



The University of the State of New York

The State Education Department State Review Officer

No. 08-112

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

Appearances:

Michael Best, Special Assistant Corporation Counsel, attorney for petitioner, Tracy Siligmuller, Esq., of counsel

Law Offices of Lauren A. Baum, P.C., attorneys for respondent, Lauren A. Baum, Esq., of counsel

DECISION

Petitioner (the district) appeals from the decision of an impartial hearing officer which found that it failed to offer an appropriate educational program to respondent's (the parent's) son and ordered it to reimburse the parent for her son's tuition costs at the Robert Louis Stevenson School (RLS) for the 2007-08 school year. The appeal must be dismissed.

I will first address a procedural issue pertaining to the commencement of this appeal. The parent, through her counsel, alleges as an affirmative defense in her answer that two pages of the district's twenty page petition were not included in the petition with which she was served. Consequently, the parent asserts that the district's petition must be dismissed as untimely or, in the alternative, that the allegations contained in the two missing pages (paragraphs numbered 26 through 33) not be considered on appeal. According to the affidavit of service filed with the petition, the petition was served upon the parent on October 3, 2008, 35 days after the date of the decision of the impartial hearing officer.¹ By letter dated October 7, 2008 to the Office of State Review, the parent's counsel requested an extension of time to answer the petition without mentioning that the petition as served was incomplete. The district, in its reply, states that the parent's counsel contacted the district on October 20, 2008 and informed it that she had not

¹ State regulations provide that a petition for review by a State Review Officer must comply with the timelines specified in section 279.2 of the regulations (8 NYCRR 279.13). To initiate an appeal, a notice of petition, petition, memorandum of law and any additional documentary evidence must be served upon respondent within 35 days from the date of the decision sought to be reviewed (8 NYCRR 279.2).

received two pages of the petition when the petition was served. The following day, the district e-mailed those pages to the parent's counsel. On October 27, 2008, the parent's counsel requested a second extension of time from the Office of State Review to answer the petition and, again, did not mention that the petition was missing any pages or that she had any concerns with regard to the service of the petition.²

The district initiated the appeal in a timely manner. Upon being advised by the parent's counsel that two pages were missing from the petition, the district promptly supplied the parent's counsel with those pages. The parent's counsel was provided additional time to respond to the petition and did file an answer within the extension period. The district corrected the error in its petition by subsequent service of the two omitted pages, thus curing the technical defect (see Application of the Bd. of Educ., Appeal No. 08-091 [permitting subsequent submission to cure a pleading defect]). The parent was not precluded from effectively formulating a responsive answer; therefore, I will review the appeal and consider all pages, including the two missing pages (see Application of a Child with a Disability, Appeal No. 07-133).

At the time of the impartial hearing, the student was attending the eleventh grade at RLS (Tr. p. 93; Dist. Ex. 31 at p. 1; Parent Exs. N at p. 2; O at pp. 2, 4). RLS has not been approved by the Commissioner of Education as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7). The hearing record describes RLS as a program designed to work with "bright underachieving students" (Tr. pp. 381, 383). It has a "very heavy counseling program" where the "students see their counselors a minimum of three times a day" (Tr. p. 383). The program has a "challenging curriculum and a great deal of counseling and support to help [students] get back on track and finish high school and move onto college" (Tr. pp. 383-84). The student's eligibility for special education services as a student with an emotional disturbance is in dispute in this proceeding (Parent Ex. O at p. 2; see 34 C.F.R. § 300.8[c][4]; 8 NYCRR 200.1[zz][4]).

On March 2, 2006 and March 16, 2006, a private psychologist (evaluating psychologist) conducted a psychoeducational evaluation of the student (Parent Ex. B at p. 1). The psychoeducational evaluation report indicated that the parent had requested the evaluation, which was also "endorsed" by the student's then current private school ("private school"), to determine whether or not the student was "struggling with an undiagnosed learning issue" or with a "mood disorder" that caused him to have "struggled" in school during the 2005-06 school year (id.). It was reported that in the past, the student was a "happy, confident, and engaging child who ha[d] over the past couple of years become increasingly quiet, withdrawn and largely unmotivated" (id.). The evaluating psychologist reported that the student's affect was "noticeably constricted," and that the student's mood affected his performance during the evaluation in that he seemed unable to process information quickly or efficiently, and seemed to lack interest in the assessment process (id. at p. 4). Administration of the Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV) yielded a verbal comprehension score in the very superior range and perceptual reasoning, working memory and processing speed scores in the average range (id.). The student's full scale IQ score of 113 was stated to be interpreted with caution due to the "wide disparity

