The University of the State of New York

The State Education Department
State Review Officer
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No. 11-117

Application of a STUDENT WITH A DISABILITY, by his parent, for review of a determination of a hearing officer relating to the provision of educational services by the New York City Department of Education

Appearances:
Law Office of Erika L. Hartley, attorney for petitioner, Erika L. Hartley, Esq., of counsel

Michael Best, Special Assistant Corporation Counsel, attorneys for respondent, Tracy Siligmueller, Esq. of counsel

DECISION

Petitioner (the parent) appeals from the decision of an impartial hearing officer which determined that respondent's (the district's) failure to provide paraprofessional services to the student and to conduct a manifestation determination review (MDR) during the 2010-11 school year resulted in a failure to offer the student a free appropriate public education (FAPE) for the 2010-11 school year. The district cross-appeals from that portion of the impartial hearing officer's decision which determined that as of December 2010, the district violated the procedural safeguards for students presumed to have a disability for discipline purposes. The appeal must be dismissed. The cross-appeal must be dismissed.

Background

In this case, the student began attending kindergarten in September 2010 as a regular education student in an integrated co-teaching classroom within the district (see Tr. pp. 145-48).[1] Shortly thereafter, the student began to engage in challenging and disruptive behaviors, including hitting, pushing, and pinching peers; using profanity; calling out in class; refusing to do work;

[1] State regulation defines integrated co-teaching services as the "provision of specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students" (8 NYCRR 200.6[g]).

throwing classroom materials; and flooding the bathroom (Parent Ex. 7 at pp. 13-14).[2] On September 29, 2010, the student's step-father met with district staff to discuss the student's behaviors, and at that time, the district initiated classroom interventions to address the behaviors, as well as the documentation of those behaviors (id. at p. 10). It was noted that if the student's behaviors continued, "a change in setting might be a possibility" (id.).[3] The student's behaviors persisted, and as a result of an occurrence on October 15, 2010, he was removed from his classroom and placed in a "Save Room" at the district until October 19, 2010 (id. at p. 11; see Parent Ex. 2 at p. 1; see also Tr. pp. 107-10, 112-14 [describing a "Save Room" as an "alternative suspension room"]).[4] In a letter to the parent dated October 19, 2010, the district indicated that the student would be moved to another kindergarten classroom within the same school beginning on October 20, 2010, in an attempt to "better meet the [student's] needs" (Parent Ex. 3 at p. 1; see Parent Ex. 2 at p. 1). On October 20, 2010, the student was involved in another occurrence and he received a suspension (Parent Exs. 5 at p. 1; 10 at pp. 1-2; see Parent Ex. 2 at p. 1).

By letter dated October 15, 2010, the parent wrote to "inform" the district "of a few disappointing inciden[t]s" involving the student at school during October 2010 (Parent Ex. 2 at p. 1).[5] The parent indicated that the student had been "struggling to adjust to the death of [his] father," and she expressed confusion regarding "why the school [was] not trying to work with [her] to improve the mental state of a grie[f] stricken child" (id.).[6] At that time, the parent requested the involvement of an "arbitrator" so that she and the school could "come to common ground" (id.). In addition, the parent noted that although she liked the school, she was concerned that the "situation" was "getting out of control," and she did not want the student "left behind or to feel as though he was disregarded" (id.).[7]

In early November 2010, the district moved the student to a third kindergarten classroom within the same school (see Parent Ex. 7 at pp. 1-2; compare Parent Ex. 3 at p. 1, with Parent Exs.

[2] The hearing record contains duplicative exhibits. I remind the impartial hearing officer that it is his responsibility to exclude evidence that he determines to be irrelevant, immaterial, unreliable, or unduly repetitious, and further, that a prehearing conference is an effective tool available to the impartial hearing officer to exercise his authority to direct parties to coordinate their efforts to offer joint exhibits or to otherwise avoid duplicative submissions (see 8 NYCRR 200.5[j][3][xi], [3][xii][c]).

[3] At the impartial hearing, the parent testified that during September 2010, she received "two to three" "complaints" a day from the district about the student's behavior (Tr. pp. 148, 151). The parent also testified that in response to the complaints, she visited the principal on "several occasions" and asked about counseling for the student; the parent was told that the principal would speak to the guidance counselor (Tr. pp. 148-49).

[4] The parent testified at the impartial hearing that from the end of September 2010 through April 2011, she received "five to seven" telephone calls per day from the district about the student's behavior (Tr. pp. 151-55).

[5] Although dated October 15, 2010, the parent's letter describes events that occurred up through October 21, 2010 (see Parent Ex. 2 at p. 1).

[6] According to the letter, the parent became a widow in March 2006 (Parent Ex. 2 at p. 1; see Dist. Ex. G at p. 3).

[7] The parent indicated in the letter that the suspension imposed on the student began on October 21, 2010, and the student had been directed to attend a different school for one week (Parent Ex. 2 at p. 1; but see Parent Ex. 10 at p. 1 [indicating that the student's suspension started on October 22, 2010]).

4 at pp. 1-5, and 5 at p. 6).[8] The student continued to engage in challenging and disruptive behaviors (see Parent Exs. 4 at pp. 1-2; 5 at pp. 4-7; 7 at pp. 1-6, 8-9, 15-22).[9] By letter dated December 6, 2010, the district notified the parent that upon "careful review of [the student's] social and academic behaviors," the student had been placed on a "truncated day," effective December 8, 2010, and that he would attend school from 8:00 a.m. through 11:30 a.m. (Parent Ex. 3 at p. 2). Despite attending a shortened school day, the student continued to engage in challenging and disruptive behaviors (Parent Exs. 4 at p. 5; 5 at pp. 8-11).

By letter dated January 7, 2011, the parent requested an evaluation of the student pursuant to the "school['s] various complaints" (Dist. Ex. C).[10, 11] By letter to the parent dated February 11, 2011, the district requested a meeting with the parent to discuss the student's "out of the classroom behavior," explaining that he left the classroom approximately three times per day and that this behavior prevented him from "gaining valuable academic instruction" (Parent Ex. 3 at p. 3 [emphasis in original]).

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[8] According to a letter dated June 23, 2011, the student began receiving weekly individual therapy through an outpatient mental health clinic on November 4, 2010 to address "poor impulse control" and "poor anger management and oppositional behavior" (Parent Ex. 12).

[9] Although neither well documented nor explained in the hearing record, it appears that the student was involved in another occurrence on November 26, 2010, which resulted in his removal from the classroom for three days (see Parent Exs. 5 at pp. 6-7 [reporting an occurrence in the "SAVE" room involving the student on December 1, 2010]; 10 at p. 4 [indicating that the student's removal had been "approved" on November 29, 2010]).

