



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 10-010

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

**Appearances:**

Nassau/Suffolk Law Services Committee, Inc., attorneys for petitioner, Ellen R. Krakow, Esq., of counsel

Conway, Farrell, Curtin & Kelly, P.C., attorneys for respondent, Gail M. Kelly, Esq., of counsel

### DECISION

Petitioner (the parent) appeals from the decision of an impartial hearing officer which determined that the educational program and services respondent's (the district's) Committee on Special Education (CSE) recommended for her son for the 2009-10 school year were not appropriate, and ordered the district to evaluate the student and to reconvene a CSE to review the newly acquired evaluative data to develop and recommend an appropriate program for the student. The appeal must be sustained in part.

At the time of the impartial hearing, the student attended a Board of Cooperative Educational Services (BOCES) 8:1+1 special class and received related services of counseling and speech-language therapy pursuant to pendency<sup>1</sup> (Dist. Exs. 3 at p. 2; 6; 20; Parent Exs. N-R). The student's eligibility for special education programs and services as a student with an other health impairment is not in dispute (see 34 C.F.R. § 300.8[c][9]; 8 NYCRR 200.1[zz][10]).

In this case, the student was given a diagnosis of attention deficit hyperactivity disorder (ADHD) in second or third grade, which has been continuously treated with medication since February 2004 through the present time (Parent Ex. G at p. 2; see Oct. 27, 2009 Tr. pp. 97-99; Dist. Ex. 8 at p. 3; Parent Ex. U at p. 2). During his early educational years, the student attended a BOCES

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<sup>1</sup> For statutory and regulatory provisions pertaining to a student's educational placement during administrative or judicial proceedings, see 20 U.S.C. § 1415(j); Educ. Law § 4404(4)(a); 34 C.F.R. § 300.518; 8 NYCRR 200.5(m).

elementary school in an 8:1+1 special class, and received speech-language therapy services (Parent Ex. U at p. 2; see Parent Ex. G at p. 2). Based upon the student's reported "success" at the BOCES elementary school, the district returned the student to a "less restrictive setting" for fourth grade, placing him in a 15:1+1 special class in a district elementary school with related services of speech-language therapy and counseling (id.). However, the student "relapse[d] soon after returning to the district setting," and struggled with his behavior in both fifth and sixth grades (id.). During fifth grade, the school psychologist developed a behavior contract for the student in which he could earn daily and weekly reinforcers for positive behavior (Parent Ex. U at p. 2). The student continued to struggle with his behavior in sixth grade (2005-06 school year) when he attended a 15:1+1 special class in a district middle school (id. at pp. 1-2; see Parent Ex. G at pp. 1-2). In sixth grade, the district completed a functional behavioral assessment (FBA) of the student and developed a behavioral intervention plan (BIP) to address the student's aggressive behaviors, which included hitting, kicking, throwing items, and stabbing peers with pencils (Parent Ex. U at p. 2). In April 2006, the student was suspended and placed on home instruction after threatening another student with scissors (id. at pp. 2, 4; see Parent Ex. G at p. 1).

At the conclusion of sixth grade, the district referred the student to BOCES for a screening (Parent Ex. U at p. 2; see Parent Ex. G). The district's school psychologist conducted a psychological reevaluation of the student in order to expedite the BOCES screening (Parent Ex. U at p. 2). An administration of the Wechsler Abbreviated Scale of Intelligence (WASI) yielded a full-scale intelligence quotient (IQ) score of 78, which fell in the borderline range of intellectual functioning (id. at p. 3). According to the psychologist, the student's abilities in the verbal domain fell within the low average range, and his abilities in the performance domain fell within the borderline range (id. at pp. 3-4). Behaviorally, the psychologist noted that the student had a "difficult year" (id. at p. 4). She described the student as "quiet and pleasant" on some days, "aggressive towards his peers" on other days, and that "it was difficult to calm him down" (id.). Although the student had responded positively to group and individual counseling sessions, he demonstrated "difficulty" applying "learned strategies in 'real life' situations" (id.). Oftentimes the student's aggressive behaviors—kicking, hitting, throwing items, stabbing with pencils—occurred after being provoked, and the student would become "uncontrollable" (id.). The psychologist opined that the student continued to require counseling "in order to learn strategies regarding self control and anger management," and she recommended that the CSE discuss an "alternative placement" for the student for seventh grade (id. at pp. 4-5).