² Both of the requests made by the parent's counsel to a State Review Officer for an extension of time in which to serve an answer were granted. The two extensions totaled 23 days and were granted with the consent of the district.

between the scores" (id.).³ The evaluation report stated that the student's language-based skills and verbal reasoning skills were "extremely well developed," but his ability to work efficiently or to simultaneously process multiple pieces of information was not nearly as well developed (id. at pp. 4, 8-9). The evaluating psychologist reported that the latter skill sets were "particularly vulnerable" to depression, which he opined was something with which the student struggled (id. at p. 4). Academically, it was reported that the student's "school based skills that [we]re language dependent [we]re very well developed," but that his math skills were not as well developed (id. at p. 7). The evaluating psychologist stated that "the fact that [the student] ha[d] recently faltered in school despite the fact that he possesse[d] such a fine mind and well developed language based achievement skills sp[oke] to the extent to which the dramatic changes in his mood ha[d] impacted his performance" (id.). The student's performance on measures of his memory skills were stated to be "at best only in the age expected range," which was reportedly "not surprising given [the student's] depressed mood" (id. at p. 8). On assessments that measured attention and "executive" functioning skills,⁴ the student's scores "fell well below what one might expect given [his] innate reasoning skills" (id. at p. 10). The evaluating psychologist indicated that it was difficult to determine whether the student had an underlying executive function problem because of the student's apparent struggle with "a clinical depression" (id.). The evaluating psychologist reported that throughout the evaluation the student "evidenced several of the signs that might lead to a diagnosis of a clinical depression: he seem[ed] to lack interest in most things; he [wa]s often down on himself; and he lack[ed] hopefulness when discussing the future" (id. at p. 11). The student also expressed his belief that although his feelings were real, he needed to "deal" with them on his own (id.). The evaluating psychologist recommended that the student continue therapy with the private neuropsychologist, that a psychopharmacologist conduct a consultation to determine whether the student might benefit from a trial of "stimulant" medication, and that the private school be made aware of the results of the psychoeducational evaluation and offer the student specific testing accommodations (id. at p. 13; see Tr. p. 489).

By the end of the 2005-06 school year, the student had achieved the following final grades: "C-" (Algebra I), "C" (Physics), "C+" (English and French II), and "B" (World History) (Parent Ex. A at pp. 16-17). During summer 2006, the student began using cocaine on a monthly basis, in addition to consuming alcohol (Tr. pp. 524-25; Parent Exs. D at p. 4; E at p. 3).

The student continued to attend the private school for tenth grade during the 2006-07 school year (Parent Ex. C). Comments prepared by the student's teachers and contained in the student's first quarter progress reports continued to reflect his variable performance and effort in his academic classes (id. at pp. 1-6). At the end of the first quarter, the student had achieved grades of "B" (Algebra Applications), "D" (Chemistry), "C-" (French III), "C+" (British Literature) and "C-" (World History II) (id. at pp. 3-5). The student's private school advisor began requiring meetings with the student for "academic review" (Tr. pp. 508-09). The parent reported that the

³ Although not clarified in the hearing record, the disparity noted is assumed to refer to the difference between the student's index scores, one of which was in the very superior range, and the remainder which were in the average range of cognitive abilities.

⁴ The hearing record refers to the term "executive functioning" as a "cluster of symptoms that includes impulsivity, perseveration, difficulty shifting set, disorganization, a poor ability to plan, and a poor sense of time, weak working memory skills, and low-self awareness" (Parent Ex. B at p. 9).

student had multiple instances of school absences and lateness due to his inability to get out of bed and his complaints of physical ailments (Tr. pp. 509-11). The parent reportedly contacted the evaluating psychologist to request recommendations for any appropriate private or public schools for the student, but did not receive a response (Tr. pp. 511-13; Parent Ex. W). Beginning in fall 2006, the student reportedly used cocaine "every weekend" (Parent Ex. D at p. 4).