[10] At the impartial hearing, the parent testified that she first communicated "verbally" with the district seeking to "open a CSE case" for the student "[o]n or about December of 2010" (Tr. pp. 150-51). The parent's January 7, 2011 letter—addressed to the School Based Support Team (SBST)—did not reference the parent's verbal request in December 2010, and the hearing record does not otherwise identify the individual to whom the parent made this verbal request (see Dist. Ex. C; see also Tr. pp. 1-208; Dist. Exs. B-M; P-T; V-X; Parent Exs. 1-14; IHO Ex. I). For students presumed to have a disability for purposes of discipline, State regulations indicate that a district

> shall be deemed to have knowledge that such student had a disability if prior to the time the behavior occurred: (1) the parent of such student has expressed concern in writing to supervisory or administrative personnel of the appropriate educational agency . . . that the student is in need of special education . . . ; or (2) the parent of the student has requested an evaluation of the student pursuant to section 200.4 . . . of this Title; or (3) a teacher of the student, . . . , has expressed specific concerns about a pattern of behavior demonstrated by the student, directly to the director of special education . . .

(8 NYCRR 201.5[b][1]-[3]).

[11] According to the hearing record, the student's challenging and disruptive behaviors continued to occur in January and February 2011 (see Parent Exs. 4 at p. 3 [documenting an occurrence involving the student on January 21, 2011]; 5 at pp. 12-16, 20 [documenting occurrences involving the student on January 20 and 21, and February 1, 2011]). A review of the hearing record indicates that the student was not subject to a suspension or removal from the classroom at the time that the parent requested an initial evaluation of the student in writing on January 7, 2011 (see Tr. pp. 1-208; Dist. Exs. B-M; P-T; V-X; Parent Exs. 1-14; IHO Ex. I). In addition, a review of the hearing record indicates that after his removal from the classroom in November 2010, the student did not receive another suspension or removal from the classroom until the occurrence in March 2011 (see Tr. pp. 1-208; Dist. Exs. B-M; P-T; V-X; Parent Exs. 1-14; IHO Ex. I; compare Parent Ex. 10 at p. 4, with Parent Ex. 10 at pp. 5-10).

On March 3, 2011, the district interviewed the parent to complete a social history;[12] on March 16 and 18, 2011, the district conducted a psychoeducational evaluation of the student; on March 18, 2011, the district conducted a functional behavioral assessment (FBA) of the student; and on March 18 and 23, 2011, the district observed the student in his classroom (Dist. Exs. E-G; R). On March 23, 2011, the student was involved in another occurrence, which resulted in the student receiving a suspension (see Dist. Ex. V at pp. 1-2; Parent Exs. 5 at p. 22; 10 at pp. 5, 9-10 [indicating that the student's suspension started on March 24, 2011]; see also Parent Exs. 5 at p. 21; 10 at pp. 6-8 [documenting two additional occurrences involving the student on March 10 and 17, 2011]).

On March 25, 2011, the Committee on Special Education (CSE) convened to conduct the student's initial review, and developed an individualized education program (IEP) and a behavioral intervention plan (BIP) (Dist. Exs. D at pp. 1-11; T at pp. 1-2). The CSE found the student eligible to receive special education programs and related services as a student with an emotional disturbance, and recommended placing him in a 12:1+1 special class in a community school with related services of counseling (Dist. Ex. D at pp. 1, 5-6; Dist. Ex. S at pp. 1-2).[13]

On April 11, 2011, the student was transferred to the recommended 12:1+1 special class, which was located at a different school within the district (see Parent Ex. 13 at pp. 1-2; see also Tr. pp. 67-68, 137, 188-94; Dist. Ex. J; Parent Ex. 6 at pp. 1-3). After the student transferred to the 12:1+1 special class, the parent provided the district with a "Request for Medical Accommodations" form, dated April 13, 2011, indicating that the student had received a diagnosis of an attention deficit hyperactivity disorder (ADHD) and that he required a paraprofessional in school and daily bus transportation (Parent Ex. 8).[14]

By letter dated May 4, 2011, the district invited the parent to attend a CSE meeting on May 25, 2011 (Dist. Ex. K at p. 1; see Tr. pp. 136-40). On May 17, 2011, the student was involved in another occurrence, which resulted in the student receiving a suspension (see Dist. Ex. X at pp. 1-2; Parent Exs. 5 at pp. 24-25; 7 at pp. 23-24; 10 at pp. 11-12; see also Dist. Ex. W; Parent Exs. 5 at p. 23; 7 at p. 24 [documenting a May 4, 2011 occurrence involving the student]). On May 25, 2011, the CSE reconvened, and added the services of a full-time 1:1 crisis management paraprofessional to the student's IEP (compare Dist. Ex. D at pp. 1, 6, 8-10, with Dist. Ex. L at pp. 1, 7, 9-11). According to the May 2011 IEP, the paraprofessional services were projected to begin

[12] In the social history, the parent reported that the student had been "suspended from all three Kindergarten classes at his school" and that he had been "rotated back to the first Kindergarten class he attended in the beginning of the school year" (Dist. Ex. G at p. 2).

[13] According to the IEP, the student's program was projected to be implemented on June 5, 2011 (Dist. Ex. D at p. 1).

[14] None of the documents—including the student's IEP—prepared by the district in March 2011 included the information that the student was diagnosed as having an ADHD (see Dist. Exs. D-G; R-T; but see Parent Ex. 12 [indicating that the student had been diagnosed as having an ADHD in November 2010]). In addition, the revised May 2011 IEP did not include information about the student's diagnosis (see Dist. Ex. L at pp. 1-12). The hearing record does not indicate if the parent advised the district of the student's diagnosis prior to providing the medical accommodations form, dated April 13, 2011 (see Tr. pp. 1-208; Dist. Exs. B-M; P-T; V-X; Parent Exs. 1-14; IHO Ex. I).

in September 2011 (Dist. Ex. L at p. 7).[15] Finally, on June 3, 2011, the student was involved in another occurrence, which resulted in the student receiving a suspension (see Parent Exs. 5 at pp. 26-27; 7 at pp. 23, 26-30; 10 at pp. 13-23).[16]

Due Process Complaint Notice

In a due process complaint notice dated June 13, 2011, the parent requested an expedited impartial hearing indicating that "to date," the student had received "numerous" suspensions without an FBA and an MDR (IHO Ex. I at p. 1). The parent further asserted that the student's current public school "[c]reated a [h]ostile and [u]nsafe [e]nvironment" for the student, and thus, denied the student a FAPE (id.). As relief, the parent requested the following: to refer the student to the Central Based Support Team (CBST) for placement in a nonpublic school at district expense; to change the student's classification from emotional disturbance to other health-impairment; the provision of home instruction with a certified special education teacher; the issuance of a Nickerson letter;[17] the provision of private tutoring through a "P3 [l]etter at the enhanced rate;" compensatory tutoring for the loss of educational benefits based upon the "[i]llegal [s]uspension(s)" of the student; the development of a "[p]ositive" BIP by a "Private Neutral Behavioral Specialist" for school and for home; and to expunge the suspensions from the student's records (id. at pp. 1-2).

