The University of the State of New York

The State Education Department

State Review Officer

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No. 09-084

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

Appearances:
Ingerman Smith L.L.P., attorneys for respondent, Susan E. Fine, Esq., of counsel

DECISION

Petitioners (the parents) appeal from the decision of an impartial hearing officer which determined that their son was ineligible for extended school year (ESY) services and denied their request to be reimbursed for costs associated with their son's attendance at Camp Kehilla for summer 2009. The appeal must be dismissed.

At the time of the impartial hearing, the student had completed first grade at respondent's (the district's) public elementary school (Tr. pp. 68-69). The student's eligibility for special education programs and services as a student with an other health impairment (OHI) is not in dispute in this appeal (see 34 C.F.R. § 300.8[c][9]; 8 NYCRR 200.1[zz][10]).

The student was referred for evaluation by the Committee on Preschool Special Education (CPSE) on March 3, 2005 (Dist. Ex. 6 at p. 1). The CPSE "Initial Information Form" reflected that the parents noted a history of late speech development, "speech delay," and "fine and gross motor delays" requiring occupational therapy (OT) and physical therapy (PT) (id. at p. 4; see Dist. Ex. 13 at p. 1). According to the hearing record, in 2005 the student achieved standard scores of 50 (severely delayed) on the Bayley Scales of Infant Development – 2nd Edition, 75 (moderately low) on the Vineland Adaptive Behavior Scales (Vineland), and a score of 7 on the Autism Diagnostic Observation Schedule (ADOS) (Dist. Ex. 12 at p. 1). From 2005 to 2007, the student attended a "DDI"[1] general education preschool class with three and four year olds and received OT, PT, and "SCIT services,"[2] in addition to receiving unspecified home services (Dist. Ex. 13 at p. 1).

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[1] The hearing record does not define "DDI."

[2] The hearing record does not define "SCIT services."

In February 2007, the student received a diagnosis of a pervasive developmental disorder, not otherwise specified (PDD-NOS) (Dist. Ex. 12 at p. 1). On April 19, 2007, the Committee on Special Education (CSE) convened and developed an individualized education program (IEP) for the student's kindergarten year of 2007-08 (Dist. Ex. 8). In attendance were the CSE chairperson, a special education teacher from "DDI," a regular education teacher, a school psychologist, a "DDI team leader," and the parents (id. at pp. 9-10). The CSE noted the student's PDD diagnosis, and classified him as speech or language impaired (id. at pp. 1, 9, 12-13; see 34 C.F.R. § 300.8[c][11]; 8 NYCRR 200.1[zz][11]). The CSE recommended a 10-month program special class in a 12:1+1 setting, related services consisting of OT once per week for 30 minutes per session in a 5:1 setting and once per week for 30 minutes per session in a 1:1 setting, PT once per week for 30 minutes per session in a 1:1 setting, speech-language therapy three times per week for 30 minutes per session in a 5:1 setting and once per week for 30 minutes per session in a 1:1 setting, door-to-door transportation, and program modifications consisting of socialization opportunities and a multisensory learning approach (Dist. Ex. 8 at pp. 5-8, 12). [3]

At the parents' request, the CSE reconvened on July 27, 2007 (Dist. Ex. 10 at p. 1). The CSE was comprised of a CSE chairperson, "County Representative," regular education teacher, school psychologist, and the parents (id. at p. 10). The July 27, 2009 IEP contained no changes to the student's classification or program (compare Dist. Ex. 8 at pp. 1, 5-8, 12-13, with Dist. Ex. 10 at pp. 1, 5-8, 10-12).

On October 2, 2007, the district conducted a psychological evaluation of the student (Dist. Ex. 12). Behaviorally, the evaluator characterized the student as "hyperactive, unfocused, and distractible," and on several occasions, the evaluator asked the student to "calm down" (id. at p. 1). Administration of the Wechsler Primary and Preschool Scale of Intelligence, Third Edition (WPPSI), yielded a verbal IQ score of 80 (9th percentile, low average); a performance IQ score of 105 (63rd percentile, average); a processing speed score of 78 (7th percentile, borderline); and a full scale IQ score of 83 (13th percentile, low average) (id. at pp. 2-3). The evaluator also determined that the student's visual motor functioning was in the low average range as measured by the Bender Visual Motor Gestalt Test II (Bender Gestalt), because the student exhibited "difficulties with pencil gripping and maintaining focus and concentration on the task at hand" (id. at p. 3).[4]

On December 8, 2007, the student's mother provided the district with an updated social history (Dist. Ex. 13). She noted that the student continued to experience expressive language difficulties and communication delays; however, she surmised that he continued to "make good gains socially," he was "much more relatable," and with speech services he was improving (id. at p. 2). Regarding the student's school performance, his mother characterized him as a "very motivated eager learner" who was hearing his letters, writing his name, and listening to stories, and together with the student's father, she was "pleased with the significant progress" he had made that year (id.).

On March 21, 2008, a private developmental pediatric evaluation of the student was conducted (Dist. Ex. 17). The evaluating pediatrician confirmed the student's prior PDD-NOS

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[3] The April 19, 2007 CSE determined that the student was ineligible for ESY services for the 2007-08 school year (Dist. Ex. 8 at p. 8).