In March 2007, a private psychiatrist (psychiatrist 1) began providing psychotherapy to the student (Tr. pp. 404, 406, 410; Parent Ex. I). The student reported to psychiatrist 1 that he consumed alcohol, was a "weekend user of marijuana," and that "on an occasional weekend" he used cocaine (Tr. p. 414). Psychiatrist 1 offered the student a diagnosis of a "depressive disorder" due to his reports of crying spells, low energy level, poor appetite, disturbed sleep, low motivation, and difficulty keeping up with school work (Tr. p. 409). In April 2007, psychiatrist 1 "started" the student on an antidepressant medication (Tr. p. 411).

The hearing record indicates that during the spring 2007 semester, the student's grades declined, he was falling behind, and he felt that he was overwhelmed (Tr. pp. 410, 518-20). The parent was in contact with the student's advisor and Chemistry teacher, and she received reports of the student's progress (Tr. pp. 518-19). Psychiatrist 1 subsequently increased the dosage of the student's antidepressant medication (Tr. p. 413). Toward the end of the 2006-07 school year, the student's school attendance declined (Parent Ex. X at p. 4). In April 2007, the parent, the student and his advisor met and reviewed the student's grades (Tr. p. 519). On May 23, 2007, administrative staff from the private school met with the parent to discuss withdrawing the student from Chemistry, which he was "probably going to fail," and to discuss alternative school placements (Tr. pp. 520-21).

From May 24, 2007 through May 30, 2007, the student was hospitalized after ingesting a prescription medication and alcohol (Parent Ex. D at pp. 3-4).⁵ The parent withdrew the student from the private school and he did not complete tenth grade at that time due to his hospitalization (Tr. pp. 436-37; 440; Parent Ex. E at p. 1). The student reported that prior to the hospitalization he was using cocaine daily and consuming 60 ounces of alcohol daily (Parent Exs. D at p. 4; E at p. 1). Psychiatrist 1 indicated that while hospitalized, the student described a "more significant substance abuse history" and a "more significant depressive history" than he had during past therapy sessions (Tr. pp. 416-17). During his hospitalization, the student's antidepressant medication dosage was increased (Parent Ex. E at p. 1). Upon discharge from the hospital on May 30, 2007, the student was admitted to an "inpatient rehab" for approximately two weeks, and it was recommended that he receive medication management; individual, group and family psychotherapy; and that the Committee on Special Education (CSE) conduct an evaluation to "determine appropriate school placement/supplemental services" (Parent Ex. D at pp. 1, 3). On June 13, 2007, the student was discharged from the inpatient rehab facility and he "relapsed" three days later by ingesting alcohol (Tr. p. 417; Parent Ex. D at p. 3). The student also reported experiencing symptoms of depression (*id.*). Upon discharge from the inpatient rehabilitation facility, the student attended an outpatient rehabilitation facility and had weekly sessions with a

⁵ Although the student's transcript reflects that he was "withdrawn" from four out of five academic classes, the private school awarded the student three-fourths credit and third quarter grades of "C" (English), "D-" (Chemistry), "B-" (French III) and "C" (Geometry) (Tr. pp. 444-47; Dist. Ex. 19). The student received full credit and a final grade of "D" in World History (Dist. Ex. 19).

private psychiatrist (Parent Exs. D at p. 3; I).⁶ The student also attended approximately two and one half weeks of summer school at RLS in an effort to complete tenth grade as the parent explored "alternative educational placements" (Tr. pp. 532-39, 542; Parent Exs. E at p. 3; W at pp. 5, 7).

On July 6, 2007, the student was hospitalized after he ingested various over-the-counter medications, prescription medications, cocaine and alcohol (Parent Ex. D at p. 3). Upon his July 13, 2007 discharge from the hospital, the student was offered a diagnosis of a "[m]ajor depression, recurrent, severe w/o psychotic" with the "modifiers" of substance abuse (id. at p. 3). The hospital physician indicated that the student's "team" believed that "a structured inpatient substance abuse treatment [wa]s necessary to improve [the student's] prognosis and to prevent him from relapse" (id. at p. 8). The physician also stated that "[t]reatment also will consist in dealing with the underline depressive symptoms that happened in the context of his SA and clarify the negative effect of substances in a concomitant depressive disorder" (id.).⁷