Impartial Hearing Officer Decision

The parties proceeded to an impartial hearing held on July 8 and 11, 2011 (Tr. pp. 1, 38). In a decision dated July 28, 2011, the impartial hearing officer concluded that the district failed to offer the student a FAPE for the 2010-11 school year (IHO Decision at pp. 5-6). The impartial hearing officer determined that although the parent "sought CSE intervention in December, 2010," the district failed to sustain its burden to establish that the student's behavioral challenges improved after the development of the student's March 2011 IEP and transfer to a new school and further, that the district failed to provide the student with paraprofessional services after the CSE

[15] In an undated letter to the SBST, the parent requested that the district "reopen[]" the student's case to change his classification from emotional disturbance to other health-impairment; to refer his case to the Central Based Support Team (CBST) for placement in a nonpublic school; and to provide home instruction, a form for home instruction, and information about the procedures to allow the student to receive home instruction (see Parent Ex. 2 at p. 2; see also Tr. p. 172 [indicating that the parent made this request "[o]n or about May or June" 2011]). In addition, the parent requested a behavioral assessment by an "outside assessor at district expense;" a neuropsychological evaluation of the student at district expense; a central auditory processing evaluation, and "visual perceptual and visual skill;" and an assistive technology evaluation (Parent Ex. 2 at p. 2).

[16] Although it appears from the evidence that the district anticipated conducting an MDR related to the June 3, 2011 occurrence, the district cancelled the MDR (see Dist. Ex. P at pp. 1-7; Parent Ex. 10 at p. 18).

[17] A "Nickerson letter," which is only available to parents and students within the school district in the instant appeal, authorizes a parent to immediately place the student in an appropriate special education program in any State-approved nonpublic school at no cost to the parent (see Jose P. v. Ambach, 553 IDELR 298, No. 79 Civ. 270 [E.D.N.Y. Jan. 5, 1982]). The remedy provided by the Jose P. decision is intended to address those situations in which a student has not been evaluated within 30 days or placed within 60 days of referral to the CSE (id.; M.S. v. New York City Dept. of Educ., 2010 WL 3377667, at *8 [E.D.N.Y. Aug. 25, 2010]; see Application of the Bd. of Educ., Appeal No. 03-110; Application of a Child with a Disability, Appeal No. 02-075; Application of a Child with a Disability, Appeal No. 00-092).

reconvened in May 2011 (id. at p. 5). Turning to the parent's contention that the district failed to conduct an MDR related to the student's suspensions during the 2010-11 school year, the impartial hearing officer determined that as of December 2010, the district should have been "deemed to have knowledge that the student had a disability for incidents occasioned thereafter" (id. at pp. 5-6 [citing 8 NYCRR 201.5[b][2]]). He indicated that because the student "engaged in a pattern of behavior that resulted in more than ten days of removal or suspension" and the district did not conduct an MDR, the "removals or suspensions were improper" (id. at p. 6). Based upon the foregoing, the impartial hearing officer concluded that the district failed to offer the student a FAPE for the 2010-11 school year (id.).

Next, the impartial hearing officer determined that the parent was not entitled to a Nickerson letter for the 2011-12 school year because the student had been evaluated and a placement existed for that school year (IHO Decision at p. 6). According to the impartial hearing officer, a Nickerson letter was intended to remedy a failure to evaluate a student within 30 days or provide a student with a placement within 60 days of a referral to the CSE, and thus, the facts of this case did not warrant such relief (id.). In addition, the impartial hearing officer denied the parent's request to refer the student to the CBST because the evidence did not "support a contention" that an appropriate placement did not exist within the "entire" district (id.).[18]

Regarding the 2011-12 school year, the impartial hearing officer agreed with the parent that the district's placement did not offer the student a FAPE because the same program had been "unsuccessful during the latter portion of the 2010-11 school year," and the evidence did not indicate that the additional services of a paraprofessional would transform it into an appropriate placement (IHO Decision at pp. 6-7). As such, the impartial hearing officer ordered the district to conduct a neuropsychiatric evaluation of the student "with corresponding recommendations for placement," and for the CSE to reconvene to "create a new placement and program" for the student (id. at p. 7). The impartial hearing officer denied, however, the parent's request to allow an "outside behavioral specialist" to create a BIP for the student for home and for school, noting that the evidence did not support an award of such relief at this time (id.). The impartial hearing officer indicated that any issues related to revisions of the student's existing BIP "can and should be addressed by the neuropsychiatrist" who conducted the evaluation of the student (id.).

Next, the impartial hearing officer denied the parent's request to change the student's classification from emotional disturbance to other health-impairment based upon the student's diagnosis of an ADHD (IHO Decision at p. 7). The impartial hearing officer concluded that the evidence supported the student's current classification and that the district sustained its burden to establish that it appropriately considered all the necessary factors required by the regulations before finding the student eligible for services as a student with an emotional disturbance (id.). The impartial hearing officer also denied the parent's request for home instruction for the student, noting the restrictiveness of the "placement option" and that the evidence did not, again, support a finding that an appropriate placement did not exist within the district (see id. at pp. 6-7).

[18] Although the impartial hearing officer's decision refers to the "School Based Support Team" (SBST), this appears to be a typographical error since students within this district are placed in an approved nonpublic school by the CBST.

Turning to the parent's request for private tutoring and compensatory educational services, the impartial hearing officer ordered the district to provide the student with 100 hours of individualized tutoring to compensate for its failure to provide the student with paraprofessional services for the final two months of the 2010-11 school year, its failure to conduct an MDR, and its failure to modify the student's March 2011 BIP when the BIP did not "resolve all issues" (IHO Decision at p. 8). And finally, the impartial hearing officer denied the parent's request to expunge the student's suspension records because he had no authority under the Individuals with Disabilities Education Act (IDEA) to provide such relief (id.).

