The University of the State of New York

The State Education Department
State Review Officer
www.sro.nysed.gov

No. 11-122

Application of the BOARD OF EDUCATION OF THE LAKE GEORGE CENTRAL SCHOOL DISTRICT for review of a determination of a hearing officer relating to the provision of educational services to a student suspected of having a disability

Appearances:
Tabner, Ryan and Keniry, LLP, attorneys for petitioner, Tracy L. Bullett, Esq., of counsel

DECISION

Petitioner (the district) appeals from the decision of an impartial hearing officer which determined that the district failed to offer respondents' (the parents') daughter special education and related services during the 2009-10 school year and awarded compensatory education services. The district also appeals from the impartial hearing officer's decision to reimburse the parents for an independent educational evaluation (IEE). The appeal must be sustained in part.

At the time the impartial hearing convened in November 2010, the student was attending tenth grade at the district's junior/senior high school (Tr. pp. 713, 740). During the 2010-11 school year, the student was receiving services pursuant to a section 504 plan offered to her in accordance with Section 504 of the Rehabilitation Act of 1973 (section 504) (29 U.S.C. §§ 701-796[l]). The student's eligibility for special education and related services as a student with a learning disability was in dispute at the time the impartial hearing was requested in this proceeding (see 34 C.F.R. § 300.8[c][10]; 8 NYCRR 200.1[zz][6]).

Background

With regard to the student's education history, the hearing record shows that the student demonstrated difficulties in the areas of math fluency and reading rate and exhibits relative weaknesses in spelling, reading fluency, written expression, and decoding (Dist. Ex. 33 at pp. 1-5; Parent Ex. T1 at pp. 1-19). The student has received diagnoses of developmental dyslexia, dysgraphia for spelling, and a disorder of written expression (Parent Ex. T1 at p. 12).

By e-mail dated November 18, 2007, the student's mother advised the district guidance counselor of her concerns regarding the student's difficulties with spelling and requested assistance (Parent Ex. J).

On January 31, 2008, an audiologist from the regional Board of Cooperative Educational Services (BOCES) conducted an educational audiology evaluation of the student for assessment of a potential auditory processing problem (Dist. Ex. 5; see also Parent Ex. D3 at pp. 2-8). With one exception, the assessment indicated the student's abilities were within normal limits (Dist. Ex. 5 at p. 1).

On May 2, 2008, the district occupational therapist conducted an occupational therapy (OT) assessment of the student (Dist. Ex. 6). The occupational therapist concluded, as a result of standardized assessment and behavioral observation, that the student demonstrated age appropriate visual perceptual skills with "some difficulty" with visual memory skills (id.). The occupational therapist advised that OT services were "not recommended at this time" (id.).

In a report card dated June 23, 2008, the student achieved final average grades of 91 in English, 96 in social studies, 95 in science, 92 in math, 93 in Spanish, 96 in health, 93 in home and careers, 94 in art, 97 in technology, and 95 in physical education (Dist. Ex. 4).

On July 29, 2008, the student's mother completed a Committee on Special Education (CSE) referral form and provided the district with consent for an initial evaluation of the student (Dist. Ex. 8; Parent Ex. W).

On August 14, 2008, a district school psychologist conducted a psychoeducational evaluation of the student (see Dist. Ex. 9). The school psychologist's evaluation concluded that the student had a full scale IQ of 101, but he advised that this score should be relied upon with caution due to the significant variability between composite scores (id. at p. 3). The school psychologist indicated that the student's perceptual reasoning abilities fell within the high average range but that her abilities related to working memory were a significant weakness (id.). The student's verbal reasoning and auditory comprehension as well as her abilities related to processing speed were within the average range (id.).

The school psychologist also administered the Woodcock-Johnson-Third Edition Tests of Achievement (WJ-III ACH) to the student (Dist. Ex. 9 at p. 2). The student's reading comprehension abilities were an area of strength, her written language ability consistently fell within the average range, and her decoding skills fell within the low average range (id. at p. 3). The student's math skills were inconsistent, including exhibiting strength in the area of math calculation and problem solving but displaying a weakness in math fluency (id.).

A report of the student's performance on the seventh grade New York State English language arts (ELA) examination dated January 2008 revealed that the student scored at level three, indicating that the student demonstrated an understanding of the ELA knowledge and skills expected of students at that grade level (Dist. Ex. 2 at p. 1-2). A March 2008 report on the student's performance on the seventh grade New York State mathematics examination reflected that the student scored at level four, indicating that she demonstrated a thorough understanding of the mathematics content expected of students at that grade level (Dist. Ex. 3 at pp. 1-2).

The parents privately obtained a pediatric neuropsychological evaluation of the student, which was conducted over two days in September and October 2008 (Parent Ex. Z). The resulting October 17, 2008 evaluation report indicated that the student demonstrated average receptive vocabulary and naming abilities (id. at p. 3). The student demonstrated "poor" phonological awareness and rapid naming abilities but average phonological memory skills (id.). With respect to results from the Gray Oral Reading Test-Fourth Edition (GORT-4), the student achieved scaled scores (percentile rank) of 8 (25) in reading fluency, a 12 (75) in reading comprehension, and an oral reading quotient of 100 (50) (id. at p. 4).

According to the October 2008 evaluation report, the student demonstrated a "relative weakness" in reading fluency including reading rate and accuracy compared to reading comprehension (id.). When assessed using subtests of the WIAT-II, the student achieved a standard score of 88 in word reading and a 95 in spelling (id.).