On July 13, 2007, the student was admitted to a private out-of-state residential treatment facility (treatment center) for treatment of his "cocaine and alcohol dependence" and "mood disorder" (Tr. pp. 117-18, 420-21; Parent Ex. E at p. 1). On July 16, 2007, a psychologist from the treatment center conducted an "integrated psychological evaluation" of the student (Parent Ex. E at pp. 3-8). According to the resultant report dated July 18, 2007, during the evaluation the student acknowledged his "tolerance" to alcohol and cocaine and indicated that he used drugs to avoid problems (id. at pp. 3-4). According to the treatment center psychologist, the student met the "DSM IV"⁸ diagnostic criteria for "cocaine and alcohol dependence" and "cannabis dependence, sustained partial remission" (id. at p. 4). The student reported that prior to his drug use, he was a "B" student, but that recently he was a "C" and "D" student (id. at p. 5). He further reported that he had recently not completed his homework, was not "invested" in school, and had occasionally missed school because he was unable to get out of bed (id.). The student indicated that he had difficulty relating to peers (id.). At the time of the evaluation, the treatment center psychologist reported that the student had "some anxiety about his current circumstances, moving and making friends" (id. at p. 6). In addition to the above diagnoses, the student was offered the diagnosis of a "Major Depressive Disorder, By History" (id.). The treatment center psychologist concluded that the student presented as a "depressed individual" who appeared to have been "suffering from depression for several years" (id. at p. 7). The psychologist's report contained specific therapeutic recommendations and a recommendation for the continued administration of medication (id. at pp. 7-8).

By letter dated August 1, 2007 to the CSE chairperson, the parent requested that the CSE evaluate the student to identify "an appropriate therapeutic program for children with similar academic profiles" (Dist. Ex. 1).

⁶ The student's sessions with psychiatrist 1 ended in June 2007 after his discharge from the hospital, and the student was subsequently seen by a psychiatrist affiliated with the inpatient rehab (Tr. pp. 417-18; Parent Ex. I).

⁷ In the context of the hearing record, "SA" appears to refer to the term "substance abuse."

⁸ The hearing record's reference to the "DSM-IV" appears to refer to the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (DSM-IV).

On August 6, 2007, a psychiatrist from the treatment center conducted a psychiatric evaluation of the student (Parent Ex. E at p. 1). The resultant evaluation report dated August 7, 2007 stated that the student reported a long history of depressive symptoms and that he "started using" alcohol at age 13 and cocaine at age 15, and that "[h]e was using both extensively, deteriorating in his behavior" (id.). The treatment center psychiatrist reported that at the time of the evaluation, the student exhibited restricted affect and a depressed mood (id. at p. 2). The student was offered diagnoses of "Alcohol Dependence," "Cocaine Dependence," "Dysthymia" and "Major Depression, Moderate" (id.). The psychiatrist opined that the student was receiving an appropriate dosage of an antidepressant and he recommended continuation of the medication (id.).

On October 31, 2007, the parent and a district social worker completed the student's social history, and the parent reported that the student was currently in an out-of-state treatment center, was scheduled to be discharged on November 11, 2007, and would begin attending RLS on November 14, 2007 (Dist. Ex. 7 at p. 1). The social history reflected that the parent was seeking an appropriate school placement through the CSE (id.).

On November 12, 2007, the student began to receive weekly 50 to 60-minute sessions of outpatient psychotherapy from a private licensed psychologist/alcohol and substance abuse counselor (treating psychologist) (Tr. pp. 319-22, 325, 364). The treating psychologist conducted an assessment of the student's social-emotional functioning and determined that the student had difficulty relating to people, still struggled with "addiction issues," and exhibited characteristics of a mood disorder and depression (Tr. pp. 324, 329-31). In addition to providing psychotherapy, the treating psychologist referred the student to a licensed psychiatrist (psychiatrist 2) in November 2007 to conduct a psychiatric evaluation of the student and to provide pharmacological consultation (Tr. pp. 324, 451-52).