In August 2006, a BOCES consulting psychiatrist performed a screening of the student (Parent Ex. G at pp. 1, 5). According to recent school reports, the student struggled academically in areas such as "written expression, organization, and multi-step directions," and he interacted poorly with peers (id. at p. 1). The psychiatrist noted that the student became "hyper" when presented with "hard" schoolwork and that he tended to be "impulsive without thinking" (id.). He also noted that the student was "easily provoked" and would become "uncontrollable" (id.). According to the parent, the student had been "bullied all year, with kids slapping him on the head or threatening to do so," and he "lost ground in learning" (id.). During a brief mental status exam, the psychiatrist noted that the student would get "angry when he [was] teased or when work [was] too hard," and that the student would "throw a fit and cry" (id. at p. 4). According to the student, other students at school would "threaten to punch him," and he would "get into trouble for fighting them or throwing chairs" (id.). The student also acknowledged that schoolwork, especially reading, was difficult for him (id.). Based upon the screening, the psychiatrist described the student as having

"chronic ADHD and accompanying LDs and likely Language Disorder (all with a probable neurological basis)," and he noted that although the student had "done well in the past at [the BOCES] elementary school program" with medication, the student had "gone downhill at school in the interim with less structure and intensive help, and more peers picking on him" (id. at p. 5). The psychiatrist offered the following working diagnoses for the student: "ADHD;" "language disorder with accompanying LDs (rule out low IQ);" "rule out PTSD;" "rule out ODD;" and "doubt Depressive Disorder" (id. at p. 4). In addition, the psychiatrist identified the following "Working Issues:" to identify the student's current level of ADHD; to clarify the student's current level of academic functioning; to further assess the student's mood, "especially for chronic PTSD," and with regard to the student's "anger self-management skills;" and to assess the student's current social skills (id. at p. 5).

During the 2006-07 school year for seventh grade, the district placed the student in an 8:1+1 special class at a BOCES middle school, where he received instruction in the general education curriculum with accommodations and related services of speech-language therapy and counseling (Dist. Ex. 18 at pp. 1-3; see Nov. 9, 2009 Tr. p. 127; Parent Exs. H; I at p. 4). Although the 8:1+1 BOCES middle school placement provided the student with a "very rigid behavior system," he continued to struggle both academically and behaviorally (Nov. 9, 2009 Tr. pp. 127-32; see Parent Ex. S). When a BOCES teacher coordinator performed an intra-BOCES screening of the student, she learned from discussions with BOCES staff that the student exhibited difficulty focusing, he threw chairs, he became "very frustrated by the level of academic work," he got into fights, had temper tantrums, and threw himself on the floor (Nov. 9, 2009 Tr. pp. 127-32).<sup>2</sup> In addition, the BOCES teachers indicated that the student could not "keep up academically" in the general education curriculum "on or near his grade level," and recommended that the student receive a "life skills program with academics within the alternative performance indicators" (Nov. 9, 2009 Tr. pp. 130-31). Based upon the information gathered, the BOCES Jr./Sr. High School staff agreed that the student would be appropriately placed in one of its 8:1+1 special classes with speech-language therapy and psychiatric consultation services (Nov. 9, 2009 Tr. pp. 132-33).

On April 13, 2007, a subcommittee of the CSE convened for the student's annual review and to develop his individualized education program (IEP) for the 2007-08 school year (Dist. Ex. 18 at pp. 1-3, 24; see Parent Ex. I).<sup>3</sup> According to the IEP, the student's present levels of academic/educational achievement, functional performance, and learning characteristics required a "structured program with clearly defined limits and expectations" and "intensive management in order to address academic goals" (Dist. Ex. 18 at p. 11). At that time, the student could effectively "perform" and "complete tasks in the classroom environment with a structured environment and a predictable, established routine" and "sufficient preparation for transitions" (id. at pp. 11, 14). The

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<sup>2</sup> The intra-BOCES screening was performed to determine whether the student could be appropriately placed at a specific BOCES Jr./Sr. High School for the 2007-08 school year (Nov. 9, 2009 Tr. pp. 119, 122, 127-28; see Dist. Ex. 18 at pp. 1-3).

<sup>3</sup> Upon review of the document submitted into evidence by the district as the student's 2007-08 IEP, it appears that the district used the IEP developed and drafted by BOCES as the student's working IEP document for that school year, as the district's own IEP document fails to contain any information about the student except for basic identifying information, the student's recommended placement at BOCES, the student's related services, and the student's testing accommodations (compare Dist. Ex. 18 at pp. 1-23, with Dist. Ex. 18 at pp. 24-33; see Parent Ex. I).