The evaluating neuropsychologist indicated, among other things, that the student's "family history strongly suggest[ed] dyslexia," that, the student had "spelling problems that were not consistent with scholastic aptitude, and that the student reportedly worked "very hard to maintain her grade point average" (Parent Ex. Z at p. 5). In addition, the report advised that based on the student's history and specified findings set forth in the evaluation report, "it appears that [the student] may have a partially compensated reading disorder that is likely to be neurodevelopmental" and "that it is very possible that this inherent weakness impacts spelling, rapid naming, foreign language learning and even math fluency" (id. at p. 6). The neuropsychologist recommended that the student receive instruction using an evidence-based comprehensive intervention such as Orton-Gillingham's "All About Spelling" which incorporated "a multisensory, multilevel stepwise methodology" (id.).

On December 15, 2008, the CSE convened to determine the student's eligibility for special education and related services (Dist. Exs. 11, 14). Meeting attendees included the CSE chairperson, a school psychologist, the student's parents, a district special education teacher, the student's social studies teacher, a district guidance counselor, an administrative assistant, and the student (Tr. pp. 54-55, 71; Dist. Exs. 11, 12, 14).

The December 2008 CSE determined that the student was not eligible for special education and related services (Tr. p. 55; Dist. Ex. 11 at p. 1). The December 2008 CSE meeting minutes indicated that the school psychologist discussed the content of the private neuropsychological with the CSE members (Dist. Ex. 11 at p. 1). During the meeting the student's social studies teacher reported that the student had "very good grades" and a "great work ethic" (id.). Additionally, the student's writing was "good and well put together" (id.). During the December 2008 CSE meeting, the student's mother reported that the student displayed difficulties with spelling and that the student worked hard to compensate for her spelling deficit (id.). The student's mother also indicated that the student needed more time on exams compared to other students and that she felt that the student should not have to work that hard (id.).

The student's performance on the eighth grade New York State ELA examination reflected that the student scored at level three, indicating that the student demonstrated an understanding of the ELA knowledge and skills expected of students at that grade level (Dist. Ex. 20 at p. 1). The student's performance on the eighth grade New York State mathematics examination reflected that

the student scored at level four, indicating that she demonstrated a thorough understanding of the mathematics content expected of students at that grade level (Dist. Ex. 21 at pp. 1).

In a 2008-09 progress report from the district's reading center, the student's reading specialist described the student's progress in spelling (Dist. Ex. 19).

By letter to the CSE dated August 12, 2009, the parents requested that copies of certain educational records be provided to a private psychologist (Parent Ex. N1 at pp. 1-2). Over four sessions between September 9, 2009 and November 4, 2009, the private psychologist conducted a neuropsychological evaluation of the student (see Parent Ex. T1).

In a letter to the parents dated November 18, 2009, the CSE chairperson stated that the student's progress in the 2009-10 school year had been reviewed and that it appeared that it would be beneficial for the CSE to administer an evaluation to determine whether there had been any significant changes in the student's achievement that would warrant additional academic support (Tr. pp. 538-540; Dist. Ex. 25). The CSE chairperson provided the parents with a consent form indicating that the student had been referred to the CSE for evaluation to determine if the student had a disability that may require special education services and which requested that the parents provide written consent so that the student could be evaluated (Dist. Ex. 25 at pp. 2, 3).

By letter dated November 30, 2009, the parents acknowledged the district's request for consent to evaluate the student (Dist. Ex. 26). The parents advised the district that they were "unable to give consent for more testing" until the results from their own private evaluation were available (id.). The parents also indicated that they would seek reimbursement for all expenses related to the student's private neuropsychological evaluation (id.; see also Parent Ex. N1).

In a letter dated December 2, 2009, the CSE chairperson advised the parents that the district would not initiate any assessments of the student "to determine her eligibility for CSE" without written consent (Dist. Ex. 27 at p. 1). Additionally, the CSE chairperson indicated that the district would not provide reimbursement to the parents for any private neuropsychological evaluations. (id.).

The private psychologist forwarded the results of her assessment to the parents on December 4, 2009 (Parent Ex. T1 at p. 19). The evaluation report described the parents' concerns and background information regarding the student (id. at pp. 1-2). The evaluation report also included a summary of the January 2008 educational audiological evaluation, the May 2008 OT assessment, the district's August 2008 psychoeducational evaluation, and the October 2008 pediatric neuropsychological evaluation (id.; see also Dist. Exs. 5; 6; 9; Parent Ex. Z; see also Parent Ex. D3 at pp. 2-7). The private psychologist administered several assessments which included the Lateral Dominance Examination, the Hand Dynamometer, the Gordon Diagnostic System: Vigilance subtests; the Process Assessment of the Learner-Second Edition: Diagnostic Assessment of Reading and Writing (PAL-II:RW); the Wechsler Individual Achievement Test-Third Edition (WIAT-III), the Test of Written Language-Third Edition (TOWL-3); the Child Behavior Checklist; and the Behavior Rating Inventory for Executive Function (BRIEF) (Parent Ex. T1 at p. 4).

In the WIAT-III, the student achieved standard scores (percentile rank) of 99 (47) in listening comprehension, 105 (63) in reading comprehension, 100 (50 in math problem solving,

102 (55) in sentence composition, 89 (23) in word reading, 82 (12) in spelling, 75 (5) in pseudoword decoding, and 112 (79) in numerical operations (Parent Ex. T1 at p. 7). With respect to the WIAT-III, the student achieved a 102 (55) in oral language, 87 (19) in total reading, 82 (12) in basic reading, 98 (45) in reading comprehension and fluency, 90 (25) in written expression, 107 (68) in mathematics, 77 (6) in math fluency, and 95 (37) in total achievement (id.).