Appeal for State-Level Review

The parent appeals from the impartial hearing officer's decision.[19] At first, the parent contends that the personal service of the petition for review upon the district on September 17, 2011, was timely and complied with all of the procedural timelines.[20] With respect to the grounds for her appeal, the parent asserts that the impartial hearing officer misapplied the MDR provisions and improperly concluded that the district should have implemented the provisions in May or June 2011. The parent also argues that the impartial hearing officer improperly denied her request for a Nickerson letter. The parent next alleges that the impartial hearing officer erred in finding that the district properly classified the student as having an emotional disturbance. Finally, the parent argues that the impartial hearing officer erred in denying her request for the development of a BIP by a "neutral behavioral specialist." As relief, the parent seeks an order directing the issuance of a Nickerson letter, the development of an FBA and a BIP by a "neutral behavioral specialist" at an enhanced rate at district expense, a change in the student's classification, and a referral of the student to the CBST for placement in a nonpublic school.

In its answer, the district responds to the parent's allegations in the petition with general admissions and denials, and affirmatively asserts that the district does not challenge the impartial hearing officer's determinations that it failed to offer the student a FAPE for the 2010-11 and 2011-

[19] Although the parent filed a "Notice of Petition," an "Attorney Affirmation in Support of Petition" (with additional documentary evidence attached), and a "Parent Affidavit in Support of Petition" (without notarization) to initiate the instant appeal, she did not file a document referred to as a "petition." State regulations governing the practice of the review of hearings for students with disabilities require that a "party seeking review shall file with the Office of State Review . . . the petition for review," which "shall clearly indicate the reasons for challenging the impartial hearing officer's decision, identifying the findings, conclusions and order to which the exceptions are taken, and shall indicate what relief should be granted" (8 NYCRR 279.4[a]). In this case, although the parent's "Attorney Affirmation in Support of Petition" is not consistent with the practice regulations governing the initiation of an appeal, it can be reasonably read to set forth the information required in a petition. I remind the parent's counsel—who drafted the "Attorney Affirmation in Support of Petition"—however, to comply with the practice regulations in the future. For convenience, the "Attorney Affirmation in Support of Petition" shall be referred to and cited to as the "petition" in this decision.

[20] In the petition, the parent also requested the inclusion of Parent Exhibit 3 in order to complete the hearing record in this case, and attached two exhibits as additional evidence to be considered on appeal (Pet. Exs. A-B). As the district did not object to the inclusion of Parent Exhibit 3 or to Exhibits A and B attached to the petition as additional evidence, the parent's request to incorporate these exhibits into the hearing record has been granted.

12 school years.[21] In addition, the district affirmatively asserts that it does not challenge the impartial hearing officer's award of 100 hours of individual tutoring as a remedy for the district's failure to offer the student a FAPE, the impartial hearing officer's order directing the district to conduct a neuropsychiatric evaluation of the student, or the impartial hearing officer's order directing the district to convene a CSE meeting to create a new placement and program for the student.[22] However, the district cross-appeals the impartial hearing officer's factual finding that the parent sought CSE intervention in December 2010, and therefore, the district was deemed to have knowledge that the student had a disability for purposes of discipline that occurred thereafter. As relief for the cross-appeal, the district seeks to vacate the impartial hearing officer's factual finding regarding the date that the district was presumed to have knowledge that the student had a disability for purposes of discipline and change it from December 2010 to January 7, 2011.

Turning to the parent's appeal, the district initially contends that the petition should be dismissed as untimely and further, that the petition fails to include good cause to excuse the failure to timely serve the petition. Next, the district objects to the consideration of the "Parent Affidavit in Support of the Petition" because it reiterates the parent's testimony or includes additional facts that were not the subject of the parent's testimony and not subject to cross-examination. The district also argues that due to the expiration of the 2010-11 school year, the parent's claims—such as the district's failure to properly follow the MDR procedures, the district's failure to timely evaluate the student, the district's failure to properly classify the student, and the district's failure to implement a "successful" FBA and BIP—are moot and any relief requested in the parent's petition would not remedy the district's failure to offer the student a FAPE for the 2010-11 school year.

Next, the district argues that contrary to the parent's allegations, the district conducted a timely initial evaluation of the student and timely offered a placement to the student and thus, the impartial hearing officer properly denied the parent's request for the issuance of a Nickerson letter. The district also contends that the parent is not entitled to a deferral of the student to the CBST for placement in a nonpublic school, arguing initially that the student has not yet received services in the district's recommended placement set forth in the May 2011 IEP, which included the services of a full-time, 1:1 crisis management paraprofessional.[23] In addition, the district argues that the

[21] Reasonably read, the parent's June 2011 due process complaint notice did not allege that the district did not offer the student a FAPE for the 2011-12 school year (see IHO Ex. I at pp. 1-2). A review of the hearing record indicates that the parent did not amend the due process complaint notice, and the parties did not agree to expand the scope of the impartial hearing to include challenges for the 2011-12 school year (see Tr. pp. 1-208; Dist. Exs. B-M; P-T; V-X; Parent Exs. 1-14; IHO Ex. I). Although it appears that the impartial hearing officer exceeded his jurisdiction by making a sua sponte determination on an issue not in controversy, neither party has appealed or otherwise challenged his conclusion regarding the 2011-12 school year, and therefore, the impartial hearing officer's determination is final and binding on both parties (see 34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[j][5][v]).

[22] Similarly, I note that although the parent seeks the relief denied by the impartial hearing officer, she does not challenge the impartial hearing officer's award of 100 hours of individual tutoring as a remedy for the district's failure to offer the student a FAPE, the impartial hearing officer's order directing the district to conduct a neuropsychiatric evaluation of the student, or the impartial hearing officer's order directing the district to convene a CSE meeting to create a new placement and program for the student (see Pet. ¶¶ 1-17).

[23] The parent's petition does not assert that the impartial hearing officer improperly denied her request to defer the student to the CBST for placement in a nonpublic school; instead, the parent seeks the student's deferral to the CBST as a form of relief (Pet. at p. 12).

impartial hearing officer appropriately determined that the evidence did not support a conclusion that an appropriate placement did not exist within the entire district for the student or that it would be appropriate to direct the student's placement in a nonpublic school. Moreover, the district asserts that the impartial hearing officer properly directed the district to conduct a neuropsychiatric evaluation of the student and to convene a CSE meeting to create a new program and placement for the student. Finally, the district argues that the impartial hearing officer properly denied the parent's request for a privately conducted FBA or BIP. In addition to an order granting its cross-appeal, the district seeks to dismiss the parent's petition in its entirety.

Responding to the district's procedural defenses, the parent contends that the appeal was timely served; the appeal is not moot because a determination of the appropriateness of the student's placement, classification, and loss of educational benefits has a "practical effect" on the parties; and the appeal is also not moot because it is capable of repetition. In response to the district's cross-appeal, the parent contends that the student was presumed to have a disability for purposes of discipline on November 16, 2010, after the student had been subjected to 15 days of removal or suspension.