IEP noted that the student could "express simple ideas," and that he needed to "continue to develop skills required for listening to acquire information and understanding" (*id.* at p. 12). The IEP also indicated that the student benefited from "a small group setting" (*id.*). Behaviorally, the IEP detailed that the student demonstrated "inappropriate" social skills, and that he needed "to refrain from arguing/fighting with peers," "to react appropriately with disappointment/pleasure," "to respond appropriately to adult disapproval," and "to relate appropriately to peers in the classroom" (*id.* at pp. 12-13). With respect to management needs, the student required "frequent teacher reinforcement" to stay on task (*id.* at p. 14). The student's 2007-08 IEP contained the following program modifications: "short breaks between assignments," "clarification of assignments," "a reward system," and "simple and clear classroom rules" (*id.* at pp. 14-15). Given the student's functional level, his "severe cognitive disability," and "significant deficits in communication/language and adaptive behavior," the student required a "highly specialized educational program that facilitate[d] the acquisition, application and transfer of skills across natural environments" (*id.* at p. 15). The IEP indicated that the student would participate in the New York State Alternative Assessments because the student would be working on the New York State Learning Standards at the alternative level, and that he would pursue an IEP diploma (*id.* at pp. 6, 9, 15). The IEP afforded the student the following testing accommodations: tests administered in a location with "minimal visual/auditory distractions" and "tests/quizzes longer than 30 minutes" to be administered with breaks (*id.* at p. 16). The IEP also noted that the student would not participate in the general education program for classes because he required a "more intensive program" to further develop the student's "academic skills" and "behavior management skills" (*id.*). The 2007-08 IEP included annual goals and short-term objectives to address the student's identified needs in the following areas: compensatory strategies/learning strategies, study skills, social skills, physical education, counseling, and speech/language therapy (*id.* at pp. 17-21).

Based upon the information provided, the CSE subcommittee recommended placing the student in an 8:1+1 special class at the BOCES Jr./Sr. High School with related services of speech-language therapy and counseling for the 2007-08 school year (Dist. Ex. 18 at pp. 3-3, 28; Parent Ex. I at pp. 1-2). The CSE subcommittee also recommended a 12-month program for the student (Dist. Ex. 18 at pp. 11, 29; Parent Ex. I at p. 6).

For the 2008-09 school year, a CSE subcommittee convened on May 29, 2008, and June 17, 2008, to conduct the student's annual review and to develop his IEP (Dist. Exs. 10 at pp. 1-3; 12; 17 at pp. 2, 7, 12; Parent Ex. J).<sup>4</sup> The CSE subcommittee recommended continuing the student's placement in an 8:1+1 special class at the same BOCES Jr./Sr. High School the student attended during the 2007-08 school year, with related services of speech-language therapy and counseling (Dist. Exs. 12; 17 at pp. 2, 7-8, 11-12; Parent Ex. J at pp. 1-2). In addition, the CSE subcommittee continued to recommend a 12-month program for the student (Dist. Exs. 12; 17 at pp. 2, 8, 11; Parent Ex. J at pp. 1, 3). The student's 2008-09 IEP included a coordinated set of transition activities and annual goals and short-term objectives to address the student's identified needs in the following areas: reading, compensatory strategies/learning strategies, compensatory strategies/mathematical

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<sup>4</sup> Upon review of the documents submitted into evidence by the district as the student's 2008-09 IEP, it appears that the district, again, used the IEP developed and drafted by BOCES as the student's working IEP document for that school year, as the district's own IEP document fails to contain any information about the student except for basic identifying information, the student's recommended placement at BOCES, the student's related services, and the student's testing accommodations (compare Dist. Ex. 17 at pp. 2, 6-8, 10-11, with Dist. Ex. 13 and Parent Ex. J).

strategies, English language arts strategies, compensatory strategies/post secondary skills, study skills, social skills, physical education, counseling, and speech-language therapy (Parent Ex. J at pp. 10-21). The IEP continued to indicate that the student would work toward an IEP diploma and would participate in the New York State Alternative Assessment (Dist. Ex. 13 at p. 1; Parent Ex. J at pp. 8-9, 22). The IEP afforded the student the following testing accommodations: tests administered in a location with "minimal visual/auditory distractions" and "tests/quizzes longer than 30 minutes" to be administered with breaks (Parent Ex. J at p. 8).

For ninth grade during the 2009-10 school year, a CSE subcommittee convened on March 27, 2009 and June 25, 2009 to conduct the student's annual review and develop his IEP (Dist. Exs. 4 at pp. 1-4; 5 at pp. 1-2; Parent Ex. F at pp. 1-4; see Tr. pp. 126-30, 140-43; Dist. Ex. 21). According to the meeting minutes recorded for the March 27, 2009 meeting, the BOCES staff participating at the meeting presented information regarding the student's needs and progress, and recommended that the student remain at the current BOCES Jr./Sr. High School placement (Dist. Ex. 21 at p. 1). The meeting minutes noted that the CSE subcommittee tabled its recommendations for the student—over the parent's objection—in order to reconvene at a later date for further discussion of the least restrictive environment (LRE) "in school" (Dist. Exs. 5 at p. 1; 21 at p. 1). The meeting minutes also noted that the parent opposed placing the student in a "district placement," and specifically wanted the student to remain at the current BOCES Jr./Sr. High School placement (Dist. Ex. 21 at p. 2). The following information was also recorded in the meeting minutes: the student had improved behaviorally, he needed to work on decision-making skills, his counseling had focused on social development, and his speech-language therapy had focused on social decision-making and development (Dist. Ex. 5 at p. 1).