The private psychologist stated in her report, among other things, that the student's phonemic decoding skills were "significantly impaired" but that her reading comprehension skills were average (Parent Ex. T1 at p. 7). The student demonstrated difficulty with her ability to write words from dictation and applying spelling strategies to spell an unfamiliar word (id.). With respect to math, the student demonstrated average math reasoning skills and high average math computation skills (id. at p. 8). However, the student "struggled to recall basic facts in addition, subtraction, and multiplication quickly" and performed significantly below same age peers on retrieval tasks (id.). According to the private psychologist, her testing indicated that a "severe working memory deficit" contributed significantly to the student's reading/writing problems (id.). Her testing also indicated that while the student's oral reading rate was at the 34th percentile and her reading accuracy was at the 8th percentile (id. at p. 9).

On a behavior checklist, the parents reported that the student's grades were good but that her understanding of the subject matter was limited (Parent Ex. T1 at p. 10). The parents indicated concern regarding the student's difficulties in spelling despite school interventions (id.). The student's teacher who completed the "teacher report form" indicated that he did not have any concerns regarding the student (id.). The teacher indicated that the student was an "excellent student" and that she listened "very well" and did assignments "accurately the first time" (id.).

The private psychologist offered the student diagnoses of developmental dyslexia, dysgraphia for spelling, and a disorder of written expression (Parent Ex. T1 at p. 12). The private psychologist recommended that the student be classified as a student with a learning disability (id.). The private psychologist also made several recommendations regarding the student including the following: a multi-sensory approach to reading (Orton-Gillingham); an assistive technology evaluation; ongoing assessment of phonological and rapid retrieval skills; learn a word-processing program; class notes; practice reading aloud; access to textbooks on tape/disk; and testing accommodations including extended time, test answers transcribed by an adult, option of oral examination, no penalty for spelling/grammatical mistakes, separate location, calculator, and an alternative testing response options (id. at pp. 12-14).

By e-mail dated December 23, 2009, the CSE chairperson acknowledged receipt of an e-mail from the parent requesting a CSE meeting to discuss the student's private neuropsychological evaluation and to "consider identification through CSE" (Dist. Ex. 28). Among other things, the CSE chairperson indicated that she would be sending another CSE referral letter and consent to evaluate and that once the CSE had received the parents' consent, it would initiate the evaluation process (id.). The chairperson indicated that once the evaluations were completed and the information collected, an initial eligibility meeting would be scheduled to discuss all materials, including the parents' private evaluation of the student (id.).

As a result of an exchange of numerous electronic and hard copy correspondence from January to May 2010, the district provided information regarding the additional testing and assessment activities it wished to conduct, the parents provided consent, and a CSE meeting was

scheduled for May 24, 2010 to determine whether the student was eligible to receive special education and related services (see Dist. Exs. 30; 31; 32; 34; Parent Exs. V1; W1; X1; Y1; B2). During this time, the parents conveyed to the district that they could not afford to pay for the private evaluator to attend the May 2010 CSE meeting and requested that the district make payment to the private evaluator so that she would attend the meeting and explain the results of her evaluation (Parent Ex. C2 at pp. 2, 8). Alternatively, the parents requested that the district provide another person at the May 2010 CSE meeting who would be able to interpret the instructional implications of the fall 2009 private evaluation of the student (Parent Ex. C2 at pp. 2, 3, 6). In response to this, communication between the parties ensued regarding obtaining consent from the parent so that the district could obtain more specific information with respect to the fall 2009 private nuropsychological evaluation (see Dist. Exs. 35; 36; 37; Parent Ex. C2 at pp. 6, 7).

With the parents consent, the school psychologist conducted a further psychoeducational evaluation of the student over three sessions in April and May 2010 (Dist. Ex. 33). The school psychologist indicated that the student maintained her attention to the tasks throughout the assessment, "readily engaged" in all tasks, and did not exhibit any overt signs of frustration (id. at p. 3). Administration of the WISC-IV to the student yielded standard scores (percentile rank) of 100 (50) in verbal comprehension, 119 (90) in perceptual reasoning, 94 (34) in working memory, 94 (34) in processing speed, and a full scale IQ of 105 (63) (id. at p. 2). Similar to the results in August 2008, the school psychologist indicated that the full scale IQ score of 105 should be relied upon with caution due to the significant variability between composite scores (id. at p. 3). According to the evaluation report, the student's scores fell within the average range on all subtests within the verbal comprehension scale (id.). The student's performance on tasks assessing her spatial reasoning abilities and perceptual organization skills fell within the high average range (id.). The student demonstrated average abilities on tasks assessing her working memory and processing speed (id.).

The school psychologist also administered the WJ-III ACH to the student (Dist. Ex. 33 at p. 2). In that testing, the student achieved standard scores (percentile rank) of 97 (41) in total reading, 92 (31) in reading decoding, 96 (40) in reading fluency, 107 (68) in reading comprehension, 105 (63) in total mathematics, 115 (83) in math calculations, 76 (5) in math fluency, and 108 (71) in problem solving (id.). In addition, the student achieved standard scores (percentile rank) of 99 (47) in written language, 96 (40) in writing fluency, 95 (36) in spelling, and 121 (92) in written expression (id.). In testing using the GORT-4, the student received a scaled score (percentile rank) of 7 (16) in reading rate, 9 (37) in reading accuracy, 8 (25) in reading fluency, 11 (63) in reading comprehension, and an oral reading quotient of 97 (42) (id. at p. 4). With respect to the results of the achievement testing, the school psychologist noted that the student consistently demonstrated skills within the average range (id. at p. 3). According to the school psychologist, the student's performance on the GORT-4 in the area of reading "were somewhat lower" compared to her achievement testing results (id. at p. 4). The student's reading rate was an area of weakness (id.). With respect to math, the student solved all computations correctly but her rate of problem solving was an area of significant weakness (id.). The student's written expression skills were an area of strength and her spelling skills fell within the average range (id.).