Discussion

Procedural Issues—Timeliness of the Appeal

In the present case, the parent states in the petition that the impartial hearing officer's "initial" decision—dated July 28, 2011—was the "subject of requests for clarifications" by both parties, and the impartial hearing officer then issued a "corrected" decision—dated August 8, 2011—to the parties by mail (Pet. ¶¶ 2-3; see Answer and Cross-Appeal ¶ 2). The parent then states that she complied with the regulations governing the timely initiation of an appeal because the personal service of the petition upon the district on September 19, 2011, was timely.[24, 25] To the contrary, the district argues that the parent failed to timely initiate the appeal because the 35th day to timely serve the petition elapsed on September 16, 2011, and further, the parent failed to articulate good cause in the petition to excuse her failure to timely serve the petition.[26] As discussed below, I find that in the exercise of my discretion the parent's appeal must be dismissed for the failure to timely initiate the instant appeal and for the failure to provide good cause to excuse the delay in the petition.

[24] The parent indicates that the 35th day to timely serve the petition elapsed on Saturday, September 17, 2011, and thus, personal service of the petition on the following Monday, September 19, 2011, complied with the regulations (see 8 NYCRR 279.11).

[25] The impartial hearing officer's decision included the required statement advising the parties of their rights to seek review of the decision by a State Review Officer, and further provided notice of the time requirements for filing an appeal in bold text under the caption "PLEASE TAKE NOTICE," which was in bold print and underlined (IHO Decision at p. 9; see 8 NYCRR 200.5[j][5][v]).

[26] To arrive at the date of September 16, 2011 as the last day to timely serve the petition, the district asserts that the August 8, 2011 impartial hearing officer's decision was mailed on the same day: August 8, 2011 (see Answer ¶ 26 [citing Pet. Ex. A]).

An appeal from an impartial hearing officer's decision to a State Review Officer is initiated by timely personal service of a verified petition for review and other supporting documents upon a respondent (8 NYCRR 279.2[b], [c]; Application of a Student with a Disability, Appeal No. 10-119; Application of a Student with a Disability, Appeal No. 10-081; Application of the Bd. of Educ., Appeal No. 10-044; Application of the Dep't of Educ., Appeal No. 09-062; Application of the Dep't of Educ., Appeal No. 09-033; Application of a Student with a Disability, Appeal No. 08-142; Application of the Dep't of Educ., Appeal No. 08-056; Application of the Dep't of Educ., Appeal No. 05-082).

As to the time period for initiating an appeal, a petition must be personally served within 35 days from the date of the impartial hearing officer's decision to be reviewed (8 NYCRR 279.2[b]). State regulations expressly provide that if the impartial hearing officer's decision has been sent by mail to the petitioner, the date of mailing and four days subsequent thereto shall be excluded in computing the period within which to timely serve the petition for review (8 NYCRR 279.2[b], [c]).[27] The party seeking review shall file with the Office of State Review the petition, and notice of intention to seek review where required, together with proof of service upon the other party to the hearing, within three days after service is complete (8 NYCRR 279.4[a]). If the last day for service of a notice of intention to seek review or any pleading or paper falls on a Saturday or Sunday, service may be made on the following Monday; if the last day for such service falls on a legal holiday, service may be made on the following business day (8 NYCRR 279.11). State regulations provide a State Review Officer with the authority to dismiss sua sponte a late petition (8 NYCRR 279.13; see Application of a Student with a Disability, Appeal No. 08-113; Application of a Child with a Disability, Appeal No. 04-003). A State Review Officer, in his or her sole discretion, may excuse a failure to timely seek review within the time specified for good cause shown (8 NYCRR 279.13). The reasons for the failure to timely seek review must be set forth in the petition (id.).

In general, the failure to comply with the practice requirements of Part 279 of the State regulations may result in the dismissal of a petition by a State Review Officer (8 NYCRR 279.8[a], 279.13; see, e.g., Application of a Student with a Disability, Appeal No. 09-099 [dismissing parents' appeal for failure to timely effectuate personal service of the petition upon the district]; Application of the Dep't of Educ., Appeal No. 08-006 [dismissing a district's appeal for failing to properly effectuate service of the petition in a timely manner]; Application of the Bd. of Educ., Appeal No. 07-055 [dismissing a district's appeal for failure to personally serve the petition upon the parents and failure to timely file a completed record]; Application of the Dep't of Educ., Appeal No. 05-082 [dismissing a district's appeal for failure to personally serve the petition upon the parent where the district served the parent's former counsel by overnight mail]; Application of the Dep't of Educ., Appeal No. 05-060 [dismissing a district's appeal for failing to timely file a hearing record on appeal]; Application of the Dep't of Educ., Appeal No. 01-048 [dismissing a district's appeal for failure to personally serve the petition upon the parent where the district served the parent by facsimile]).

[27] As a general rule, in the absence of evidence in the hearing record identifying the date of mailing, the date of mailing is presumed to be the next day after the date of the decision (see Application of a Student with a Disability, Appeal No. 08-065). In this case, however, the evidence indicates that the August 8, 2011 impartial hearing officer's decision—which is the date relied upon by the parent to calculate the timeliness of the initiation of her appeal—was served by mail on the same date: August 8, 2011 (Pet. ¶ 2; Pet. Ex. A).

In this case, the parent failed to timely initiate the instant appeal regardless of the date of the impartial hearing officer's decision used to calculate the timelines, and she failed to include good cause to excuse the failure to timely initiate the appeal in the petition. If relying upon the July 28, 2011 decision date, and presuming that the impartial hearing officer's decision was transmitted by mail, the parent had until September 6, 2011 to timely serve the petition upon the district (see 8 NYCRR 279.2[b], [c]). Therefore, personal service of the petition upon the district on September 19, 2011, was untimely. If relying upon the August 8, 2011 decision date and accounting for the evidence presented by the parent identifying August 8, 2011 as the date of mailing of that decision, the parent had—as argued by the district—until September 16, 2011 to timely serve the petition upon the district (Pet. ¶ 2; Pet. Ex. A; see Application of a Student with a Disability, Appeal No. 08-065).[28, 29] Therefore, personal service of the petition upon the district on September 19, 2011, was also untimely.

Moreover, the parent fails to articulate good cause to excuse the failure to timely initiate the appeal in her petition. Instead, as noted by the district, the parent conclusively asserts that personal service of the petition upon the district on September 19, 2011 complied with the regulations (Pet. ¶¶ 2-3; Verified Answer to Procedural Defenses & Cross-Appeal ¶ 1). Even assuming for the sake of argument that the parent's statements in the petition regarding the parties' requests for "clarifications" of the "initial" decision could be reasonably read as asserting good cause to excuse the failure to timely initiate the appeal, the requested clarifications could not be asserted as good cause to excuse the parent's failure to timely initiate the appeal from the August 8, 2011 decision—which is the date the parent appears to have relied upon to calculate, albeit incorrectly, the last day to timely serve the district with the appeal. Additionally, to the extent that the parent asserts that the "clarifications" constitute good cause to excuse the failure to timely serve the petition from the date of the "initial" decision—July 28, 2011—I find that under the circumstances, the argument is without merit.