[4] The evaluator also commented that the student achieved a score of 14 on a 2007 administration of the ADOS, a score that she concluded "met the ADOS criteria for a spectrum disorder" (Dist. Ex. 12 at p. 1).

diagnosis, and noted "excellent progress" made by the student in the district's program (id. at pp. 2-4).

In March 2008, the district conducted a speech-language reevaluation of the student (Dist. Ex. 14). The evaluating speech-language pathologist observed that, behaviorally, the student continued to exhibit focusing and attention difficulties, but that he could be successfully redirected (id. at p. 1). The speech-language pathologist reported that the student's therapy sessions focused on increasing auditory processing skills, reasoning skills, and semantics and she posited that the student had made "gradual but steady progress … across all subsystems of speech and language," including dramatic improvement in the area of articulation (id.). However, the speech-language pathologist also discerned that the student "continues to exhibit weakness in the areas of auditory processing, reasoning, semantics, expressive language skills and pragmatic language which impacts on his academic success within the classroom setting" (id. at p. 3).

On April 6, 2008, the student's physical therapist completed a PT annual progress note, which included results from a previously conducted "Physical Therapy School Based Functional Assessment Inventory" of the student (Dist. Ex. 15 at pp. 3-10). The physical therapist cited "demonstrated improvements in gross motor ability since the start of the school year" and believed that the student was capable of "independently negotiating the school setting at a pace consistent with his peers" (id. at p. 2). The physical therapist noted the student's continuing difficulties with safety and spatial awareness, but surmised that when the student was attentive to his task and the environment, his performance improved in those areas (id.). The physical therapist concluded her report by recommending a discontinuation of PT during the 2008-09 school year (id.).

On April 10, 2008, the district conducted an educational reevaluation of the student (Dist. Ex. 18). On the Wechsler Individual Achievement Test II (WIAT-II) subtests, the student achieved a standard score of 120 (91st percentile) in word reading, and composite standard scores of 113 (81st percentile) in math, and 87 (19th percentile) in oral language (id. at p. 4).[5]

On May 1, 2008, the student's occupational therapist completed the "Functional Skills Assessment for School Based Occupational Therapy" and reported on the results of previously administered standardized testing (Dist. Ex. 16 at pp. 2-6). The occupational therapist reported that the student's OT services focused on his improvement of fine motor coordination skills, visual motor skills, and activities of daily living skills, and assessed the student's functional skills for school-based classroom services to be age appropriate (id. at p. 5). She also cited the student's "progress in the area[s] of fine motor skills, bilateral coordination and visual/motor and perceptual skills" (id.).

On May 6, 2008, the CSE convened and developed an IEP for summer 2008 and the student's first grade school year of 2008-09 (Dist. Ex. 20). Comprised of two CSE chairpeople, a special education teacher, a school psychologist, a social worker, a speech pathologist, and both parents, the CSE changed the student's classification to OHI based upon his previous PDD diagnosis (id. at pp. 1, 14-15, 18). For summer 2008, the CSE recommended a special class in a 12:1+1 setting, with related services consisting of counseling once per week for 30 minutes per session in a 5:1 setting, and speech-language services twice per week for 30 minutes per session in a 5:1 setting, a mainstream gym class, a program modification consisting of a multisensory learning approach, and door-to-door transportation (id. at pp. 10-11, 13, 17-18). For the 2008-09

[5] The summary report did not include scores for written language (see Dist. Ex. 18 at pp. 1-2, 4).

school year, the CSE recommended a special class in a 15:1 setting, with related services consisting of counseling once per week for 30 minutes per session in a 5:1 setting, and speech-language services three times per week for 30 minutes per session in a 5:1 setting, a mainstream gym class, a program modification consisting of a multisensory learning approach, door-to-door transportation, and testing accommodations consisting of extended time on tests, prompting to remain focused, and directions read and re-read, repeated, simplified and/or explained (id. at pp. 10-12, 17-18).

In January 2009, the district conducted the student's speech-language annual review (Dist. Ex. 22). Administration of the Clinical Evaluation of Language Fundamentals – 4 (CELF-4) revealed that the student progressed significantly in his "linguistic skills" and made gains in his expressive language skills,[6] but the evaluating speech-language therapist identified the student's difficulties in sequencing thoughts and expressing them in sentence formation as areas of need (id. at p. 1).

On February 13, 2009, the district conducted the student's educational evaluation annual review (Dist. Ex. 23). On the WIAT-II subtests, the student achieved a standard score of 117 (87th percentile) in reading comprehension and a standard score of 112 (79th percentile) in math reasoning (id. at p. 2).[7]

On March 3, 2009, the district conducted a functional behavioral assessment (FBA) of the student (Parent Ex. 5; see 8 NYCRR 200.1[r]). The FBA noted that the student "can get emotional and frustrated during transitions or unstructured social situations …. Under these circumstances he becomes frustrated, cannot modulate his feelings and can become harsh with his words" (Parent Ex. 5 at p. 1). The development of a behavioral intervention plan (BIP) was recommended (id. at p. 2). On the following day, the district developed a BIP, which recommended building the student's self-esteem through praise, social reinforcement of appropriate behavior, positive reinforcement, teaching of social skills through stories, and role playing (Parent Ex. 6 at p. 2; see 8 NYCRR 2001[mmm]).