On November 28, 2007, a district school psychologist conducted a psychoeducational evaluation of the student (Tr. pp. 56, 62; Parent Ex. G). To assess his social-emotional functioning, the student completed projective drawings "and material," and the Behavior Assessment System for Children, Second Edition (BASC-2) Self-Report, which was described in the hearing record as a "self-report personality scale" (Parent Ex. G at pp. 1, 8). The school psychologist stated that the student reported experiencing "considerable substantial emotional problems," indicated by "the elevated Internalizing Problems Composite" and "marked elevations" on the somatization, sense of inadequacy, social stress, anxiety and depression clinical scales of the BASC-2 (id. at p. 8). The student's responses regarding self-esteem, self-reliance and interpersonal relations yielded "clinically significant" scores and "low levels of adjustment," which were stated to suggest deficient coping skills (id. at pp. 8-9). It was reported that the student had a tendency toward withdrawal, introversion, and repressing uncomfortable feelings and thoughts (id. at p. 9). However, the student reported his perception of being responsible for, or at least having control over, his own success or failure as a relative strength and his responses regarding school problems reflected "positive adaptation" to school including his attitude toward school and teachers (id. at p. 8). The student did not report difficulty with attention or hyperactivity (id.). The school psychologist reported that the student had a "support system" in place and "positive outlets" for his problems (id. at p. 9). The school psychologist indicated that the student's educational program recommendation would be made at the CSE review (id.).

On November 30, 2007, psychiatrist 2 conducted an "extensive and comprehensive psychiatric evaluation" of the student, and by letter dated December 12, 2007, offered the student the diagnoses of a "Mood Disorder NOS" and an "Alcohol Abuse disorder" (Parent Ex. H).⁹ Psychiatrist 2 concluded that the student's mood disorder preceded his substance abuse (id.).

By letter dated December 13, 2007, psychiatrist 1, who had treated the student from March to June 2007, reported that the student's depression "prompted" his substance abuse, which led to his recommendation for inpatient hospitalization and rehabilitation for both depression and substance abuse (Parent Ex. I).

By letter dated December 14, 2007 to the school psychologist, the principal of the private high school the student had attended from 2005-07 indicated that during the student's time there he "struggled academically and emotionally" until his withdrawal in spring 2007 (Tr. p. 425; Parent Ex. J). The principal reported that the student's grades were lower than his intellectual ability, and that the private school recognized that his emotional health was interfering with his academic success (Parent Ex. J). The private school attempted to address the student's "personal issues" and academics without success, and it concluded that its "rigorous" academic program only "made his situation worse" (id.). The principal of the private high school indicated that during the student's enrollment he was "respectful, thoughtful and kind. He endeared himself to his teachers who were eager to help him find success" (id.). She further stated that the student felt "terrible" about letting down his teachers and family, but that he could not "muster the strength to turn the situation around" (id.). After meeting with the student and the parent, the private school determined that it had exhausted all of its resources and, "in the end, [the student] was in such an emotionally fragile state that he could not even come to school" therefore, he was withdrawn from enrollment from the private school (id.).

On December 18, 2007, one of the district's special education teachers conducted a 40-minute classroom observation of the student in his math class at RLS (Dist. Ex. 25). The special education teacher reported that she observed the student working independently and asking for teacher assistance when necessary while taking a math quiz (id.). The special education teacher reported that during the observation the student "asked questions, he was focused, respectful to his teacher and peers. He appeared motivated and was hard working. He responded to questions in an appropriate manner. His behavior was age appropriate" (id.).

On December 19, 2007, the student's teachers at RLS submitted to the district a teacher report containing information about the student's performance (Dist. Ex. 26). The report indicated that the student's reading ability was estimated to be at about the twelfth grade level and that he was an "excellent reader" with good comprehension and interpretation of content (id. at p. 1). The student's math skills were estimated to be at an eleventh grade level, and the report stated that the student needed "structure and procedures for solving multi-step problems" (id.). The student's receptive language skills were described as "strong," but it was noted that he exhibited "some processing difficulties," and his expressive language skills were described as "excellent" (id.). The report described the student as a "good analytical writer, well organized and clear" without grammar and spelling problems (id. at p. 2). The student was stated to need to "extend his ability

⁹ The hearing record does not indicate to whom this letter was addressed.

to expand ideas in essays" (id.). It was reported that the student's gross and fine motor skills were age appropriate (id.). The student's behavior with peers was described as "[r]eserved, but not isolated," and he reportedly accepted structure from authority figures (id.). The teacher report indicated that the current program was meeting the student's needs (id.).

By letter dated December 21, 2007, the psychiatrist from the treatment center informed the school psychiatrist of his support for the recommendation of a "therapeutic school" placement for the student (Parent Ex. K). The psychiatrist reiterated that the student had been admitted to the treatment center for "the treatment of chemical dependency" from July 13, 2007 to November 11, 2007, where he received treatment for both "drug and alcohol and psychiatric disorders" (id.). The psychiatrist stated that the student required a school with "a high level of supervision, high teacher to student ratio, psychiatric and psychological services and close supervision" (id.).