On May 24, 2010, the CSE convened to determine whether the student was eligible for special education and related services as a student with a disability (Dist. Exs. 34; 39 at p. 1; 40).

Meeting attendees included the CSE chairperson, a district school psychologist, a district special education teacher, the student's English teacher, a district guidance counselor, a district reading specialist, an additional parent member, the district's attorney, the student's mother, and the student (Tr. pp. 583-83; Dist. Exs. 39 at p. 1; 40). The May 2010 CSE considered the evaluative data with respect to the student including the August 2008 psychoeducational evaluation, the April 2008 reading evaluation, the January 2008 educational audiology evaluation, the parent's fall 2009 private neuropsychological evaluation of the student, and the May 2010 psychoeducational evaluation (Dist. Ex. 39 at pp. 1-2; see also Dist. Exs. 5; 9; 33; Parent Ex. T1; see also Parent Ex. D3 at pp. 2-7). The student's teachers indicated that the student worked hard and initiated her own successes (Dist. Ex. 39 at p. 1). The parents indicated that the student had regressed, but the reading specialist indicated that there was no report showing regression (id. at pp. 1-2). The reading specialist described when reading services were provided and noted that the student missed them (id. at p. 1). The parent indicated that the student's schedule was full (id.).

The May 2010 CSE determined that the student was not eligible for special education and related services (Tr. pp. 106, 591-92; Dist. Exs. 39 at pp. 1-2; 53). According to the CSE meeting minutes, the student demonstrated delays but that those did not have a significant affect on her academic performance (Dist. Ex. 39 at p. 2). Additionally, the CSE noted that the student would benefit from reading services as "an intervention that does not require identification" as eligible for special education (id.) The May 2010 CSE also recommended that the student be referred for section 504 services (id.).

On June 2, 2010, the Section 504 committee convened and determined that the student was eligible to receive section 504 services for the balance of the 2009-10 school year and for the 2010-11 school year (Dist. Exs. 46, 49, 50, 51).

The student's final grades for her ninth grade year were a 78 in English, 87 in global studies, 83 in earth science, 83 in algebra, 94 in career/financial management, 97 in studio art, 98 in design/drawing, and a 94 in physical education (Dist. Ex. 58).

Due Process Complaint Notice and Response

In a due process complaint notice dated August 5, 2010, the parents requested, among other things, an impartial hearing pursuant to the IDEA and section 504 (see Parent Ex. M2 at p. 3). Among other things, the parents asserted that the district failed "to follow appropriate timelines" in 2008 and 2010 relating to the evaluation of the student and conducting CSE meetings (id. at p. 8). The parents asserted that the CSE failed to determine that the student was eligible for special education and related services at its CSE meetings in December 2008 and May 2010 (id. at pp. 8-10). With respect to the May 2010 CSE's determination, the parents also contended that the district failed to pay for and secure the attendance of the private psychologist who conducted the fall 2009 evaluation at that CSE meeting (id. at p. 9). The parents further asserted that the district failed to have an individual present at its May 2010 CSE meeting who was able "to interpret the instructional implications" of the fall 2009 private evaluation report (id. at pp. 10-11). As a consequence of the district failing to classify the student, the parents contended that the district failed to provide the student with an appropriate individualized education program (IEP) for 2008 and 2010 (id. at p. 10). Finally, the parents alleged the district failed to conduct an assistive technology evaluation of the student in accordance with the fall 2009 private evaluation report and provide the student with assistive technology services (id. at p. 11). To the extent that the

allegations in the due process complaint asserted procedural violations, the parents contended that such violations impeded the student's right to a free appropriate public education (FAPE), significantly impeded the parents' opportunity to participate in the decision making process, and caused a deprivation of benefits (id. at p. 12). The parents' due process complaint notice also asserted claims that the district had also violated section 504 as well as the Americans for Disabilities Act of 1990 (the ADA).

For relief, the parents requested (1) that the CSE classify the student as a student with a learning disability under the IDEA, (2) development of an IEP for the 2010-11 school year that specifically provided for a multisensory reading program, (3) reimbursement for the cost of the fall 2009 private evaluation of the student, (4) that the district invite and pay for the private psychologist who evaluated the student in fall 2009 to attend a CSE meeting, (5) an assistive technology evaluation, (6) findings of and the direction by the impartial hearing officer to cease harassing, intimidating, retaliatory, and/or discriminatory practices,[1] (7) compensatory education, (8) and training for district staff in the areas of the student's deficits (Parent Ex. M2 at p. 13).

In a response to the due process complaint notice, the district generally denied the parents' allegations (Dist. Ex. 1 at p. 1). With respect to the parents' IDEA claims, the district asserted, among other things, that the student was not eligible for special education and related services at the time of the December 2008 and May 2010 CSE meetings, that the district was not required to reimburse the parents for the fall 2009 private evaluation, and that compensatory education under the IDEA was not an appropriate remedy (id. at pp. 1-2). With respect to the parents' section 504 and ADA claims, the district asserted that the student did not qualify for section 504 services at the time of the December 2008 CSE meeting and that the district had not discriminated against or harassed the student or her family (id. at pp. 1, 3).

Impartial Hearing Officer Decision

A prehearing conference was held on September 8, 2009 (Interim IHO Decision at p. 1; see 8 NYCRR 200.5[j][3][xi]).[2] The impartial hearing began on November 2, 2010 and concluded on May 6, 2011, after nine days of proceedings (Tr. pp. 1, 176, 357, 517, 709, 895, 1066, 1211, 1360, 1513-14). The impartial hearing officer issued an interim decision dated December 31, 2010 determining, among other things, that the IDEA did not preclude a district from identifying a particular reading program on a student's IEP (Interim IHO Decision at p. 3). In a decision dated August 31, 2011, the impartial hearing officer concluded that the information before the December 2008 CSE supported its decision not to classify the student pursuant to the IDEA (id. at pp. 26, 27,

[1] In particular, the parents requested that the impartial hearing officer order the district to cease the district's "practice and requirement that all communication regarding [the student] and Special Education matters be sent to the [district's] attorney or ultimately be responded to by the [district's] Attorney" and its "practice of having the [district's] Attorney present at all of [the student's] educational meetings " (Parent Ex. M2 at p. 13).