First, the parent does not point to any regulation or legal authority that allows a party to seek "clarifications" of an impartial hearing officer's decision after the impartial hearing officer has rendered his or her decision. To the contrary, I find that the impartial hearing officer lacked the authority to issue a second "corrected" decision in this matter. Impartial hearing officers are appointed by a board of education in accordance with a specific rotational selection process (Educ. Law § 4404[1]; 8 NYCRR 200.2[e][1], 200.5[j][3][i]). An impartial hearing officer's jurisdiction is limited by statute and regulations and there is no authority for an impartial hearing officer to reopen an impartial hearing, reconsider a prior decision, or retain jurisdiction to resolve future disputes between the parties (see Application of the Dep't of Educ., Appeal No. 11-014; Application of a Student with a Disability, Appeal No. 10-118; Application of a Student Suspected

[28] In her response to the district's procedural defense that the petition was not timely served, the parent reiterates that the August 8, 2011 impartial hearing officer's decision was mailed on "August 8, 2011" (Verified Answer to Procedural Defenses & Cross-Petition ¶ 1).

[29] Although not asserted in this case, the parties are reminded that State regulations do not rely upon the date of receipt of an impartial hearing officer's decision for purposes of ascertaining the deadline for serving a petition for review (8 NYCRR 279.2[b], [c] [emphasis added]; see Application of a Student with a Disability, Appeal No. 10-081; Application of a Student with a Disability, Appeal No. 10-034; Application of a Student with a Disability, Appeal No. 08-043; Application of a Child with a Disability, Appeal No. 04-004). Therefore, the date of the alleged receipt of the impartial hearing officer's decision is irrelevant to the instant analysis regarding timeliness.

of Having a Disability, Appeal No. 10-021; Application of the Dep't of Educ., Appeal No. 08-024; Application of the Bd. of Educ., Appeal No. 07-081; Application of the Dep't of Educ., Appeal No. 06-133; Application of a Child with a Disability, Appeal No. 06-021; Application of a Child with a Disability, Appeal No. 05-056; Application of the Bd. of Educ., Appeal No. 02-043; Application of the Bd. of Educ., Appeal No. 98-16; see also Application of the Dep't of Educ., Appeal No. 08-041). An impartial hearing officer's decision is final unless timely appealed to a State Review Officer (20 U.S.C. § 1415[i][1][A]; 34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[j][5][v]). Here, an impartial hearing officer was appointed, presided at a hearing, and issued a written decision on July 28, 2011, which ended his jurisdiction over the matter. Second, even if the impartial hearing officer's "corrected" decision contained nothing more than clerical revisions, neither party has submitted a copy of the July 28, 2011 decision for consideration on appeal, which forecloses a State Review Officer from any meaningful opportunity to review what, if any, changes were made that may under the circumstances, constitute good cause for failing to timely initiate this appeal. Indeed, there is only one impartial hearing officer's decision submitted as part of the hearing record in this case: it is dated both July 28, 2011 and August 8, 2011, and it does not explain the parties' requested "clarifications" (see IHO Decision at p. 9). Therefore, given the impartial hearing officer's lack of authority to render a second "corrected" decision and the unspecified nature of the parties' requests for "clarifications," the parent has failed to assert good cause for the delay in timely initiating the appeal.

Thus, based upon the parent's failure to timely initiate the appeal and in the absence of good cause for the untimely service of the petition for review, I will exercise my discretion and dismiss the petition for review as untimely (8 NYCRR 279.13; see 8 NYCRR 279.2[b], [c]; 279.11; see also Kelly v. Saratoga Springs City Sch. Dist., 2009 WL 3163146, at *5 [N.D.N.Y. 2009]; Grenon v. Taconic Hills Cent. Sch. Dist., 2006 WL 3751450, at *5 [N.D.N.Y. 2006] [upholding dismissal of a late petition for review where no good cause was shown]; Keramaty v. Arlington Cent. Sch. Dist., 05 Civ. 00006 [S.D.N.Y. Jan. 24, 2006] [upholding dismissal of a petition for review that was served one day late]; Application of a Student with a Disability, Appeal No. 11-013; Application of a Student with a Disability, Appeal No. 10-081; Application of the Bd. of Educ., Appeal No. 10-044; Application of a Student Suspected of Having a Disability, Appeal No. 10-021; Application of a Student with a Disability, Appeal No. 09-099 [noting that attorney miscalculation of the pleading service requirements does not constitute good cause]; Application of a Student with a Disability, Appeal No. 08-148; Application of a Student with a Disability, Appeal No. 08-142; Application of a Student with a Disability, Appeal No. 08-114; Application of a Student with a Disability, Appeal No. 08-113; Application of a Student with a Disability, Appeal No. 08-039; Application of a Student with a Disability, Appeal No. 08-031; see generally Jonathan H. v. Souderton Area Sch. Dist., 2008 WL 746823, at *4 [E.D. Pa. 2008], rev'd in part on other grounds, 562 F.3d 527 [3d Cir. 2009] [upholding a review panel's dismissal of a late appeal from an impartial hearing officer's decision]; Matter of Madeleine S. v. Mills, 12 Misc. 3d 1181[A] [Sup. Ct. Alb. Co. 2006] [upholding a determination by the Commissioner of Education to dismiss an appeal as untimely]).

Merits of the Appeal

Notwithstanding the dismissal of the petition for untimeliness, however, I note that even if the parent had timely initiated her appeal, the appeal must be dismissed because, as discussed more fully below, the parent's claims are without merit.

Scope of Review on Appeal—Unappealed Determinations

Initially, State regulations provide that a party who fails to obtain a favorable ruling with respect to an issue submitted to an impartial hearing officer is bound by that ruling unless the party either asserts an appeal or interposes a cross-appeal (see 34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[j][5][v]). Neither party—in the appeal or cross-appeal—has challenged the impartial hearing officer's determinations that the district failed to offer the student a FAPE for the 2010-11 and 2011-12 school years, and the parent has not appealed the impartial hearing officer's decision denying her request for home instruction or denying her request to expunge the suspensions from the student's records (IHO Decision at pp. 5-8). In addition, neither party has challenged the impartial hearing officer's orders directing the district to provide 100 hours of individual tutoring to the student as a remedy for the district's failure to offer the student a FAPE, directing the district to conduct a neuropsychiatric evaluation of the student, or directing the district to convene a CSE meeting to create a new placement and program for the student (id. at pp. 7-8). Accordingly, these determinations have become final and binding on the parties, and I now turn to the remaining issues.