In January 2008, the student's teachers at RLS reported the following grades for the student: "A+" (Biology), "B+" (Algebra II), "A-" (American History), "A" (Shakespeare), and "A" (Art) (Parent Ex. S). The student's teachers consistently reported that he exhibited "excellent" to "superior" academic progress, his class participation was "good" to "outstanding," he was highly motivated, he achieved "adequate" to "excellent" test results, his assignments were complete, and he exhibited "good" study habits (id.). The student's teachers also consistently reported that the student related and worked well with others, exhibited cooperative behavior toward the class and teacher, was usually on time to class and exhibited satisfactory to excellent class attendance (id.).

On January 8, 2008, the CSE convened for an initial review of the student (Dist. Exs. 31; 32; 35 at p. 1). Meeting attendees included a district regular education teacher, a district school psychologist, a district social worker, a district special education teacher who also acted as the district representative, the parent and an additional parent member (Dist. Ex. 31 at p. 2). The headmaster of RLS participated in the meeting by telephone (id.). The CSE prepared the student's January 2008 individualized education plan (IEP) present levels of performance by using information contained in the March 2006 private psychoeducational evaluation report, the September 2007 physical examination report, the October 2007 social history, the district's November 2007 psychoeducational evaluation report, the November 2007 treatment center discharge summary, the December 2007 teacher reports from RLS and information from the parent (Tr. pp. 123-24; compare Dist. Ex. 31 at pp. 3-6, with Dist. Exs. 4; 26, and Parent Exs. B; F; G). According to the minutes of the CSE meeting, the CSE again explained to the parent her due process rights, and the parent presented her concerns about the student (Dist. Ex. 32 at p. 1). The CSE noted its awareness of the student's "depression," "mood disorder," "cry for help," and attendance at the treatment center for treatment of his substance abuse (id.). According to the CSE meeting minutes, the headmaster of RLS reported that the student received instruction in classes of 7-10 students and that his attendance was good (id. at pp. 1-2). The headmaster was also noted to have stated that the student received two "short" counseling sessions and one "long" counseling session per day, and one session of group counseling per week (id.). By account of the headmaster, the student benefitted from the counseling and "would probably be on the honor roll this period," receiving grades in academic classes in the "A" to "B" range (id. at p. 1). The student had earned approximately "half his credits" necessary to graduate in June 2009, which was the date appropriate for his age (id. at p. 2). The CSE completed an "Emotional Disability Justification" form and subsequently determined that the student did not meet the criteria for a student with an emotional disturbance; therefore, determining that the student was not eligible for special

education services as a student with a disability (Dist. Ex. 31 at p. 1; Parent Ex. L). The parent disagreed with the CSE's determination that the student was not eligible for special education services and the CSE's recommendation that he attend a general education program without related services (Dist. Ex. 32 at p. 2).

By a "Final Notice of Recommendation" (FNR) letter dated January 10, 2008 to the parent, the district indicated that the student was not classified as a student with a disability and that a general education program was recommended at a specific district school (Dist. Ex. 33). The parent responded by handwriting a notation on the bottom of the FNR that the student would remain at RLS "because of his need for a therapeutic and supportive environment" (*id.*).

By letter to the CSE chairperson dated January 17, 2008, the parent, through her attorney, advised the district that she rejected the program recommendations made by the CSE at the January 8, 2008 CSE meeting and the placement recommendations made by the district in the FNR dated January 10, 2008 (Parent Ex. N at p. 1).¹⁰ The parent asserted that the district failed to appropriately classify the student as a student with a disability (*id.* at p. 2). They further advised the district that they would be placing the student at RLS "as of the first day of school applicable to their child's 2007-2008 academic school year, and w[ould] seek public funding of th[e] unilateral placement" (*id.*).

The parent filed a due process complaint notice, through her attorney, with the district dated February 26, 2008, alleging that the district procedurally and substantively failed to offer the student a free appropriate public education (FAPE) for the 2007-08 school year (Parent Ex. O). Procedurally, the parent alleged that, despite referring the student to the CSE for an initial evaluation on or about August 1, 2007 and fully cooperating with the CSE in the conduct of the evaluation, the CSE did not complete the evaluation of the student in a timely manner, thereby denying the student a FAPE (*id.* at pp. 1-2). Substantively, the parent alleged that the student met the criteria to be eligible for special education services as a student with an emotional disturbance (*id.* at p. 2). The parent alleged that the CSE failed to provide the student with a FAPE by failing to classify him and by offering him a general education program (*id.*).