Prior to reconvening on June 25, 2009, a BOCES school psychologist conducted a psychological evaluation on June 16, 2009, as part of the student's triennial evaluation and to assess the student's intellectual and adaptive functioning, as well as his educational needs (Dist. Ex. 9 at p. 1). The psychologist easily established rapport with the student, and the student was able to stay on task and complete required activities with minimal reinforcement (id.). An administration of the Wechsler Intelligence Scales for Children—Fourth Edition (WISC-IV) yielded the following standard scores: verbal comprehension, 89 (low average); perceptual reasoning, 77 (borderline); working memory, 68 (extremely low average); processing speed, 75 (borderline); and a full-scale IQ score of 73 (borderline) (id. at pp. 2-3). To assess the student's adaptive functioning, the psychologist administered the Vineland Adaptive Behavior Scales, Second Edition (Vineland-II) to the student's teacher, which revealed an adaptive behavior composite score of 79 (moderately low range) (id. at p. 3). The student's communication skills, socialization skills, and daily living skills were all judged to be in the moderately low range (id. at pp. 3-4). Based upon the test results, the student demonstrated extremely low to low average levels of intellectual functioning, moderately low levels of adaptive functioning, and the student's academic skills and classroom performance fell below grade level (id. at p. 4). The psychologist recommended that the student continue to receive services at his current BOCES Jr./Sr. High School placement (id.).

On June 25, 2009, a CSE subcommittee reconvened to complete the student's annual review and to specifically discuss the student's placement for the 2009-10 school year (Dist. Ex. 4 at p. 1; see Sept. 25, 2009 Tr. pp. 143-44). Similar to the March 27, 2009 CSE subcommittee meeting, the BOCES staff participating at the meeting presented information regarding the student's needs and progress, and continued to recommend that the student remain at the current BOCES Jr./Sr. High

School placement (Dist. Ex. 21 at p. 1; see Tr. p. 144). The CSE subcommittee reviewed, among other things, the most recent psychological evaluation report from June 2009 (Sept. 25, 2009 Tr. pp. 144-53; Dist. Exs. 4 at p. 4; 21 at p. 1). According to the meeting minutes, the district's school psychologist in attendance at the meeting "suggest[ed] that due to the latest IQ score of 73, the team should consider having [the] student return to [the district] to pursue a local diploma in a half day academic and half day vocational program" (Dist. Ex. 21 at pp. 1-2). At the impartial hearing, the district's school psychologist testified that the student's verbal comprehension score of 89 was "quite high for a student who attended" the BOCES Jr./Sr. High School placement (Sept. 25, 2009 Tr. pp. 153-58). In addition, the meeting minutes indicated that "[m]eds" had "stabilized [the student]" and that he had the "potential to pursue a local diploma" (Dist. Ex. 4 at p. 1). The parent disagreed with returning the student to a district placement, noting that "he had already been brought back to [the district] once before, only to return back to . . . BOCES," and that placing the student "in this program would only set him up for failure" (Dist. Ex. 21 at p. 2). The CSE subcommittee chairperson noted that the student could have a 1:1 aide for support in the district placement and that the district was "responsible" for considering "the LRE" (id.). For the 2009-10 school year, the CSE subcommittee recommended placing the student in a district 8:1+1 special class with a 1:1 aide and related services of speech-language therapy and counseling (Dist. Ex. 4 at pp. 1-2, 9). In addition, the student would also attend a vocational program four days per week and "possibly" pursue an IEP diploma (Sept. 25, 2009 Tr. pp. 132-36).

By due process complaint notice dated July 12, 2009, the parent requested an impartial hearing because she did not agree with the CSE subcommittee's recommended district placement for the 2009-10 school year (Parent Ex. B). The parties proceeded to an impartial hearing on September 25, 2009, and concluded on November 9, 2009, after seven days of testimony (Sept. 25, 2009 Tr. p. 1; Nov. 9, 2009 Tr. pp. 1, 223).

In her decision dated December 22, 2009, the impartial hearing officer concluded that the district failed to offer the student a free appropriate public education (FAPE) for the 2009-10 school year, and further, that the BOCES Jr./Sr. High School placement was also not appropriate to meet the student's needs (IHO Decision at pp. 11-18). To support her finding that the BOCES Jr./Sr. High School placement was not appropriate, the impartial hearing officer agreed with the district's contention that the student's most recent psychological evaluation suggested that he "may be capable of higher level work" and that his "intellectual ability [was] not accurately reflected by the full scale IQ score" (id. at p. 14). She also noted that the while attending the BOCES Jr./Sr. High School placement, the student's computation skills "fell back," indicating that the student "may, in fact, need greater stimulation to make advances in mathematics, or perhaps different strategies need[ed] to be employed to compensate more effectively for his language difficulties when teaching mathematics" (id.). In addition, the impartial hearing officer opined that the student's passage comprehension skills, which she described as a relative strength, needed to be "addressed as well as [the student's] weaknesses," and that the evidence suggested that the student may not be appropriately grouped at the BOCES Jr./Sr. High School for reading instruction (id. at pp. 14-15). She noted that the CSE, upon reconvening, should consider whether a "quiet environment for reading or individualized instruction" or other instructional strategies would allow the student to "read at a level [at which] he [was] capable of" reading (id. at p. 15). Moreover, the impartial hearing officer noted that the student's current classroom teacher at the BOCES Jr./Sr. High School was not familiar with how the student's "speech-language difficulties impact[ed] his learning," and thus, she questioned whether the instructional strategies used in the classroom adequately addressed the student's language

difficulties (id.). The impartial hearing officer added that the "CSE or the speech and language provider must inform the classroom teacher of the nature of the student's language difficulties and develop strategies for the classroom teacher to use to assist the student in comprehension" (id. at pp. 15-16).

