral clinician is consistent with the school psychologist's assessment of the student's cognitive level (Tr. pp. 13-14, 40). Accordingly, I find that JRC could appropriately group the student with students with similar functioning and age ranges (Tr. p. 106).

In remanding the case to the district to provide a residential placement, the impartial hearing officer noted the significance of the student's psychiatric evaluation conducted on July 10, 2008, its conclusion that the student required a residential placement and the unavailability of the report at the time of the May 2008 CSE (Parent Ex. N; IHO Decision at p. 4). However, the hearing record indicates that the results of a private psychological evaluation conducted in September 2006 recommending that the student be placed in a residential program was available at the time of the May 2008 CSE meeting (Parent Ex. E at p. 8). Furthermore, a letter dated May 22, 2008 from the social worker who conducted the September 2006 psychological evaluation and attended the May 2008 CSE meeting noted that the student's team had been treating him since October 2004 (Tr. p. 156; Parent Exs. C at p. 2; K at p. 1). The social worker further noted that the student had achieved limited success with his treatment progress and needed a higher level of care (id.). The letter further opines that residential treatment is the only viable option for the student (Parent Ex. K at p. 1).

In addition to the matters addressed in the impartial hearing officer's decision, the hearing record reflects additional academic and social/emotional benefits that would be available to the student at JRC. For example, the testimony of the behavioral clinician indicates that before a student arrives at JRC, a functional behavior assessment (FBA) is initiated, based on the student's record, parent interview and observations of the student once he arrives (Tr. p. 81).[12] The student is next exposed to available rewards to begin the process of controlling the student's behavior (Tr. p. 80). The behavioral clinician testified that the student's behavior contract "puts the student in

[11] I note that the behavioral clinician indicated that it is possible that the student's I.Q. is an underestimate of what it could be if the student had been in school over the past two years, and although the student reportedly has limited insight that does not lead to the conclusion that he cannot progress from training in behavioral self management (Tr. pp. 106-07).

[12] Although the school psychologist claimed that the district did not conduct an FBA because the student was not attending school, she was able to conduct a psychoeducational evaluation of the student over two sessions (Tr. pp. 50-51; Parent Ex. H). The parent testified that she would try to make the student attend evaluations (Tr. pp. 155-56; Parent Ex. H at p. 3). The student had a documented history of truancy, hospitalizations and emotional disturbance (Parent Ex. I at pp. 1-4), and there is no indication that the district made efforts to determine whether his behavior was a function of his disability, and I find that the district did not demonstrate adequate efforts to conduct an FBA (see 8 NYCRR 200.1[r], 200.22[a]).

contact with success and positive rewards for academic behavior . . . and for some students that may be the first time for a very long time that they are in touch with positive events because of academic behavior" (Tr. p. 85). According to the behavioral clinician, the same behavior modification program used in the educational program is also used in the residential component of JRC's program, which allows the student to progress in both school and home environments (Tr. p. 91).

The hearing record also indicates that counseling services are available at JRC and are provided in accordance with the student's behavior modification program (Tr. pp. 88-89). Testimony by the behavioral clinician indicates that counseling services are usually timed so that sessions can occur after "some appropriate behavior" occurs instead of at a regularly scheduled time so as to "avoid inadvertently reinforcing negative behavior," and that there is an emphasis on analytical strategies which the student can use to cope with and improve their own behavior (Tr. p. 89).

The evidence also shows that students with substance abuse problems are accepted at JRC, which, according to the behavioral clinician, enforces a drug-free environment with the assistance of "digital monitoring which is omnipresent at JRC" (Tr. p. 112). JRC further focuses on students' needs in this area with a software-based education program that addresses the health risks to the body and brain, teacher-student and clinician-student discussion of the issues that relate to problematic past environments, and the student's behavioral responses to those environments (Tr. pp. 110-11). The clinician also prepares students to manage their own responses by helping them learn new coping skills to replace their reliance on drugs (Tr. p. 111).