On March 10, 2009, the CSE convened to develop an IEP for the student's second grade school year of 2009-10 (Dist. Ex. 26). Attended by the district school principal, assistant coordinator of student services, special education teacher, speech pathologist, school psychologist, social worker, and both parents, the CSE recommended maintaining the student's OHI classification (id. at pp. 1, 10, 12). The March 10, 2009 CSE recommended a program identical to that described in the May 6, 2008 IEP, except that the former added preferential seating as a program modification, contained only one testing accommodation (tests read), and did not find the student eligible for ESY services (compare Dist. Ex. 20 at pp. 10-13, 17-18, with Dist. Ex. 26 at pp. 6-9, 12).

On March 17, 2009, the parents forwarded correspondence to the district referencing a prior telephone conversation from the previous day in which they challenged the March 10, 2009 CSE's determination that the student was ineligible for ESY services during summer 2009 (Dist.

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[6] The district's speech-language annual review report compared the student's scores on the March 2008 and January 2009 administrations of the CELF (Dist. Ex. 22 at p. 2). Reference thereto indicates that in 13 different categories, the student's scores improved in all but two; word structure (in which his scaled score dropped from 10 [50th percentile] in March 2008 to 5 [5th percentile] in January 2009), and expressive vocabulary (in which his scaled score dropped from 9 [37th percentile] in March 2008 to 8 [25th percentile] in January 2009) (id.).

[7] The summary report did not include scores for written language or oral language (see Dist. Ex. 23 at pp. 1-2).

Ex. 27). The parents contended that at the March 10, 2009 CSE meeting, they were "informed that [the student] was not eligible for summer school. According to the sub-committee, his ineligibility was due to his above average academic achievements and his current placement" (id.).[8] However, the parents maintained that although the CSE conceded that the student continued to require assistance in the areas of "socialization and speech in order to mainstream," unspecified district personnel allegedly informed the parents that "the district had no summer programs for [the student's] needs and that services for the summer were discontinued," and that "the summer school program would not be beneficial for him due to his academic achievements and that a more specialized program dealing with socialization would" (id.).[9]

On March 24, 2009, the CSE convened in response to the parents' request (Dist. Ex. 30). In attendance were the CSE chairperson, two special education teachers, an "applied behavioral analysis [ABA] specialist," a school psychologist, social worker, school principal, teacher assistant (TA), the parents, an additional parent member, and a "friend" (id. at p. 10). The recommendations developed by the March 24, 2009 CSE were identical to those contained in the March 10, 2009 IEP, including its determination that the student was ineligible for ESY services during summer 2009 (compare Dist. Ex. 26 at pp. 6-9, 12, with Dist. Ex. 30 at pp. 6-9).[10]

On March 24, 2009, the parents also filed a due process complaint notice (Dist. Ex. 1). It consisted of one sentence, objecting only to the CSE's recommendation on the March 24, 2009 IEP that the student was ineligible to receive summer services for summer 2009 (id.). The district, through counsel, challenged the sufficiency of the due process complaint notice on March 31, 2009 (Dist. Ex. 2; see 8 NYCRR 200.5[i][3], [6]). The district's counsel alleged that the due process

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[8] According to the student's progress reports contained in the hearing record, through the third quarter of the 2008-09 school year, the student met objectives set for him in: English language arts (ELA) decoding/encoding (reading and spelling sight words), and organization/study skills (Dist. Ex. 31 at pp. 1, 3). He was described as "progressing. Objective not met, but performance improved" in: ELA reading development, decoding/encoding (sound segmentation), listening/speaking, and verbal comprehension; math addition/subtraction, currency value calculation, telling time, and word problems; speech-language elementary pragmatics, auditory, syntax/morphology/oral expression (grammatical forms), and semantics (direction and position concepts, time and sequence concepts, and responding to "wh" question forms) (id. at pp. 1-8). He was observed to be experiencing difficulty with and making "very little progress" in: ELA written language; math (utilizing graphs or charts to reach conclusions); and counseling (communicating feelings, maintaining self-control, and social skills) (id. at pp. 1, 3, 7-8). He was assessed as having made "minimal progress … due to lack of prerequisite skills" in counseling (expressing feelings with respect to changes in his family and exercising responsibility) (id. at pp. 7-8). According to his report card contained in the hearing record, through the third quarter of the 2008-09 school year, district staff considered the student a "bright and polite child. Academically he is doing well in all subject areas," but noted that "he tends to rush through assignments making careless errors and not putting his best effort forth" (Dist. Ex. 32 at p. 4; see Dist. Ex. 32 at pp. 2-3). However, his teachers noted that "Socially he has made great strides in self control and communicating in a more positive way" and encouraged him to "Keep up the great work" (Dist. Ex. 32 at p. 4).