[2] State regulations relating to the prehearing conference provides that a transcript or a written summary of the prehearing conference shall be entered into the hearing record by the impartial hearing officer (8 NYCRR 200.5[j][3][xi]). However, I note that impartial hearing officer did not comply with State regulations and include either the transcript or written summary of the prehearing conference. A transcript or a written summary of the prehearing conference should be entered into the hearing record by the impartial hearing officer and provided to a State Review Officer as part of the hearing record (see 8 NYCRR 200.5[j][3][xi]; 279.9).

42).[3] However, with respect to the 2009-10 school year, the impartial hearing officer found that the district failed to classify the student with a learning disability in December 2009 under the IDEA thereby denying the student a FAPE (id. at p. 31).[4]

With respect to the parents' non-IDEA claims, among other things, the impartial hearing officer found that the student should have been covered by a section 504 plan during the 2008-09 school year and that a meeting should have been convened to determine the student's eligibility for a section 504 plan shortly after the school psychologist reviewed the October 2008 private pediatric neuropsychological evaluation of the student in November 2008 (IHO Decision at pp. 28-30). The impartial hearing officer also concluded that the requirement imposed by the district upon the parents that they communicate about the educational needs of their children, including the student, through the school district's attorney only was unsupported by the hearing record, "inappropriate," discriminated against the student and her parents in violation of section 504 and the ADA, and constituted "harassment" in violation of section 504 (id. at pp. 35-36). With respect to damages, the impartial hearing officer also found that the parents were entitled to compensatory damages under section 504 because of his conclusion that the district engaged in discrimination in violation of section 504 when it failed to find the student eligible for a section 504 plan in December 2008 and again, in December 2009 when the district received the fall 2009 private neuropsychological evaluation (id. at p. 38). The impartial hearing officer also found that the parents were entitled to compensatory damages the district "discriminated against [the student and her parents] by imposing a communication restriction on the parents that constitutes harassment under [section] 504" (id.).

Due to the section 504 violations for the 2008-09 and 2009-10 school years, as well as to the 2009-10 violation of the IDEA, the impartial hearing officer awarded compensatory education services (IHO Decision at pp. 38-40).[5]

The impartial hearing officer also found that the district's CSE should reconvene and determine whether to recommend an Orton-Gillingham-based or Wilson reading instruction program be placed on the student's IEP for the 2011-12 school year (id. at p. 40-41). With respect to the 2009-10 school year, the impartial hearing officer noted that the CSE did not conduct all of the required evaluations for an initial evaluation as provided by State regulations and determined that the district should reimburse the parents for the cost of the fall 2009 private evaluation (id. at pp. 31 n.7, 36-38).

[3] I note that the impartial hearing officer appears to mistakenly reference the December 2008 CSE meeting as a December 2009 CSE meeting (IHO Decision at p. 27; see Dist. Ex. 11).

[4] The impartial hearing officer concluded that the parents referred the student to the CSE in December 2009 and that the CSE should have reconvened within a week of the date of the parent's letter transmitting the fall 2009 private neuropsychological evaluation to the CSE and classified the student (IHO Decision at pp. 31-32, 39 n.12; see Parent Ex. T1 at p. 1).

[5] The impartial hearing officer also concluded that he would not consider the parents' claim for compensatory or additional services for tutoring obtained during summer 2010 because that claim was not set forth in the parents' due process complaint notice (see IHO Decision at p. 38).

The impartial hearing officer ordered the district to provide (1) compensatory education to the student in the form of spelling instruction by a qualified special education teacher trained in Orton-Gillingham methodology (2) compensatory education to the student in the form of Orton-Gillingham reading instruction by an appropriately trained and experienced special education teacher, and (3) reimbursement to the parents for the cost of the fall 2009 private neuropsychological evaluation upon proof of payment (IHO Decision at pp. 41-42). The impartial hearing officer also directed the CSE to reconvene and consider whether the Orton-Gillingham-based instructional methodology or the Wilson Program should be placed on the student's IEP (IHO Decision at pp. 41-42).[6]

Appeal for State-Level Review

The district appeals, requesting that the impartial hearing officer's decision be reversed in part.[7] In particular, with respect to the 2009-10 school year, the district asserts that the impartial hearing officer erred in determining that the district should have classified the student as a student with a learning disability during the 2009-10 school year. The district contends that it appropriately determined that the student did not meet the classification of a student with a learning disability and that the student did not require special education and related services. The district further asserts that the impartial hearing officer incorrectly determined that the district failed to timely hold a CSE meeting and make its recommendations during the 2009-10 school year. According to the district, the impartial hearing officer incorrectly determined that the parents did not delay the CSE process during the 2009-10 school year and that any delay in the evaluation and recommendation process was directly attributable to the parents' conduct. With respect to a lack of evaluation noted by the impartial hearing officer prior to the May 2010 CSE meeting, the district asserts that it was limited by what evaluations the parent agreed could be conducted; that the impartial hearing officer erred in noting that one assessment was not completed, and that the lack of other evaluations did not deny the student a FAPE. Additionally, the district contends that the impartial hearing officer incorrectly granted reimbursement for the fall 2009 private neuropsychological evaluation of the student. With respect to the impartial hearing officer's award of compensatory additional services, among other things, the district alleges that the impartial hearing officer incorrectly determined that the student was entitled to compensatory education services. Finally, the district asserts that the impartial hearing officer incorrectly determined that the Wilson or Orton-Gillingham program must be placed on the student's IEP.