With regard to the student's history of prescribed psychotropic medication use, while the evidence is unclear as to the efficacy of those medications because the student was chronically noncompliant in taking them, the hearing record shows that according to the behavioral clinician's testimony, the approved school has a psychiatrist on staff that would "monitor and assess whether or not [the student] should continue with his medication" (Tr. p. 98). He further stated that if the psychiatrist determined that medication was appropriate for the student, he would "conduct regular follow up with a clinician to ensure that the medications were having some beneficial effects for [the student] in terms of his behavior, emotion, and so on, as well as not having side effects that would be harmful to him" (Tr. p. 102).[13]

In view of the forgoing, I disagree with the impartial hearing officer's conclusion that JRC is not an appropriate residential placement for the student; however, before the district can be directed to place the student at JRC, it must be ascertained that placement at JRC will meet the IDEA's mandate that the student be placed in the 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, Newington, 2008 WL 4509089 at *6). A determination that a particular out-of-state residential placement is the LRE for a student requires a district to determine whether an appropriate in-state residential facility is available to meet the student's needs with the least amount of segregation from the student's nondisabled peers and community (8 NYCRR 200.6[j][1][iii][e]). In this case, the hearing record shows, as noted previously, the district did not give appropriate consideration to the parent's

[13] JRC is reported to attempt to minimize the use of medication to control behavior (Tr. p. 175).

request for residential placement, and the parent, while strongly supportive of enrolling the student at JRC, has indicated some willingness to consider other residential placements that could address the student's needs (Tr. p. 152). I also note that the hearing record does not contain adequate information to determine whether any effort has been made to identify available in-state residential facilities closer to the student's home that could address the student's needs (Educ. Law § 4407[a]; 8 NYCRR 200.6[j][1][iii][e]; see 34 C.F.R. §§ 300.114[a][2][i], 300.116[b][3]).

In view of the LRE mandate and the conflicts and difficulties that the student has experienced with family members amidst their attempts to support him (see, e.g., Parent Exs. G at p. 6; I at p. 5; J at pp. 2-3, 5; N at pp. 3-5), I find it would be appropriate to consider available residential placement options that would foster contact between the student and his family to the maximum extent appropriate. However, the IDEA also requires that consideration of LRE factors in the selection of a program be weighed against the importance of providing appropriate educational services and the potential harmful effect on the student or on the quality of services that he or she needs (see 34 C.F.R. § 300.116[d]; Newington, 2008 WL 4509089 at *7; see generally Seattle Sch. Dist., No. 1 v. B.S., 82 F.3d 1493, 1501-02 [9th Cir. 1996]). Now that the student's need for residential services has been determined (IHO Decision at pp. 3-4), the provision of these services may not be unreasonably delayed in the process of identifying an ideal residential program for the student. Accordingly, I will direct that an expeditious review of potential options be considered,[14] and upon exhaustion of other considerations, the district shall arrange for the student to be placed at JRC at public expense.[15] The district is required to contact the Office of Vocational and Educational Services for Individuals with Disabilities (VESID) and request assistance.

I also note that in reviewing the impartial hearing officer's decision, he determined that the student's IEP for the 2008-09 school year was invalid and directed that the "community based support team" provide the student with a residential placement (IHO Decision at pp. 3-4). The IDEA requires that a public school provide special education services in accordance with an IEP, and thus a school district is required to put an IEP in effect (see 34 C.F.R. §§ 300.116[b][2], 300.323[c][2], 324[b][i]; 300.325[a][1]; 8 NYCRR 200.4[d][2], [e][3], [f], 200.6[j][ii]). I note that while the placement recommendation was overturned by the impartial hearing officer, the parent did not identify any specific deficiencies with the present levels of performance, the goals and objectives developed by the school psychologist or the provision of related services (Tr. pp. 63-64). Accordingly, as a temporary measure, I will modify the impartial hearing officer's order and permit those portions of the May 2008 IEP to remain in effect while changing the placement recommendation to residential setting, and I will direct the district to reconvene the CSE, ensure

[14] A short time frame to identify residential placement options is appropriate in this case since actions to implement the unappealed aspects of the impartial hearing officer's order to provide a residential placement should already be underway.

[15] Since I am directing relief in accordance with the parent's request that the district be ordered to provide a placement, it is not necessary to address the parent's alternative theory that she is entitled to relief pursuant to Connors v. Mills, 34 F. Supp. 2d 795 (N.D.N.Y. 1998) analysis. Furthermore, I do not address the applicability of Connors to this case since the parent has not identified any authority with regard to whether the relief provided by the District Court in Connors may be provided by an administrative hearing officer.

parent participation and consider additional matters for the 2008-09 school year consistent with this decision.[16]