[9] The hearing record contains an undated counseling status report addressing the student's 2008-09 school year (Dist. Ex. 24). The evaluating district social worker asserted that "[t]his is [the student's] first year at [the district elementary school] but he adjusted well to the new setting and routine with new people" (id. at p. 1). The social worker further observed that the student experienced difficulty working through some situations because "'in the heat of the moment' he cannot think clearly enough to do so. It is his strong emotional reactions that cause him to be harsh, especially when trying to assert himself" (id.). The social worker concluded that "[f]or him to be more successful both socially and in a more academically advanced class he will need to better modulate his emotions" (id.).

[10] The March 24, 2009 IEP specifically noted that "the parent[s] requested summer services" (Dist. Ex. 30 at p. 10).

complaint notice was deficient in that it did not comport with 8 NYCRR 200.5(i) because it failed to set forth the residence address of the student, the name of the school attended by the student, a description of the nature of the alleged problem and the facts related thereto, and a proposed resolution of the problem (Dist. Ex. 2). On April 17, 2009, the impartial hearing officer issued a ruling dismissing the district's sufficiency challenge (Dist. Ex. 3; see 8 NYCRR 200.5[i][6][ii]). On April 21, 2009, the parents amended their due process complaint notice requesting "pendency for the duration of our litigation. Pendency placement is requested in light of CSE recommendations not to provide summer programming. We propose an appropriate program to be provided on a 12 month basis" (Dist. Ex. 4).[11]

An impartial hearing convened on May 18, 2009 and concluded on June 9, 2009, after four days of testimony.[12] In his decision dated June 23, 2009, the impartial hearing officer determined that: (1) the student was not eligible for ESY services because the hearing record demonstrated that he was not in danger of substantial regression during summer 2009 as contemplated by the State regulations; furthermore, the hearing record demonstrated that the student performed academically commensurate with his abilities, satisfactorily in his special education classroom, and, according to his classroom teachers, had made "excellent" progress academically and socially during the 2008-09 school year, thereby justifying the CSE's decision to deny ESY services during summer 2009; (2) nothing in the hearing record supported the parents' claim that the district predetermined that the student was not eligible for ESY services; (3) even if the student was eligible for ESY services, in consideration of the services provided by Camp Kehilla selected by the parents, the hearing record lacked sufficient evidence demonstrating that the student's IEP goals could be met in such a setting; and (3) by virtue of the foregoing determination, the parents were not entitled to reimbursement for the summer camp services they procured for summer 2009 (IHO Decision at pp. 7-10).[13]

The parents, proceeding pro se, appeal from the impartial hearing officer's decision, alleging three principal arguments. First, they allege bias and a lack of impartiality on the part of the impartial hearing officer, contending that: (1) the impartial hearing officer accommodated the district's and his own scheduling needs, but failed to consider theirs when scheduling impartial hearing dates; (2) the impartial hearing officer made his determination without obtaining full witness testimony from the district's assistant coordinator of student services, who allegedly failed to provide answers to questions the parents posited during the impartial hearing; and (3) the impartial hearing officer rendered his decision before receiving a copy of the impartial hearing

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[11] The parents' amended due process complaint notice did not name a specific program that they were proposing for the student.

[12] The parents, proceeding pro se, did not appear during the first two days of the impartial hearing, during which no witness testimony was taken (Tr. pp. 1-2, 4, 34, 40-42, 45, 51). The hearing record indicates that the impartial hearing convened on May 18, 2009 at 10:00 A.M. (Tr. p. 1). However, the hearing record contains correspondence from the parents to the impartial hearing officer dated May 17, 2009, in which the parents advised the impartial hearing officer of their intention to appear for the hearing on May 18, 2009 at 2:00 P.M. (Dist. Ex. 33 at p. 1).

[13] Although the impartial hearing officer's decision generally references the evidence contained in the hearing record, it is devoid of any specific cites to transcript pages or exhibit numbers. State regulations provide in relevant part that "[t]he decision of the impartial hearing officer shall set forth the reasons and the factual basis for the determination. The decision shall reference the hearing record to support the findings of fact" (8 NYCRR 200.5[j][5][v]). In order to properly reference the hearing record, pages of transcript and relevant exhibit numbers should be cited with specificity. The impartial hearing officer is encouraged to comply with State regulations and cite to relevant facts in the hearing record with specificity.

transcript. Second, they assert that the testimony of the district's witnesses during the impartial hearing was "biased," "scripted," and "rehearsed." Finally, the parents maintain that the district's decision not to offer the student ESY services for summer 2009 was not based upon the student's needs, but was predetermined by the district based upon standard practice and the student's previous placement during the school year. The parents seek relief in the form of reimbursement of the cost of Camp Kehilla in which they enrolled the student for summer 2009. The parents attach additional evidence to their petition.

The district answers, countering that: (1) all impartial hearing dates were scheduled with the cooperation and consent of both parties; (2) although conceding that its witness, the assistant coordinator of student services, was unable to answer a question posed by the parents during the impartial hearing because he did not have access to necessary data and records, the question posed by the parents neither related to the student nor was determinative of the impartial hearing's outcome; (3) the district did not predetermine its determination that the student was not eligible for ESY services; rather, it based its denial upon the likelihood of the student experiencing substantial regression; and (4) the student was not eligible for ESY services because, in the opinion of the CSE, he did not exhibit the potential for "substantial regression" over the summer months as mandated by State regulations.