An impartial hearing convened on April 28, 2008 and concluded on August 4, 2008 after one day of addressing procedural matters and four days of testimony (Tr. pp. 1-28, 30, 225, 371, 470). The district called four witnesses and submitted 36 documents into evidence (Tr. pp. 55, 201, 229, 263; Dist. Exs. 1-36). The parent called seven witnesses, including the student's mother, and submitted 26 documents into evidence (Tr. pp. 275, 318, 380, 403, 424, 449, 473; Parent Exs. A-Z).

In a decision dated August 29, 2008, the impartial hearing officer found that the district both procedurally and substantively failed to offer the student a FAPE (IHO Decision at p. 21). Procedurally, she found that the district failed to sustain its burden to prove that it fulfilled its obligation to evaluate and offer placement to the student in a timely manner (*id.* at pp. 21-22). Substantively, she found that the CSE failed to sustain its burden to prove that the recommendation to not classify the student was appropriate (*id.* at pp. 22-23). The impartial hearing officer further

¹⁰ The January 17, 2008 letter incorrectly stated that the CSE meeting was held on January 9, 2008 and that the placement recommendation was made on or about January 15, 2008 (Parent Ex. N at p. 1).

found that the unilateral placement selected by the parent was appropriate, and that equitable considerations supported the parent's request to be reimbursed for tuition (*id.* at pp. 23-24). She remanded the matter to the CSE to update assessments and hold a new review, and ordered the district to reimburse the parent for tuition for the 2007-08 school year, prorated from the date of enrollment of the student (*id.* at pp. 24-25).

The district appeals the decision of the impartial hearing officer, requesting that the decision be vacated. The district alleges that, contrary to the impartial hearing officer's findings, the district offered the student a FAPE, the parent's placement of the student at RLS was not appropriate, and the equities in this matter do not favor an award of tuition reimbursement to the parent.

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 student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] *aff'd*, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an impartial hearing officer's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 130 [2d Cir. 1998]; *see* Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; *see* Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school

district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see P. v. Newington Bd. of Educ., 546 F.3d 111 [2d Cir. 2008]; Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs (34 C.F.R. § 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals related to those needs (34 C.F.R. § 300.320[a][2]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (34 C.F.R. § 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

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).

A student with an emotional disturbance must meet one or more of the following five characteristics:

- (A) An inability to learn that cannot be explained by intellectual, sensory, or health factors.

- (B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers.
- (C) Inappropriate types of behavior or feelings under normal circumstances.
- (D) A general pervasive mood of unhappiness or depression.
- (E) A tendency to develop physical symptoms or fears associated with personal or school problems.

(34 C.F.R. § 300.8[c][4]; see 8 NYCRR 200.1[zz][4]). Additionally, the student must exhibit one or more of the five characteristics over a long period of time and to a marked degree that adversely affects the student's educational performance (id.). While emotional disturbance includes schizophrenia, the term does not apply to students who are socially maladjusted, unless it is determined that they otherwise meet the criteria above (id.; New Paltz Cent. Sch. Dist. v. St. Pierre, 307 F. Supp. 2d 394, 398 [N.D.N.Y. 2004]).