With respect to her decision about the appropriateness of the BOCES Jr./Sr. High School placement, the impartial hearing officer also questioned the amount of instruction the student received in daily living skills, as the results of the Vineland-II indicated that he independently functioned in the kitchen and performed a variety of responsibilities in the home, such as "cleaning his room, cleaning his bathroom, sweeping the floors and feeding and walking the dog" (IHO Decision at p. 16). She also noted that the student demonstrated "an understanding of rules, rights, and safety issues at home and in the community," and suggested that the CSE consider the training the student required in daily living skills (id.). The impartial hearing officer also questioned whether the BOCES Jr./Sr. High School placement adequately addressed the student's emotional needs, noting that his current classroom teacher testified "that the student [was] being held back in academics due to his behavior, and that if his behavior improved he would be moved" to a less restrictive classroom (12:1+1) within the BOCES program, which focused on "more academic goals" (id.). Thus, the impartial hearing officer opined that further evaluative information would be "helpful in determining" the student's current difficulties and how to best address his difficulties, that a psychiatric evaluation "may help pinpoint any other emotional difficulties . . . impeding this student's progress," and that classroom observations and a teacher report would assist in the FBA and development of a BIP to address the student's problematic behaviors (id. at pp. 16-17).

The impartial hearing officer noted that although the parent sought an order directing the student's placement at the BOCES Jr./Sr. High School due to the "district's failures," she did not agree with that request (IHO Decision at p. 17). The impartial hearing officer opined that with the guidance set forth in the decision the district would be able to find "an appropriate placement" for the student" (id.). Thus, the impartial hearing officer directed that the CSE should "continue to evaluate this student and make its recommendations," noting that "[i]f the recommended program" could be provided in a district school then there was "no reason that the student should not attend it" (id. at pp. 17-18). Finally, the impartial hearing officer directed that "[u]ntil such a program [was] recommended and a placement offered, however, the student will remain at his current placement in [the BOCES Jr./Sr. High School]" (id. at p. 18).

Next, the impartial hearing officer ordered the district to conduct a psychiatric evaluation, a speech-language evaluation (including an auditory processing assessment), and a neuropsychological evaluation of the student (IHO Decision at p. 18). In addition, the impartial hearing officer ordered the district to conduct one or more classroom observations of the student while he participated in the each of the following settings: reading instruction; mathematics instruction (to include observations of the student's problem-solving skills, computation skills, money skills, and ability to tell time); discussions of literature, social studies, and science; transitions between classes in the hallways; and in less structured settings, such as lunch and recess (id.). The impartial hearing officer also ordered the district to conduct a comprehensive FBA to "address all areas of behavior which may impede the learning of the student or others, including expected manifestations of frustration or shame, if any," and further, that the FBA must "consider expected behaviors both in the current BOCES placement as well as in a setting in which there are general education students such as [in the district]" (id.). The impartial hearing officer ordered the district

to obtain a classroom teacher report that discussed "with detail and specificity" the student's "academic functioning and ability, his strengths and weaknesses, his needs" as observed by the teacher, the student's "ability to understand multiple step directions and directions to put things in sequence," and the student's "academic abilities" in a "quiet environment as opposed to in a classroom" (id.). She noted that the teacher report should also "include suggestions for addressing the totality of the student's needs" (id. at pp. 18-19). The impartial hearing officer ordered the district to complete all of the above evaluations, classroom observations, FBA, and teacher report within 30 days from the date of the decision (id.).

The impartial hearing officer further ordered that the district develop a BIP within 45 days from the date of the decision, which "shall provide for behavioral interventions both in the current setting" and in a setting with the student's non-disabled peers, such as in the district (IHO Decision at p. 19). Finally, the impartial hearing officer ordered the district to convene a CSE meeting within 60 days from the date of the decision to review the newly acquired evaluative data and to make "an appropriate recommendation" (id.). The impartial hearing officer specifically directed that the CSE shall "include all parties with significant knowledge of the student's needs, functioning, and anticipated performance;" keep "detailed minutes of the meeting;" and provide the opportunity for the student's participation and allow the student to "express his interests, preferences, concerns, and desires" (id.). In addition, the impartial hearing officer ordered the CSE to

make an appropriate recommendation which [met] the student's needs, specifying the size and staffing ratios of the class or classes that the student will attend; what portion of the day the student will attend the class, or each such class; the portion of the day the student will attend vocational training, if any; the portion of the day the student will attend a class with a different instructional ratio, and any other relevant matters

(id.).