The district also objects to the attachment of any documents to the petition that were not already entered as evidence into the hearing record, and raises four affirmative defenses: (1) the impartial hearing officer's determinations are fully supported by the hearing record and should be upheld because his issuing of the decision prior to his receiving the transcript was not improper, in that his June 23, 2009 decision reflects thoughtful analysis of the testimonial and documentary evidence entered at the hearing, and because he substantially complied with all regulatory requirements when issuing his decision and did not assume facts not in evidence; (2) the petition should be dismissed because the parents include multiple allegations per paragraph in violation of 8 NYCRR 279.8(a)(3); (3) the impartial hearing officer's determination that the March 24, 2009 CSE correctly found that the student did not require 12-month services is fully supported by the hearing record and should be upheld; and (4) even if a State Review Officer determines that the student was eligible for 12-month services, Camp Kehilla, selected by the parents, is inappropriate in that it is not a special education placement.

At the outset, I will address several procedural matters arising on appeal. First, the district objects to the introduction of multiple documentary exhibits appended to the petition. I note that several of these exhibits (which are not labeled by the parents) were previously introduced into evidence during the impartial hearing and incorporated into the hearing record, including a copy of the May 6, 2008 IEP (Dist. Ex. 20); correspondence from the student's mother to the student's special education teacher dated May 2, 2009 (Parent Ex. 4); and correspondence from Camp Kehilla to the district dated June 4, 2009 (Parent Ex. 13). Because these exhibits are already included in the hearing record, I will consider them in this appeal.[14]

However, the parents also attempt to introduce multiple exhibits that were not previously admitted into evidence during the impartial hearing, including several letters they wrote to the impartial hearing officer addressing scheduling issues, dated May 6, 2009 (two letters), May 11,

[14] State regulations provide that "[t]he impartial hearing officer shall attach to the decision a list identifying each exhibit admitted into evidence. Such list shall identify each exhibit by date, number of pages and exhibit number or letter" (8 NYCRR 200.5[j][5][v]). The impartial hearing officer did not attach an exhibit list to his decision. I encourage the impartial hearing officer to ensure compliance with this regulation in the future.

12, 14, and May 18, 2009; as well as a letter from the district to the parents dated May 18, 2009; and an excerpted page from Camp Kehilla's internet website. Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an impartial hearing officer's decision only if such additional evidence could not have been offered at the time of the hearing and the evidence is necessary in order to render a decision (see, e.g., Application of the Dep't of Educ., Appeal No. 09-055; Application of a Student with a Disability, Appeal No. 09-006; Application of the Bd. of Educ., Appeal No. 08-126; Application of a Student with a Disability, Appeal No. 08-107; Application of the Dep't of Educ., Appeal No. 08-061; Application of the Dep't of Educ., Appeal No. 08-044; Application of the Dep't of Educ., Appeal No. 08-037; Application of a Student with a Disability, Appeal No. 08-030; Application of the Dep't of Educ., Appeal No. 08-024; Application of a Student with a Disability, Appeal No. 08-003; Application of the Dep't of Educ., Appeal No. 07-140; Application of a Child Suspected of Having a Disability, Appeal No. 07-042; Application of the Bd. of Educ., Appeal No. 07-005; Application of a Child with a Disability, Appeal No. 06-058; Application of the Bd. of Educ., Appeal No. 06-044; Application of the Bd. of Educ., Appeal No. 06-040; Application of a Child with a Disability, Appeal No. 05-080; Application of a Child with a Disability, Appeal No. 05-068; Application of a Child with a Disability, Appeal No. 05-020; Application of the Bd. of Educ., Appeal No. 04-068). Because the parents could have offered these exhibits at the time of the impartial hearing but elected not to do so, I decline to consider them in this appeal.

Second, although the district correctly states that the parents included multiple allegations per paragraph in the petition in contravention of 8 NYCRR 279.8(a)(3), consonant with the discretion afforded me by the State regulations, I decline to dismiss the petition on this ground (see Application of a Student with a Disability, Appeal No. 09-034; Application of a Student with a Disability, Appeal No. 08-048; Application of a Child with a Disability, Appeal No. 07-099).

I will now address the parents' allegations of bias and a lack of impartiality on the part of the impartial hearing officer. An impartial hearing officer must be fair and impartial and must avoid even the appearance of impropriety or prejudice (see Application of the Bd. of Educ., Appeal No. 09-057; Application of a Student with a Disability, Appeal No. 09-052; Application of a Student with a Disability, Appeal No. 08-090; Application of a Child with a Disability, Appeal No. 06-039; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 04-010; Application of a Child Suspected of Having a Disability, Appeal No. 03-071), and must render a decision based on the hearing record (see Application of a Student with a Disability, Appeal No. 09-058; Application of a Student with a Disability, Appeal No. 08-036; Application of a Child with a Disability, Appeal No. 06-065; Application of a Child with a Disability, Appeal No. 06-039; Application of a Child with a Disability, Appeal No. 00-063; Application of a Child Suspected of Having a Disability, Appeal No. 00-036; Application of a Child with a Disability, Appeal No. 98-55). An impartial hearing officer, like a judge, must be patient, dignified and courteous in dealings with litigants and others with whom the impartial hearing officer interacts in an official capacity and must perform all duties without bias or prejudice against or in favor of any person, and shall not, by words or conduct, manifest bias or prejudice, according each party the right to be heard (Application of a Child with a Disability, Appeal No. 07-090; Application of a Child with a Disability, Appeal No. 07-075; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child Suspected of Having a Disability, Appeal No. 01-021).