Nickerson Letter

On appeal, the parent contends that although the impartial hearing officer determined that the district's obligation to evaluate the student was triggered in December 2010, the district failed to comply with regulations requiring the district to conduct an expedited evaluation of the student within 15 days, or alternately, to evaluate the student within 30 days. Based upon the district's failure to timely evaluate the student, the parent argues that she is entitled to the issuance of a Nickerson letter. In opposition, the district asserts the impartial hearing officer properly denied the parent's request for a Nickerson letter, noting that neither an impartial hearing officer nor a State Review Officer has jurisdiction over class action suits or consent orders, such as the Jose P. litigation. Alternatively, however, the district contends that regardless of jurisdictional concerns, the district complied with the regulatory timelines to conduct the student's evaluation and offered a timely placement, therefore, the parent is not be entitled to the issuance of a Nickerson letter. Specifically, the district asserts that the student was referred to the CSE by the parent's letter dated January 7, 2011, and that the hearing record does not support a finding that the district's obligation to conduct an initial evaluation—which must be requested in writing pursuant to State regulations—was triggered by any earlier date. The district also argues that when the parent requested an initial evaluation of the student in writing on January 7, 2011, the student was not the subject of a suspension or removal, and therefore, the district was not obligated to conduct an expedited evaluation. With respect to the 2011-12 school year, the district asserts that the parent "does not, and could not argue" that the district did not timely evaluate or timely offer a placement to the student because the May 2011 IEP was projected to be implemented in September 2011. Upon review and consideration of the hearing record, I find that the impartial hearing officer properly denied the parent's request for the issuance of a Nickerson letter and the parent's argument is without merit.

In this case, regardless of whether the district's alleged failure to timely evaluate or timely place the student denied the student a FAPE, the impartial hearing officer resolved the issue of whether the district offered the student a FAPE for both the 2010-11 and 2011-12 school years in favor of the student and awarded relief to the student, which the parent neither appeals nor otherwise asserts any disagreement with in her appeal, and I find that further relief fashioned in

the form of a Nickerson letter that is styled after the relief in Jose P. is not warranted in this case.[30] Under the circumstances, an appropriate equitable remedy would be an award of additional educational services or an independent educational evaluation at district expense—which the impartial hearing officer has already awarded as relief.[31] To the extent that the parent seeks the issuance of a Nickerson letter to prospectively fund a nonpublic school placement, the impartial hearing officer directed the district to convene a CSE meeting to create a new program and placement for the student, which again, under the circumstances, constitutes an appropriate equitable remedy that the parent neither appeals nor otherwise asserts any disagreement with in her appeal.

Moreover, as the district correctly argues, jurisdiction over class action suits and consent orders (and by extension, stipulations containing injunctive relief) issued by the lower federal courts rests with the district courts and circuit courts of appeals (see 28 U.S.C. § 1292[a][1]; Fed. R. Civ. P. 65; see, e.g., Weight Watchers Intern., Inc. v. Luigino's, Inc., 423 F.3d 137, 141-42 [2d Cir. 2005]; Wilder v. Bernstein, 49 F.3d 69 [2d Cir. 1995]; Pediatric Specialty Care, Inc. v. Arkansas Dept. of Human Services, 364 F.3d 925 [8th Cir. 2004]; M.S. v. New York City Dep't of Educ., 734 F. Supp. 2d 271, 279 [E.D.N.Y. 2010]; E.Z.-L. v. New York City Dep't of Educ., 763 F. Supp. 2d 584, 594 [S.D.N.Y. 2011]). No provision of the IDEA or the Education Law confers jurisdiction upon a state educational agency or a local educational agency to sit in review of or resolve disputes over injunctions or consent orders issued by a judicial tribunal. Consequently, neither the impartial hearing officer, nor I for that matter, have jurisdiction to resolve a dispute regarding whether the student is a member of the class in Jose P., the extent to which the district may be bound or may have violated the consent order issued by a district court, or the appropriate remedy for the alleged violation of the order (R.K., 2011 WL 1131492, at *17 n.29 ; W.T., 716 F. Supp. 2d at 289–90 n.15; see M.S., 734 F. Supp. 2d at 279 [addressing the applicability and parents rights to enforce the Jose P. consent order]; Levine v. Greece Cent. School Dist., 2009 WL 261470, *9 [W.D.N.Y. 2009] [noting that the Second Circuit has consistently distinguished systemic violations such as those in Handberry v. Thompson (436 F.3d 52 [2d Cir. 2006]) and Jose P. to be addressed by the federal courts, from technical questions of how to define and treat individual students' learning disabilities, which are best addressed by administrators]; Application of a Student with a Disability, Appeal No. 10-115; see also R.E., 2011 WL 924895,

[30] In addition, it is unclear whether the parent was asking the impartial hearing officer and now a State Review Officer to determine if the student was a member of the class of plaintiffs in Jose P. and to enforce the Court's injunction in that case or whether the parent was simply seeking similar relief upon a similar theory (see Application of the Dep't of Educ., Appeal No. 11-105; Application of the Dep't of Educ., Appeal No. 11-016; Application of the Dep't of Educ., Appeal No. 10-115).

[31] Courts have repeatedly recognized the "broad discretion" that hearing officers and reviewing courts must employ under the IDEA when fashioning equitable relief, and as noted recently, courts have also "repeatedly rejected invitations to restrict the scope of remedial authority provided in Section 1415(i)(2)(C)(iii)" (see, e.g., Mr. and Mrs. A v. New York City Dep't of Educ., 769 F. Supp. 2d 403, 422-23, 427-30 [S.D.N.Y. 2011]; see Forest Grove v. T.A., 129 S.Ct. 2484 [2009]). Notably, the parent does not assert that the impartial hearing officer abused his discretion in either the relief awarded or in the relief denied.

at *12; E.Z.-L., 763 F. Supp. 2d at 594; Dean v. School Dist. of City of Niagara Falls, 615 F. Supp. 2d 63, 70 [W.D.N.Y. 2009]).[32]

Classification

Here, the parent asserts that the impartial hearing officer improperly denied her request to change the student's classification from an emotional disturbance to other health-impairment. The parent argues that evidence of the student's diagnosis of an ADHD squarely contradicts the district's determination to classify the student with an emotional disturbance and that the district failed to appropriately evaluate the student in all areas of suspected disability.[33] The district seeks to uphold the impartial hearing officer's determination, but argues, alternatively, that even if the evidence does not support the student's classification of emotional disturbance, the impartial hearing officer has already ordered the appropriate remedy: to convene a CSE meeting to create a new program and placement for the student. Upon review and consideration of the hearing record, however, I find that the impartial hearing officer properly denied the parent's request to change the student's classification and the parent's argument is without merit.