In their answer, the parents assert, among other things, that the district appeals from and seeks to annul issues relating to section 504 and the ADA, over which a State Review Officer lacks jurisdiction; that the impartial hearing officer correctly determined that the parents should be reimbursed for certain costs relating to the fall 2009 private neuropsychological evaluation; and that the impartial hearing officer did not incorrectly determine that the Wilson or Orton-Gillingham program must be placed on the student's IEP. The parents also assert that the district's appeal with respect to the student's classification during the 2009-10 school year should not be considered

[6] The impartial hearing officer denied all other requests for relief (IHO Decision at p. 42).

[7] The district's petition for review states that it does not appeal those portions of the impartial hearing officer decision relating to Section 504 of the Rehabilitation Act and correctly indicates that such determinations are not reviewable by a State Review Officer (Application of a Student Suspected of Having a Disability, Appeal No. 10-128).

because prior to the beginning of the impartial hearing in November 2010, as part of a resolution agreement, the district had agreed to classify the student as a student with a disability pursuant to the IDEA and provide her with an IEP and educational services for 2011-12 and that as a result the only remaining IDEA-related issue at the impartial hearing was reimbursement for certain costs related to the fall 2009 private evaluation. The parents also assert that the district's appeal of the impartial hearing officer's determination to award them compensatory additional services need not be decided because the impartial hearing officer made such an award both under section 504 and the ADA in addition to the IDEA. As part of their answering submission, with the exception of certain attachments which the impartial hearing officer did not allow into evidence at the impartial hearing, the parents attach copies of their post-hearing submissions to the impartial hearing officer and request that this material become a part of the record on appeal.[8]

In a reply, the district asserts that the parents' answer is not verified as required by State regulations and therefore should not be considered. It further sets forth that the parents' memorandum of law fails to comply with the form requirements in the practice regulations governing reviews by State Review Officers and requests that the document not be considered. The district additionally requests that the parents' post-hearing submissions not be considered. The district contends that a State Review Officer has jurisdiction to consider and determine the impartial hearing officer's decision as it relates to the parents' contentions related to the IDEA. Further, the district asserts that the parents have refused to admit or deny facts which the parents say are applicable to both the IDEA and to section 504 because of their misguided belief that the district could not seek review of those issues and that this should result in a finding that all of facts which are not disputed by the parents should be deemed admitted. Finally, the district contends that the parents have asserted that "a [FAPE] for the 2007-08, 2008-09, and 2009-10 school years" is not and has not been at issue, and that a determination therefore should be made that the impartial hearing officer improperly considered and decided those issues and that adverse rulings against the district should be annulled.[9]

Applicable Standards

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]-

[8] The parents do not cross-appeal any of the impartial hearing officer's determinations that are adverse to them. As a consequence, I find that these unapealed determinations of the impartial hearing officer are final and binding upon the parties (Application of a Student with a Disability, Appeal No. 10-004; see 34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[j][5][v]).

[9] Pursuant to State regulations, a reply is limited to any procedural defense interposed by a respondent or to any additional documentary evidence served with the answer (8 NYCRR 279.6). Some of the allegations in the district's reply neither respond to the parents' procedural defenses nor to additional evidence submitted with the answer. Accordingly, such allegations of the reply are beyond the scope of the State regulations and will not be considered on appeal (see 8 NYCRR 279.6; Application of a Student with a Disability, Appeal No. 10-119; Application of the Bd. of Educ., Appeal No. 10-036; Application of a Student with a Disability, Appeal No. 09-145).

[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]). The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at *7 [S.D.N.Y. Aug. 27, 2010]).

Procedural Matters

Initially, three procedural matters must be addressed. First, as indicated above, the district has asserted in its reply that the answer was not verified and that it therefore should not be considered (see 8 NYCRR 279.7). Verification errors may be corrected by subsequent submission to the Office of State Review of a verified copy of the pleading in question (see, e.g., Application of the Bd. of Educ., Appeal No. 08-091; Application of the Bd. of Educ., Appeal No. 07-087; Application of a Child with a Disability, Appeal No. 04-081). The answer filed by the pro se parents contains a verification dated October 12, 2011. While I note that the verification was executed a day after the answer was served on the district, the asserted defect has been cured. Accordingly, in this case, I will accept the parents' answer (Application of the Bd. of Educ., 08-091). In the event the parents file pleadings with the Office of State Review in the future, I remind them that they are required to verify their pleadings prior to serving them on the opposing party. Similarly, I note that the parents' memorandum of law does not fully comply with the practice regulations (see 8 NYCRR 279.8[a][6]). In the exercise of my discretion, I decline to reject the parents' memorandum of law (8 NYCRR 279.8[a]). However, I once again remind the parents to ensure compliance with Part 279 of the State regulations in the future.

Third, the parents request that their post hearing submissions be made a part of the record on appeal. As indicated above, the district objects. I will accept the proffered material as a part of the hearing record. The documents were submitted to the impartial hearing officer and such material properly constitutes "other items" that an impartial hearing officer should mark for identification and include in the record of proceedings for submission to the Office of State Review (see 8 NYCRR 200.5[j][5][v]; Application of a Student Suspected of Having a Disability, Appeal No. 11-084). I also note that oral closing statements before an impartial hearing officer must be included in the hearing record as a part of the verbatim transcript of proceedings. With regard to the district's concerns that the closing brief is not "evidence," administrative hearing officers are required to distinguish those documents that properly constitute evidence from those which set forth the parties' respective positions regarding the facts and the application of the law.