On appeal, the parent contends that the impartial hearing officer erred in her determination that the district should develop a district program for the student with a Regents-level curriculum, as such finding was against the weight of the evidence. In addition, the parent asserts that the impartial hearing officer erred in finding that the BOCES Jr./Sr. High School placement was not appropriate, and that she further erred in remanding the matter to the CSE to develop an appropriate program for the student due to the district's previous failures. As relief, the parent seeks to annul each and every factual finding of the impartial hearing officer adverse to the parent; to annul each and every legal conclusion of the impartial hearing officer adverse to the parent; a finding that the student is entitled to the 2009-10 IEP as drafted by BOCES, which identifies the student's placement in an 8:1+1 special class at the BOCES Jr./Sr. High School with related services, a 12-month program, accommodations, and annual goals and short-term objectives; and for other further relief deemed just and appropriate.

In its answer, the district asserts that the impartial hearing officer appropriately concluded that the BOCES Jr./Sr. High School was not an appropriate placement and seeks to dismiss the petition in its entirety. In her reply to the district's answer, the parent asserts that due to the district's failure to include specific admissions or denials to each of the numbered paragraphs in the petition

beyond paragraph four, all subsequent allegations in the petition should be deemed as true with a decision rendered upon those facts.

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 Forest Grove v. T.A., 129 S. Ct. 2484, 2491 [2009]; 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][iii]; 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]).

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]; Tarlowe v. Dep't of Educ., 2008 WL 2736027, at \*6 [S.D.N.Y. July 3, 2008]), 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).

Initially, I note that an impartial hearing officer's decision is final and binding upon the parties unless appealed to a State Review Officer (34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[j][5][v]). In this case, the district did not interpose a cross-appeal challenging the impartial hearing officer's determination that the district failed to offer the student a FAPE for the 2009-10 school year (IHO Decision at pp. 11-14). Similarly, neither party appealed those portions of the impartial hearing officer's decision ordering the district to conduct a psychiatric evaluation; a speech-language evaluation (including an auditory processing assessment); a neuropsychological evaluation; and one or more classroom observations of the student during his reading instruction,

during his mathematics instruction (to include observations of the student's problem-solving skills, computation skills, money skills, and ability to tell time), during discussions of literature, social studies, and science, during transitions between classes in the hallways, and in less structured settings, such as lunch and recess (id. at p. 18).<sup>5</sup> In addition, neither party appealed those portions of the impartial hearing officer's decision ordering the district to conduct a comprehensive FBA, to obtain a detailed teacher report, or to develop a BIP as set forth in the decision (id. at pp. 18-19). Finally, neither party appealed that portion of the impartial hearing officer's decision directing that the student remain in his current placement at the BOCES Jr./Sr. High School until the district "recommended" and "offered" an "appropriate placement" for the student (id. at pp. 17-19). Consequently, the impartial hearing officer's determinations on the abovementioned issues are final and binding upon the parties (see Application of the Dep't of Educ., Appeal No. 09-046; Application of the Dep't of Educ., Appeal No. 09-033; Application of the Dep't of Educ., Appeal No. 09-027; Application of a Student with a Disability, Appeal No. 08-046; Application of the Dep't of Educ., Appeal No. 08-025; Application of a Student with a Disability, Appeal No. 08-021; Application of the Bd. of Educ., Appeal No. 07-135; Application of a Child with a Disability, Appeal No. 07-050; Application of a Child with a Disability, Appeal No. 07-026; Application of a Child Suspected of Having a Disability, Appeal No. 06-092; Application of a Child with a Disability, Appeal No. 06-085; Application of a Child with a Disability, Appeal No. 04-024; Application of a Child with a Disability, Appeal No. 03-108; Application of a Child with a Disability, Appeal No. 02-100).

Turning to the merits of the appeal, I find that the parent's claims must be dismissed as either lacking merit or based upon the doctrine of mootness. First, the parent claims that the impartial hearing officer erred in her determination that the district should develop a district program for the student with a Regents-level curriculum, as such finding was against the weight of the evidence. However, upon an independent review of the impartial hearing officer's decision, I find that the parent has mischaracterized this portion of the impartial hearing officer's decision. Contrary to the parent's claim, the impartial hearing officer directed the district to reevaluate the student and for the CSE to reconvene to develop an appropriate program for the student, further noting that "if" the appropriate program could be provided in a district placement, then there was no reason for the student to be precluded from potentially attending a district placement (IHO Decision at pp. 17-19)