In this case, while the parent persuasively argues that the district's submission of an "unsigned Emotional Disability Justification Form" does not constitute sufficient evidence to support the district's decision to classify the student with an emotional disturbance, the parent's own argument that evidence of the student's diagnosis of an ADHD supports a determination that the student's classification should be changed to an other health-impairment is also not sufficient to grant her request (see generally Fort Osage R-1 Sch. Dist. v. Sims, 641 F.3d 996, 1004 [8th Cir. 2011] [noting that "the particular disability diagnosis affixed to a child in an IEP will, in many cases, be substantively immaterial because the IEP will be tailored to the child's specific needs," accordingly, "as with any other purported procedural defect, the party challenging the IEP must show that the failure to include a proper disability diagnosis compromised the pupil's right to an appropriate education, seriously hampered the parents' opportunity to participate in the formulation process, or caused a deprivation of educational benefits"]; Application of a Student with a Disability, Appeal No. 09-126 ["a student's special education programming, services and placement must be based upon a student's unique special education needs and not upon the student's disability classification"]). In addition, even if the parent presented sufficient evidence,

[32] Nothing precludes the parties to an administrative due process proceeding from developing a hearing record with regard to the individual needs of a student and asserting arguments regarding appropriate relief, which may, in some cases, be similar to the relief granted to individual plaintiffs in Jose P. (see Application of a Student with a Disability, Appeal No. 10-115).

[33] I note that the claim that the district failed to evaluate the student in all areas of suspected disability was not raised in either the parent's due process complaint notice, in an amended due process complaint notice, or by agreement of the parties during the impartial hearing (see Tr. pp. 1-208; Dist. Exs. B-M; P-T; V-X; Parent Exs. 1-14; IHO Ex. I). Consequently, I find that the parent's claim is not properly before me since it has only been raised for the first time on appeal, and is, thus, beyond the scope of review (see A.B. v. San Francisco Unified Sch. Dist., 2008 WL 4773417, at *9 [N.D. Cal. Oct. 30, 2008]; Saki v. Hawaii, 2008 WL 1912442, at *6-*7 [D. Hawaii April 30, 2008]; Application of a Student with a Disability, Appeal No. 08-158; Application of a Student Suspected of Having a Disability, Appeal No. 08-100; Application of the Bd. of Educ., Appeal No. 08-026; Application of a Student with a Disability, Appeal No. 08-020; Application of the Dep't of Educ., Appeal No. 08-009; Application of a Child with a Disability, Appeal No. 07-122; Application of a Child with a Disability, Appeal No. 07-072; Application of a Child with a Disability, Appeal No. 07-051; Application of a Child with a Disability, Appeal No. 06-139).

I note that it would be premature at this point to direct a change in the student's classification given that the district has been ordered to conduct a neuropsychiatric evaluation of the student—which may result in new or different information about the student—and to convene a CSE meeting to create a new program and placement for the student. Thus, I find no reason to disturb the impartial hearing officer's determination and the parent's request must be dismissed.

Privately Developed BIP

On this issue, the parent contends that the impartial hearing officer erred in denying her request for the development of a BIP by a "neutral behavioral specialist." In particular, the parent argues that she is entitled to this relief because the district's FBA and BIP were not "successful," the district failed to comply with the MDR regulations, and the evidence does not support the impartial hearing officer's determination that the requested BIP could be addressed by the neuropsychiatric evaluation to be conducted. The district alternatively asserts that the parent's claim for a privately developed BIP must be dismissed because the 2010-11 school year has expired and the claim is moot; the hearing record contains no information about the student's current placement for the 2011-12 school year with the services of the 1:1 crisis management paraprofessional and existing BIP; and finally, the issue of a new FBA or BIP can be addressed by the impartial hearing officer's order to convene a CSE meeting to create a new program and placement for the student. For reasons discussed below, I find that the impartial hearing officer properly denied the parent's request for a privately developed BIP.

In this case, the district developed the student's IEP and BIP at the CSE meeting held on March 25, 2011 (Dist. Exs. D at pp. 1-11; T at pp. 1-2). Although the student was placed in the recommended 12:1+1 special class on April 11, 2011, the hearing record does not contain any evidence that either the failure to implement the student's BIP or the inadequacy of the student's BIP contributed to or resulted in the student receiving suspensions in May and June 2011 (see Tr. pp. 1-208; Dist. Exs. B-M; P-T; V-X; Parent Exs. 1-14; IHO Ex. I). In addition, the hearing record does not contain evidence to support a finding that the student's BIP was not appropriate to meet his needs or that the parent objected to the district's FBA or BIP at the March CSE meeting, or otherwise indicated any dissatisfaction with the district's FBA or BIP (see Tr. pp. 1-208; Dist. Exs. B-M; P-T; V-X; Parent Exs. 1-14; IHO Ex. I). However, to the extent that the district may have been required, ultimately, to review and revise the student's existing BIP had it complied with the MDR regulations, the impartial hearing officer's order that revisions to the student's BIP should be contemplated through the neuropsychiatric evaluator's report is well within his broad discretion when fashioning equitable relief. Therefore, in light of the neuropsychiatric evaluation to be conducted and the order for the district to convene a CSE meeting to create a new program and placement for the student, the parent's request for a privately developed BIP, at this time, is without merit and must be dismissed.

Modifications of the Impartial Hearing Officer Decision

Finally, both parties seek to modify factual findings made by the impartial hearing officer. The parent contends that based upon the facts of the case, the district should have implemented the MDR provisions in November 2010—as opposed to May or June 2011 as noted by the impartial hearing officer—and seeks to modify the impartial hearing officer's factual finding "to correctly reflect when the MDR provisions were triggered." In its cross-appeal, the district argues that based upon the facts of the case, the district could not be deemed to have knowledge that the student had

a disability until January 7, 2011, when the parent requested an evaluation of the student in writing—as opposed to December 2010, the date recognized by the impartial hearing officer. However, both requests must be dismissed because even if the requested modifications were made to the impartial hearing officer's decision, it would have no actual effect on the legal conclusions rendered, the relief ordered, or the legal relationship of the parties.

Conclusion

I have considered the parties' remaining contentions and find that in light of my determinations, I need not reach them.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL DISMISSED.

Dated: **Albany, New York**
December 14, 2011

_____
STEPHANIE DEYOE
STATE REVIEW OFFICER