Discussion

Withdrawal of IDEA Claims

Turning to the district's contentions that the impartial hearing officer erred in determining that the district should have classified the student as a student with a learning disability during the 2009-10 school year and related findings I note that when the impartial hearing began in November 2010, the parties informed the impartial hearing officer that the CSE had determined in October 2010 that the student was eligible to receive special education and related services as a student with a learning disability (Tr. p. 3). The impartial hearing officer correctly recognized that as a consequence, the question of the student's eligibility for special education and related services had been "taken off the table" (Tr. p. 1437). The parties also advised the impartial hearing officer of the status of the issues set forth in the August 2010 due process complaint notice and that some matters were resolved (see Tr. pp. 3-7, 1217). The parents further indicated in their post hearing submissions that the IDEA issues had therefore been limited and that the other hearing issues related to section 504 and the ADA (Parent Answer to Dist. Br. Att. A at p. 3; Parent Answer to Dist. Br. Att. B at p. 1). The parents' July 20, 2011 closing summary stated that the student had been classified as a student with a disability and that an IEP had been developed in October 2010 as part of the resolution process and that when the hearing began, the following questions, which were IDEA related, remained: (a) should the parents be reimbursed/compensated for the student's fall 2009 private neuropsychological evaluation (b) should the Wilson Reading Program be identified on the student's IEP, and (c) should the parents be compensated for summer 2010 tutoring (Parent Answer to Dist. Br. Att. A at p. 3, 26-27).[10] Once again, in the parents' July 24, 2011 reply brief the parents stated the following: "to be clear[,] we agreed that there were only two IDEA issues remaining for the Impartial Hearing Officer …," which were (a) reimbursement for the student's fall 2009 private neuropsychological evaluation and (b) should the Wilson Reading program be identified on the student's IEP (Parent Answer to Dist. Br. Att. B at p. 1). The parents continue to take this position in this appeal (Parent Mem. of Law at p. 3). The parents' note in this appeal that "(b)ecause the [d]istrict had agreed to classify [the student] as part of the Resolution Agreement, and provide her with an IEP and educational services for 2011-12, the only parent-generated IDEA-related issue at the hearing was reimbursement for [the psychologist who conducted the fall 2009 private] neuropsychological evaluation (Parent Mem. of Law at p. 3).

In light of the hearing record and the parents' affirmative statements regarding their IDEA claims, I find that the above-referenced determinations regarding classification of the student in 2008-09 and 2009-10 school years and their request for compensatory education services pursuant to the IDEA were withdrawn on the record at the time the impartial hearing convened. If there was any doubt remaining as to the parents' withdrawal during the impartial hearing, it was certainly laid to rest no later than July 2011 when they submitted their written arguments. Therefore, there was no need for the impartial hearing officer to determine whether the student should have been classified during the 2008-09 or 2009-10 school years or whether

[10] The impartial hearing officer denied the parents' request for compensation for summer 2010 tutoring as that issue had not been raised in the parents' due process complaint notice (see IHO Decision at p. 38). As indicated previously, the parents have not cross-appealed from the impartial hearing officer's determination.

the student should receive compensatory education services due to violations of the IDEA during the 2008-09 or 2009-10 school years. Accordingly, I will annul those aspects of his decision.[11]

However, as noted previously, the parents' due process complaint notice asserted other statutory bases for their claims aside from the IDEA (Parent Ex. M2 at pp. 3, 8-10, 11-12) and, the impartial hearing officer decision may be reasonably read as determining that the student was entitled to compensatory education services due to section 504 violations for both school years at issue; and, further, the district does not argue on appeal that the impartial hearing officer awarded compensatory education relief that was attributable solely to an IDEA violation (see IHO Decision at pp. 38-39). Consequently, I will not disturb the compensatory education relief granted by the impartial hearing officer (see id. at pp. 38-41).

Section 504 Determinations

With regard to the impartial hearing officer's determinations (1) that the recommendation for regular education reading services on December 15, 2008 was inappropriate, (2) that the May 2008 CSE chairperson was obligated to make a referral of the student to the section 504 committee in December 2008, (3) that the district CSE chairperson acted with deliberate indifference to the student and her parents, (4) that the student was entitled to compensatory education services, including the type and amount thereof and (5) of the weight given to the parents' October 2008, private pediatric neuropsychological evaluation, a review of the impartial hearing officer's decision indicates that these determinations are related to the parents' section 504 claims (see IHO Decision at pp. 27-31, 35-36, 38-40, 41). As the parties have alluded, New York State Education Law makes no provision for state-level administrative review of hearing officer decisions in section 504 hearings and a State Review Officer does not review section 504 claims (Application of a Student Suspected of Having a Disability, Appeal No. 08-002; Application of a Child with a Disability, Appeal No. 06-001; Application of a Child with a Disability, Appeal No. 05-111; Application of the Bd. of Educ., Appeal No. 05-108; Application of the Bd. of Educ., Appeal No. 05-033; Application of a Child Suspected of Having a Disability, Appeal No. 03-094; Application of a Child with a Disability, Appeal No. 00-051; Application of a Child with a Disability, Appeal No. 00-010; Application of a Child with a Disability, Appeal No. 99-10). Therefore, as indicated above, I have no jurisdiction to review those portions of the impartial hearing officer's decision regarding these five identified matters; and, accordingly, I will dismiss those portions of the district's appeal (Application of a Student Suspected of Having a Disability, Appeal No. 10-128).