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<sup>5</sup> I remind the parties that federal and State regulations provide that, subject to certain limitations, a parent has the right to an independent educational evaluation (IEE) at public expense if the parent disagrees with an evaluation obtained by the school district (34 C.F.R. § 300.502[a], [b]; 8 NYCRR 200.5[g][1]; see R.L. v. Plainville Bd. of Educ., 363 F. Supp. 2d. 222, 234-35 [D. Conn. 2005] [finding parental failure to disagree with an evaluation obtained by a public agency defeated parent's claim for an IEE at public expense]). A parent, however, is only entitled to one IEE at public expense "each time the public agency conducts an evaluation with which the parent disagrees" (34 CFR 300.502[b][5]; 8 NYCRR 200.5[g][1]; see R.L., 363 F. Supp. 2d at 234-35). If a parent requests an IEE at public expense, the school district must, without unnecessary delay, ensure that either an IEE is provided at public expense or initiate an impartial hearing to show that its evaluation is appropriate or that the evaluation obtained by the parent does not meet the school district criteria (34 C.F.R. § 300.502[b][2][i]-[ii]; 8 NYCRR 200.5[g][1][iv]; see, e.g., R.L., 363 F. Supp. 2d. at 234-35; A.S. v. Norwalk Bd. of Educ., 183 F. Supp. 2d 534, 549 [D. Conn. 2002] [upholding order of reimbursement where the district failed to demonstrate that its evaluation was appropriate]; Application of the Bd. of Educ., Appeal No. 09-109; Application of a Student with a Disability, Appeal No. 08-101). If a school district's evaluation is appropriate, a parent may not obtain an IEE at public expense (34 C.F.R. § 300.502[b][3]; 8 NYCRR 200.5[g][1][v]; DeMerchant v. Springfield Sch. Dist., 2007 WL 2572357, at \*6 [D. Vt. Sept. 4, 2007]; Application of a Student with a Disability, Appeal No. 09-121; Application of a Student with a Disability, Appeal No. 08-039; Application of a Child with a Disability, Appeal No. 07-126; Application of a Child with a Disability, Appeal No. 06-067; Application of the Bd. of Educ., Appeal No. 05-009; Application of a Child with a Disability, Appeal No. 04-082; Application of a Child with a Disability, Appeal No. 04-027).

(emphasis added). In addition, the impartial hearing officer's decision cannot be interpreted to have ordered the district to develop a specific district program with a Regents-level curriculum—as asserted in the parent's petition—or to return the student to a district placement, but rather, that the impartial hearing officer's decision left the specific placement option open for further consideration by the CSE after the CSE evaluates the student and reviews the new evaluations (*id.*). Thus, the parent's claim that the impartial hearing officer erred in her determination that the district should develop a district program for the student with a Regents-level curriculum must be dismissed as the claim is not supported by an objective reading of the impartial hearing officer's decision.

With respect to the parent's claim that the impartial hearing officer erred in finding that the BOCES Jr./Sr. High School program was not appropriate, I am constrained to find that this claim must be dismissed as moot based upon the facts and circumstances of this case. It is well settled that a dispute between the parties in an appeal must at all stages be "real and live," and not "academic," or it risks becoming moot (see Lillbask v. State of Conn. Dep't of Educ., 397 F.3d 77, 84 [2d Cir. 2005]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]; J.N. v. Depew Union Free Sch. Dist., 2008 WL 4501940, at \*3-\*4 [W.D.N.Y. Sept. 30, 2008]; see also Chenier v. Richard W., 82 N.Y.2d 830, 832 [1993]; Hearst Corp. v. Clyne, 50 N.Y.2d 707, 714 [1980]; Application of a Child with a Disability, Appeal No. 07-139). In general, cases dealing with issues such as desired changes in IEPs, specific placements, and implementation disputes may become moot at the end of the school year because no meaningful relief can be granted (see, e.g., Educ. Law § 2[15]; Application of the Bd. of Educ., Appeal No. 06-044; Application of the Bd. of Educ., Appeal No. 05-058; Application of a Child with a Disability, Appeal No. 04-027; Application of a Child with a Disability, Appeal No. 00-037; Application of the Bd. of Educ., Appeal No. 00-016; Application of a Child with a Disability, Appeal No. 96-37). In addition, a case becomes moot when the parties lack a legally cognizable interest in the outcome (Murphy v. Hunt, 455 U.S. 478, 481 [1982]). In determining whether a controversy has become moot, the relevant inquiry is whether the facts alleged, under all the circumstances, show that there is a substantial controversy of sufficient immediacy and reality to warrant relief (Christopher P. v. Marcus, 915 F.2d 794, 802 [2d Cir. 1990]). Administrative decisions rendered in cases that concern such issues that arise out of school years since expired may no longer appropriately address the current needs of the student (see Daniel R.R. v. El Paso Indep. Sch. Dist., 874 F.2d 1036, 1040 [5th Cir. 1989]; Application of a Child with a Disability, Appeal No. 07-139; Application of the Bd. of Educ., Appeal No. 07-028; Application of a Child with a Disability, Appeal No. 06-070; Application of a Child with a Disability, Appeal No. 04-007). Thus, consistent with the mootness doctrine, State Review Officers have determined that there is no need to decide issues on appeal that are no longer in controversy, or to make a determination that would have no actual effect on the parties (Application of a Child with a Disability, Appeal No. 07-066; Application of a Child with a Disability, Appeal No. 05-018; Application of a Child with a Disability, Appeal No. 02-110; Application of a Child with a Disability, Appeal No. 98-73; Application of a Child Suspected of Having a Disability, Appeal No. 95-60). However, a claim may not be moot despite the end of a school year for which the student's IEP was written, if the conduct complained of is "capable of repetition, yet evading review" (see Honig v. Doe, 484 U.S. 305, 318-23 [1988]; Lillbask, 397 F.3d at 84-85; Daniel R.R., 874 F.2d at 1040; Application of a Child with a Disability, Appeal No. 04-038). The exception, which applies only in limited situations and is severely circumscribed, does not apply in this matter (City of Los Angeles v. Lyons, 461 U.S. 95, 109 [1983]; Knaust v. City of Kingston, 157 F.3d 86, 88 [2d Cir. 1998]).