After an independent review of the hearing record, I find the parents' allegations are without merit. The hearing record evidences that the impartial hearing officer expressed a willingness to grant a 21-day adjournment in order to afford the parents an opportunity to secure representation

(Tr. pp. 19-22, 50-51). He declined to permit any discussion on the record regarding the student's classification outside of the parents' presence (Tr. p. 21). He attempted to contact the parents telephonically during the first day of the impartial hearing when they did not appear for the morning session (Tr. pp. 32-34). He further directed the district's counsel to forward to the parents information regarding low-cost legal counsel (Tr. pp. 48-49). The impartial hearing officer commenced the third day of the impartial hearing at 2:00 P.M. at the parents' request (Tr. pp. 53, 55). He allowed both sides to fully develop testimony and gave the parents a general overview of cross examination (Tr. pp. 161, 164-65, 170-71).[15] He directed questions to witnesses from both sides (Tr. pp. 146-53, 214-18, 225-27, 237-43).[16] I find that the impartial hearing officer demonstrated consideration of both parties with respect to the amount of time required to continue the impartial hearing (Tr. pp. 191-92), as well as the provision of documents to both sides (Tr. pp. 198-99). He issued instructions fair to both parties regarding the preparation of closing statements (Tr. pp. 252-53) and permitted the parents to read a prepared statement into the hearing record (Tr. pp. 260-75).

The parents also assert that the impartial hearing officer issued his decision prior to receiving the impartial hearing transcripts, constituting further evidence of bias and a lack of impartiality.[17] State regulations require an impartial hearing officer to render a decision that is based solely upon the hearing record (8 NYCRR 200.5[j][5][v]; see Application of a Student with a Disability, Appeal No. 09-058; Application of a Child with a Disability, Appeal No. 00-063; Application of a Child Suspected of Having a Disability, Appeal No. 00-036; Application of a Child with a Disability, Appeal No. 98-55). Although impartial hearing officers often review impartial hearing transcripts prior to issuing their decisions, there is no statutory requirement for them to do so. Nor is it clear from the evidence in this case that the impartial hearing officer rendered his decision without reviewing the transcripts and, as more fully set forth below, the hearing record supports his decision. Consequently, under the circumstances of this case, I decline to find that there is evidence of bias or a lack of impartiality on the part of the impartial hearing officer.

Another matter raised by the parents concerns the scheduling of the impartial hearing dates. State regulations provide that the impartial hearing "shall be conducted at a time and place which is reasonably convenient to the parent and the student involved" (8 NYCRR 200.5[j][3][x]; see 34 C.F.R. § 300.515[d]). The parents contend that the first two days of the impartial hearing were

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[15] At all stages of the impartial hearing, an impartial hearing officer may "assist an unrepresented party by providing information relating only to the hearing process" (8 NYCRR 200.5[j][3][vii]; see Application of a Student with a Disability, Appeal No. 09-058; Application of a Student with a Disability, Appeal No. 09-052; Application of a Student with a Disability, Appeal No. 08-158; Application of a Student with a Disability, Appeal No. 08-138; Application of a Student Suspected of Having a Disability, Appeal No. 08-100; Application of a Student with a Disability, Appeal No. 08-090; Application of a Child with a Disability, Appeal No. 07-130; Application of a Child with a Disability, Appeal No. 07-075; Application of a Child with a Disability, Appeal No. 06-065; Application of a Child with a Disability, Appeal No. 06-039; Application of a Child with a Disability, Appeal No. 04-082).

[16] State regulations do not impair or limit the authority of an impartial hearing officer to ask questions of counsel or witnesses for the purpose of clarification or completeness of the hearing record (8 NYCRR 200.5[j][3][vii]; see Application of a Student with a Disability, Appeal No. 09-058; Application of a Student with a Disability, Appeal No. 08-158; Application of a Child with a Disability, Appeal No. 07-130; Application of a Child with a Disability, Appeal No. 06-065).

[17] There is no indication in the impartial hearing officer's June 23, 2009 decision as to when he received the impartial hearing transcripts.

held at times that were not convenient to them, and further allege that "decisions and conclusions were made in the two days that we were not present 'off the record.'" However, in the case at bar, the hearing record demonstrates that the parents were afforded reasonable notice of the scheduling of the impartial hearing, notwithstanding their decision not to appear during its first two days (see Dist. Ex. 33 at p. 1), that the impartial hearing officer commenced the third day of the impartial hearing at 2:00 P.M. pursuant to the parents' request (Tr. pp. 53, 55), and that the fourth day of the impartial hearing commenced at 3:00 P.M. (Tr. p. 202). The parents also produce no evidence to support their allegation that the impartial hearing officer and the district reached "off the record" decisions and conclusions that violated their due process rights.