Whether a student's condition adversely affects his or her educational performance such that the student needs special education, within the meaning of the IDEA, is an issue that has been left for each state to resolve (J.D. v. Pawlett Sch. Dist., 224 F.3d 60, 66 [2d Cir. 2000]). Although some states elect to establish further, more explicit definitions for these terms, often through regulation or special education policy (see, e.g., Mr. I. v. Maine Sch. Admin. Dist. No. 55, 480 F.3d 1, 11 [1st Cir. 2007]; J.D., 224 F.3d at 66-67; Johnson v. Metro Davidson County Sch. Sys., 108 F. Supp. 2d 906, 918 [M.D.Tenn. 2000]), others do not and instead resolve the issue on a "case-by-case" basis (R.B. v. Napa Valley Unified Sch. Dist., 2007 WL 2028132, at *9 [9th Cir. July 16, 2007]; see, e.g., Yankton Sch. Dist. v. Schramm, 93 F.3d 1369, 1375-76 [8th Cir. 1996]; Greenland Sch. Dist. v. Amy N., 2003 WL 1343023, at *8 [D.N.H. Mar. 19, 2003]). Cases addressing this issue in New York appear to have followed the latter approach (Corchado v. Bd. of Educ. Rochester City Sch. Dist., 86 F. Supp. 2d 168, 176 [W.D.N.Y. 2000] [holding that each child is different and the effect of each child's particular impairment on his or her educational performance is different]; Application of a Student Suspected of Having a Disability, Appeal No. 08-100; Application of the Dep't of Educ., Appeal No. 08-042; Application of a Student Suspected of Having a Disability, Appeal No. 08-023; Application of a Child Suspected of Having a Disability, Appeal No. 07-086; see Muller v. E. Islip Union Free Sch. Dist., 145 F.3d 95, 103-04 [2d Cir. 1998]; N.C. v. Bedford Cent. Sch. Dist., 473 F. Supp. 2d 532, 543 [S.D.N.Y. 2007], aff'd 2008 WL 4874535 [2d Cir. Nov. 12, 2008]; New Paltz, 307 F. Supp. 2d at 399). While consideration of a student's eligibility for special education and related services should not be limited to a student's academic achievement (34 C.F.R. § 300.101[c]; 8 NYCRR 200.4[c][5]; see Corchado, 86 F. Supp. 2d at 176), evidence of psychological difficulties, considered in isolation, will not itself establish a student's eligibility for classification as a student with an emotional disturbance (N.C., 473 F. Supp. 2d at 546). Moreover, as noted by the U.S. Department of Education's Office of Special Education Programs, "the term 'educational performance' as used in the IDEA and its implementing regulations is not limited to academic performance" and whether an impairment adversely affects educational performance "must be determined on a case-by-case basis, depending on the unique needs of a particular child and not based only on discrepancies in age or grade performance in academic subject areas" (Letter to Clarke, 48 IDELR 77).

The hearing record reflects that the January 2008 CSE considered all of the information it had available to it, and that the parent and the headmaster of RLS participated in the meeting, which lasted approximately two hours (Tr. pp. 86-87, 92, 110-12, 614-15).

I agree with the impartial hearing officer that the information the CSE considered at the January 2008 initial meeting, which included the district's psychoeducational evaluation report, the social history, the classroom observation, the March 2006 private psychoeducational evaluation report, RLS teacher reports, the student's transcript, the discharge reports from the student's hospitalization and treatment center, and letters from psychiatrist 1, psychiatrist 2 and the psychiatrist from the treatment center, demonstrates that the student met the characteristic of a generally pervasive mood of unhappiness or depression and that the characteristic had been present over a long period of time to a marked degree (see 8 NYCRR 200.1[zz][4][iv]; see also Tr. pp. 88, 93-97, 102-10, 115-16; Dist. Exs. 7; 19; 25; 26; Parent Exs. B; D; E; F; G; H; I; J; K; L).¹¹

I also concur with the impartial hearing officer that the district did not sufficiently demonstrate that the student's depression and the student's withdrawal from school and inability to complete the 2006-07 school year, under the circumstances herein, did not meet the "adversely affects the student's educational performance" requirement for eligibility (Parent Ex. L; see also 8 NYCRR 200.1[zz][4]).¹²

Based on the hearing record and the particular facts before me, I am not persuaded that the impartial hearing officer erred in finding that the district did not meet its burden of proof to show that the student was not eligible for special education as a student with an emotional disturbance.

I have also considered all of the district's other arguments, including the alleged inappropriateness of RLS for this student and the alleged inequities of awarding tuition reimbursement, and have found them to be without merit substantially for the reasons articulated in the impartial hearing officer's decision.

THE APPEAL IS DISMISSED.

**Dated: Albany, New York
December 15, 2008**

**PAUL F. KELLY
STATE REVIEW OFFICER**

¹¹ As cited above, the State regulations mandate that, in addition to other requirements, a student must exhibit "one or more" of five characteristics in order to be identified as a student with an emotional disturbance (8 NYCRR 200.1[zz][4]). Having determined that the student met one of the five criteria, I need not determine whether he also met the other four.

¹² Although the district alleged that the student's needs would have been met through support and services available to him in the general education setting, the hearing record does not provide sufficient information about those services to demonstrate that despite the student's emotional difficulties that he did not require special services and programs (8 NYCRR 200.1[zz])