Lastly, with regard to the parent's claim for compensatory education at JRC for the 2009-2012 school years, I note that the issue was mentioned one time during the district's opening statement at the beginning of the impartial hearing (Tr. p. 8), and the parties did not further develop the issue in the hearing record. Within the Second Circuit, compensatory education has been viewed as instruction provided to a student after he or she is no longer eligible because of age or graduation to receive instruction. It has been awarded if there has been a gross violation of the IDEA resulting in the denial of, or exclusion from, educational services for a substantial period of time (see Somoza v. New York City Dep't of Educ., 2008 WL 3474735, at *1 [2d Cir. Aug. 14, 2008]; Mrs. C. v. Wheaton, 916 F.2d 69 [2d Cir. 1990]; Burr v. Ambach, 863 F.2d 1071 [2d Cir. 1988]; Application of a Child with a Disability, Appeal No. 03-078 [awarding two years of instruction after expiration of IDEA eligibility as compensatory education]; but see Newington, 2008 WL 4509089, at * 10 [upholding an award of compensatory education for a school aged student without finding a gross violation of the IDEA]). Compensatory education is an equitable remedy that is tailored to meet the circumstances of the case (Wenger v. Canastota, 979 F. Supp. 147 [N.D.N.Y. 1997]). State Review Officers also have awarded compensatory "additional services" to students who remain eligible to attend school and have been denied appropriate services, if such deprivation of instruction could be remedied through the provision of additional services before the student becomes ineligible for instruction by reason of age or graduation (Bd. of Educ. v. Munoz, 16 A.D.3d 1142 [4th Dep't 2005] [finding it proper for a State Review Officer to order a school district to provide "make-up services" to a student upon the school district's failure to provide those educational services to the student during home instruction]; Application of a Child with a Disability, Appeal No. 08-072 [awarding after school and summer reading instruction as compensatory services to remedy a denial of a FAPE]; Application of the Bd. of Educ., Appeal No. 08-060; Application of the Bd. of Educ., Appeal No. 06-074; Application of a Child with a Disability, Appeal No. 05-041; Application of a Child with a Disability, Appeal No. 04-054).

In this case, I find that the district's argument that the parent abandoned the issue is unpersuasive since the responsibility to address the parent's compensatory education claim lies with the district (Educ. Law § 4404[1][c]). However, I also note that in her due process complaint notice, the parent requested a placement without identifying any specific deficit(s), area(s) of instruction, or related service(s) that would be necessary to remedy the deficiencies (Parent Ex. A at p. 3). I find that the parent's assertion that the issue of compensatory education was the subject of "extensive testimony" and documentary evidence is not supported by the hearing record, and this is underscored by the parent's failure to provide even a single citation to support her assertion (Reply at p. 2). Although the impartial hearing officer determined that the district failed to offer a FAPE in May 2008 (IHO Decision at p. 3), he did not address whether this failure constituted a gross violation of the IDEA. Furthermore, the hearing record indicates that the student is 17 years old, has accumulated very few academic credits toward graduation, and is listed as being in the ninth grade (Tr. pp. 43-44; Parent Exs. C at p. 1; I at p. 4); therefore, it is highly improbable that he will become ineligible for services in the near future. Consequently, I find that compensatory

[16] The CSE should invite appropriate staff from the student's then-current placement to participate in the CSE meeting.

education is not an appropriate remedy under the circumstances presented in this case. However, since neither the district nor the impartial hearing officer addressed this issue on the merits at the impartial hearing, I will direct the CSE, upon meeting, to review the student's IEP for the 2008-09 school year, and to specifically seek the parent's input in determining whether additional services may be appropriate to address delays in the student's educational progress resulting from his truancy.

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

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the district shall contact VESID within two business days after the date of this decision, request assistance with the identification of appropriate available residential placements for the student in the LRE, and notify the parent in writing that such request has been made; and

IT IS FURTHER ORDERED that the district shall enter into a contract with JRC for the provision of special education and related services for the student for the remainder of the 2008-09 school year not later than 30 calendar days after the date of this decision, unless the district provides the student with a residential placement in an LRE within that time period; and

IT IS FURTHER ORDERED that the impartial hearing officer's decision dated August 19, 2008 is annulled to the extent that it invalidated the student's May 23, 2008 IEP and remanded the matter to the community based support team; and

IT IS FURTHER ORDERED that the student's May 23, 2008 IEP shall remain in effect as described in this decision, and the district shall convene the CSE within 45 days after the date of this decision to consider, among other things, additional services and the results of an FBA conducted in accordance with State regulations, and to make any revisions necessary in the student's IEP for the 2008-09 school year consistent with this decision.

Dated: **Albany, New York**
October 24, 2008

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ROBERT G. BENTLEY
STATE REVIEW OFFICER