After reviewing the entire hearing record, I find that the evidence does not support the parents' contention that the impartial hearing officer was not impartial or acted in a manner that did not conform with federal and State regulations. Under the circumstances in this case, while the parents disagree with the conclusions reached by the impartial hearing officer, their disagreement does not provide a basis for finding that the impartial hearing officer acted with bias (Application of a Student with a Disability, Appeal No. 09-058; Application of a Student with a Disability, Appeal No. 08-158; Application of a Child with a Disability, Appeal No. 07-078; Application of a Child with a Disability, Appeal No. 06-102; Application of a Child with a Disability, Appeal No. 06-013; Application of a Child with a Disability, Appeal No. 96-3; Application of a Child with a Disability, Appeal No. 95-75).

Turning to the merits of the case, 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 (A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if a procedural violation is alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; E.H. v. Bd. of Educ., 2008 WL 3930028, 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 P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; 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 Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

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). Subsequent to its development, an IEP must be properly implemented (8 NYCRR 200.4[e][7]; Application of a Child with a Disability, Appeal No. 08-087).

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 law took effect for impartial hearings commenced on or after October 14, 2007; therefore, it applies to the instant case (see Application of the Bd. of Educ., Appeal No. 08-016).

According to State regulations, "[s]tudents shall be considered for [ESY] special services and/or programs in accordance with their needs to prevent substantial regression" (8 NYCRR 200.6[k]; Application of the Bd. of Educ., Appeal No. 09-047; Application of a Student with a Disability, Appeal No. 08-078; Application of a Child with a Disability, Appeal No. 07-089; Application of a Child with a Disability, Appeal No. 07-082; Application of a Child with a Disability, Appeal No. 07-039; Application of the Dep't of Educ., Appeal No. 07-037; Application of a Child with a Disability, Appeal No. 07-004; Application of the Bd. of Educ., Appeal No. 04-102; see 34 C.F.R. § 300.106 [defining ESY]; 8 NYCRR 200.4[d][2][x] [noting that a student's IEP shall indicate whether the student is eligible for a special service or program on a 12-month basis]). The State regulations define substantial regression as "the student's inability to maintain developmental levels due to a loss of skill or knowledge during the months of July and August of

such severity as to require an inordinate period of review at the beginning of the school year to reestablish and maintain IEP goals and objectives mastered at the end of the previous school year" (8 NYCRR 200.1[aaa]).[18]

The principal issue in this appeal is whether or not the student required ESY services to prevent substantial regression during summer 2009. The parents believe that the student is likely to experience such a substantial regression unless he receives ESY services during summer 2009. In support of their argument, Camp Kehilla's program director of special needs (program director), who admittedly never met the student, testified as to her general beliefs that students on the autism spectrum need to "continue to be in a social environment where their social interactions, social skills and behaviors are constantly attended," and that students on the autism spectrum who "are not sustained in a very social setting can revert back to more withdrawn self stimulatory behaviors" (Tr. pp. 211-12, 220). She opined that generally, in a hypothetical case, a departure from such an environment for a period of 2½ months would likely create regression from the gains made during a hypothetical student's subsequent school year, but she did not testify to this student's specific needs (Tr. pp. 212-13).

The parents also produced as their witness at the impartial hearing the district's speech-language pathologist who worked with the student during the 2008-09 school year. The speech-language pathologist testified that when the student returned from Christmas break, "[h]e was fine" and "fell right back where [he] needed to" (Tr. pp. 236-37). She also testified that while substantial regression in the student was possible, "we have two very involved parents and I'm sure they are following through at home. So if he's getting continual reinforcement at home, then I'm sure he will be fine come September" (Tr. p. 239). She also testified to the student's developing ability to prevent himself from lapsing into previously undesirable behavior on his own (Tr. pp. 242-44).[19]

The district produced several witnesses at the impartial hearing who were familiar with the student.[20] The student's special education teacher testified that he experienced a "very easy" transition back into class after the school's eight or nine-day Easter vacation, and denied that the student demonstrated any academic, behavioral, or social regression during the balance of the 2008-09 school year thereafter (Tr. pp. 84-85). When asked to describe what she felt the ideal

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[18] In February 2006, the Office of Vocational and Educational Services for Individuals with Disabilities (VESID) published a guidance memorandum, dated February 2006, which states the following regarding ESY services:

> A student is eligible for a twelve-month service or program when the period of review or reteaching required to recoup the skill or knowledge level attained by the end of the prior school year is beyond the time ordinarily reserved for that purpose at the beginning of the school year. The typical period of review or reteaching ranges between 20 and 40 school days. As a guideline for determining eligibility for an extended school year program a review period of eight weeks or more would indicate that substantial regression has occurred.

(http://www.vesid.nysed.gov/specialed/publications/policy/esy/qa2006.htm).

[19] Although the parents also produced at the impartial hearing a prescription from the student's pediatrician dated June 2, 2009, which recommended "Behavioral and social intervention June – mid August" (Parent Ex. 14; see Tr. pp. 261-62), the pediatrician did not testify during the impartial hearing and there is no further information in the hearing record concerning this recommendation.