Consistent with the mootness doctrine and in light of facts and circumstances of this case, there is no need to render an administrative decision regarding the appropriateness of the BOCES Jr./Sr. High School placement for the student for the 2009-10 school year because it would have no actual effect on the parties, and alternatively, no meaningful relief can be granted. Here, the parent requests a determination of this issue because she ultimately seeks to keep the student at the BOCES Jr./Sr. High School with the IEP drafted by BOCES for the 2009-10 school year. As previously noted, however, the impartial hearing officer's decision specifically directed that the student remain in his current placement—the BOCES Jr./Sr. High School—until the CSE developed, recommended, and offered an "appropriate placement" for the student, and this portion of the impartial hearing officer's decision has not been appealed by either party (IHO Decision at pp. 17-19). Thus, since the parent has effectively obtained her requested relief by virtue of pendency and through the impartial hearing officer's decision, an administrative decision finding that the BOCES Jr./Sr. High School placement was appropriate and directing services to be provided in accordance with the BOCES 2009-10 IEP would have no actual effect on the parties because the student is already in that placement and receiving those services, which renders the parent's claim moot.

Alternatively, as previously noted, neither party has appealed those portions of the impartial hearing officer's decision ordering the district to evaluate and observe the student, conduct an FBA and develop a BIP, and obtain a detailed teacher report of the student's academic functioning in an effort to fully determine the student's needs (IHO Decision at pp. 18-19). Thus, assuming arguendo that the BOCES Jr./Sr. High School placement was appropriate for the student for the 2009-10 school year, an administrative decision on this issue at this time would not provide any meaningful relief because the BOCES Jr./Sr. High School may no longer appropriately address the student's current special education needs based upon the newly acquired evaluative information ordered by the impartial hearing officer (see Daniel R.R. v. El Paso Indep. Sch. Dist., 874 F.2d 1036, 1040 [5th Cir. 1989]; Application of a Child with a Disability, Appeal No. 07-139; Application of the Bd. of Educ., Appeal No. 07-028; Application of a Child with a Disability, Appeal No. 06-070; Application of a Child with a Disability, Appeal No. 04-007). Under this analysis, the parent's claim must also be dismissed as moot.

Notwithstanding the above, however, and in light of the fact that the CSE must convene shortly to conduct the student's annual review for the 2010-11 school year and develop an IEP for the 2010-11 school year, I will modify the impartial hearing officer's decision for purposes of efficiency and clarity and order the CSE to review and use the newly acquired evaluative information—as ordered by the impartial hearing officer in her decision dated December 22, 2009—to conduct the student's annual review for the 2010-11 school year, to develop an appropriate IEP for the student for the 2010-11 school year, and to determine an appropriate placement for the student for the 2010-11 school year. In addition, I will also modify the impartial hearing officer's decision and I will order that, unless the parties otherwise agree, the student remain at his current BOCES Jr./Sr. High School placement through at least the conclusion of the 2009-10 school year and until such time that the CSE develops, recommends, and offers an appropriate placement for the student for the 2010-11 school year.

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

**THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.**

**IT IS ORDERED** that the impartial hearing officer's decision, dated December 22, 2009, is modified to the extent that the CSE is directed to review and use the newly acquired evaluative information, as ordered by the impartial hearing officer's decision, to conduct the student's annual review for the 2010-11 school year, to develop an appropriate IEP for the student's 2010-11 school year, and to develop, recommend, and offer the student an appropriate placement for the 2010-11 school year; and

**IT IS FURTHER ORDERED** that the impartial hearing officer's decision, dated December 22, 2009, is further modified to direct that, unless the parties otherwise agree, the student shall remain at his current BOCES Jr./Sr. High School placement at least through the conclusion of the 2009-10 school year and until such time that the CSE develops, recommends, and offers an appropriate placement for the student for the 2010-11 school year.

**Dated:**            **Albany, New York**  
                      **March 15, 2010**

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**PAUL F. KELLY**  
**STATE REVIEW OFFICER**