[20] The parents argue that I should annul the impartial hearing officer's decision because the testimony given by the district's witnesses during the impartial hearing was "biased," "scripted," and "rehearsed." They assert no basis in the hearing record to support these allegations.

summer for the student would be, she testified "I think if he plays with other children in the neighborhood and goes to the parks and mingles with other children and things like that. I think that would be great" (Tr. pp. 103-05). She expressed her belief that the student could function in such an environment during the summer, and testified that the student had demonstrated the ability to do so in the school playground without her constant intervention (Tr. pp. 103-05, 108-110).

The district's social worker denied that there were any school breaks that preceded the student's manifestation of difficulties in transitioning to a new reading class,[21] or the district's decision to implement the student's BIP (Tr. pp. 122-23, 131-33). She also denied observing any changes in the student upon his return to school after the school's Thanksgiving and Christmas breaks (Tr. pp. 128-29).[22] She confirmed that she attended both of the CSE meetings held in March 2009, during which she explained to the parents that she did not believe that the student required ESY services because he would not likely experience substantial regression during summer 2009, a belief that she reiterated during the impartial hearing (Tr. pp. 129-30, 133-34).

The district also produced as a witness the TA who served in the student's classroom during the 2008-09 school year. She too denied observing any increase in the student's aggressive behavior following school breaks (Tr. pp. 140-42). She expressed her belief that the student did not pose a likelihood of substantial regression during summer 2009 (Tr. pp. 146, 154).

The chairperson of the March 24, 2009 CSE meeting testified to a detailed description of the discussion that occurred between the parents and the other CSE members relative to the parents' request for a 12-month program for their son (Tr. pp. 158-61). He advised that after consulting the other members of the CSE, there was a consensus that the student neither was regressing at the time of the CSE meeting nor posed a likelihood of substantial regression during the summer, and that he informed the parents that the likelihood of a student's substantial regression, as assessed by the CSE, was determinative of whether or not ESY services would be approved for a student (id.; see Tr. pp. 166-67).

The district's assistant to the coordinator of student services, who participated in the March 10, 2009 CSE meeting, testified as to the distinction between "regression," which she opined all students, including general education students, experience, versus "substantial regression," which triggers eligibility for ESY services under the State regulations (Tr. pp. 181-82). While conceding that socialization was the primary concern holding the student back, she did not believe that it was likely that the student would experience substantial regression during summer 2009, and hence, she did not consider him a suitable candidate for ESY services (Tr. pp. 183-84, 187).

I note that the hearing record contains no documentary or testimonial evidence establishing that the student required ESY services during summer 2009 in order to prevent substantial regression of the skills or knowledge level, including in the area of social skills, that he attained by the end of the 2008-09 school year. Based upon the foregoing, I conclude that the weight of the evidence contained in the hearing record supports the impartial hearing officer's determination that the student did not require ESY services to prevent a likelihood of substantial regression

[21] The hearing record indicates that the student's original reading teacher left the district during the 2008-09 school year, and the student was placed in a new reading class thereafter for "two months or so" during the balance of the 2008-09 school year (Tr. pp. 95-96).

[22] The hearing record does not indicate the lengths of the school's Thanksgiving or Christmas breaks.

during summer 2009, and that the March 24, 2009 CSE's denial of ESY services was justified under the State regulations.

The parents also contend that the district's decision not to offer the student ESY services for summer 2009 was not based upon the student's needs, but was predetermined by the district based upon standard practice and the student's previous placement during the school year. I agree with the impartial hearing officer that this contention does not find support in the hearing record. The parents produced no documentary or testimonial evidence supporting their allegation. The district, however, produced multiple witnesses who testified that the likelihood of substantial regression as set forth in the State regulations was the determining factor in evaluating the student's eligibility for ESY services (Tr. pp. 177-79, 244-50). Specifically, the district's coordinator of student services denied that it was a district practice to discontinue ESY services once a student is placed in a 15:1+1 class, and maintained that a student's eligibility for ESY services is determined by State guidelines for substantial regression (Tr. pp. 244-50; see Tr. pp. 129-30, 166-67). The parents also produced no documentary or testimonial evidence to support their assertion that the district did not have an appropriate summer program available for the student (Tr. p. 271), an assertion refuted by multiple district witnesses (Tr. pp. 113-14, 134-35, 185).

In consideration of the above, I concur with the finding of the impartial hearing officer that the evidence contained in the hearing record does not support the parents' allegation of predetermination.

In conclusion, I find that the impartial hearing officer's determination that the district appropriately determined that the student did not require ESY services for summer 2009 is supported by the hearing record. Having determined that the student did not require ESY services, I need not reach the issue of whether Camp Kehilla was appropriate for the student and the necessary inquiry is at an end (M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 134 [2nd Cir. 1998]; Application of a Child with a Disability, Appeal No. 08-158; Application of a Child with a Disability, Appeal No. 05-038).

I have considered the parties' remaining contentions and I find them to be without merit.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
August 24, 2009

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PAUL F. KELLY
STATE REVIEW OFFICER