Methodology

I now turn to the district's contention that the impartial hearing officer should not have directed it to place a particular methodology on the student's IEP. The impartial hearing officer correctly held that a CSE is not prohibited from putting a particular methodology on a student's

[11] I note that a board of education may conduct its own evaluations rather than simply accept private evaluations (DuBois v. Connecticut State Bd. of Ed., 727 F.2d 48 [2d Cir. 1984]; Vander Malle v. Ambach, 673 F.2d 49 [2d Cir. 1982]; Reg'l Sch. Dist. No. 9 Bd. of Educ., v. Mr. and Mrs. M, 2009 WL 2514064, at *13 [D. Conn. Aug. 7, 2009]; accord, Rettig v. Kent City Sch. Dist., 720 F.2d 466 [6th Cir. 1983]).

IEP (IHO Decision at p. 40). I note that while there is nothing in the IDEA that requires an IEP to include specific instructional methodologies, whether to include an instructional methodology in a student's IEP is a CSE's decision and therefore, if a CSE determines that specific instructional methods are necessary for the student to receive a FAPE, the instructional methods may be addressed in the IEP (Statement of Special Education and Related Services, 71 Fed. Reg. 46665 [Aug. 14, 2006]). Additionally, I note that the Analysis of Comments accompanying the federal regulations implementing the IDEA also provides that "the final decision about the special education and related services . . . that are to be provided to a [student] must be made by the [student's] IEP team based on the [student's] individual needs" (id.).

In this case, however, at the time the impartial hearing officer issued his decision, the 2010-11 school year had elapsed and there was little point in modifying the 2010-11 school year IEP after it expired. Therefore, the dispute between the parties with respect to whether a particular methodology should have been provided to the student during the 2010-11 school year pursuant to an IEP is no longer "real and live" and the matter has been rendered moot as no meaningful relief can granted (Application of a Student Suspected of having a Disability, Appeal No. 11-044). With regard to whether or not a particular methodology should be placed on the student's IEP for a school year subsequent to the 2010-11 school year, this was not an issue set forth in the parent's due process complaint notice or otherwise properly included in the scope of issues to be decided at the impartial hearing in accordance with applicable regulations (see 20 U.S.C. § 1415[c][2][E][i][II]; [f][3][B]; 34 C.F.R. §§ 300.508[d][3][i], [ii]; 300.511[d]; 8 NYCRR 200.5[i][7][b]; [j][1][ii]; see Application of a Student with a Disability, Appeal No. 11-073; Application of the Bd. of Educ., Appeal No. 10-067; Application of the Bd. of Educ., Appeal No. 10-020). At the time of the impartial hearing this question was premature and was not ripe for review.

Notwithstanding the forgoing, to the extent that the impartial hearing officer directed the CSE to convene to consider placing a methodology on the student's IEP, the district has suffered little if any prejudice because the parents themselves may obtain the same result by making such a request. The district would be still obligated to convene the CSE and provide the parents that opportunity under the IDEA and State regulations and, thereafter, provide prior written notice to explain why the district proposes or refuses to take action (8 NYCRR 200.4[e][4], 200.5[a]). Therefore, since the parents have continued to express such interest in a CSE meeting, I decline to overturn the impartial hearing officer's directive to convene the CSE to consider the parents' request that that a particular reading program be placed on the student's IEP.

Independent Educational Evaluation

Lastly, with regard to the district's assertions that the impartial hearing officer erred in granting reimbursement for the fall 2009 private neuropsychological evaluation because, among other things, the parents did not disagree with evaluations performed by the district; the parents did not give the district the opportunity to ask why they objected to the district's evaluation of the student; and, the hearing officer improperly relied upon the thoroughness of the fall 2009 private neuropsychological evaluation, federal and State regulations provide that, subject to certain limitations, a parent has the right to an 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 a 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 C.F.R. § 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];[12] 8 NYCRR 200.5[g][1][iv]; see, e.g., 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. 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).[13]

Contrary to the district's assertion, I find that the parents disagreed with an August 2008 psychoeducational evaluation that summarized the reading specialist's assessment of the student's spelling skills. Upon review, the hearing record reflects that the parents disagreed with the accuracy and validity of the student's November 2008 spelling reassessment, did not agree that the student's spelling had increased to the 6th grade level, and communicated this disagreement to the district (see Tr. pp. 848-51; Dist. Exs. D1; I1; Parent Ex. V at p. 3; see also Tr. p. 75). Further, although the parents had sought classification of the student pursuant to the IDEA and disagreed with the district's evaluation of the student, the district did not initiate an impartial hearing at that time to challenge the parent's request for an IEE and establish that its evaluation was appropriate.[14] To the extent that the district asserts that the parents failed to explain why they wanted an IEE, I note that the Analysis of Comments accompanying the federal regulations implementing the provisions of an IEE provide that "[i]f a parent requests an independent educational evaluation, the public agency may ask for the parent's reason why he or she objects to the public evaluation.

---

[12] The Analysis of Comments accompanying the federal regulations implementing the provisions for an IEE state that "[a]lthough it is appropriate for a public agency to establish reasonable cost containment criteria applicable to personnel used by the agency, as well as to personnel used by parents, a public agency would need to provide a parent the opportunity to demonstrate that unique circumstances justify selection of an evaluator whose fees fall outside the agency's cost containment criteria" (Independent Educational Evaluation, 71 Fed. Reg. 46689-90 [Aug. 14, 2006]).

[13] I note here that the parents assert that additional factors or considerations are relevant to whether the fall 2009 private neuropsychological evaluation of the student should be provided at public expense. As set out above, whether a parent has a right to an evaluation at public expense is limited to the considerations and factors set forth in applicable law (see 34 C.F.R. § 300.502; 8 NYCRR 200.5[g]).

[14] While the phrase "without unnecessary delay" is not defined in either State or federal regulations, "[i]t permits, however, a reasonably flexible, though normally brief, period of time that could accommodate good faith discussions and negotiations between the parties over the need for, and arrangements for, an IEE" (Letter to Anonymous, 56 IDELR 175 [OSEP 2010]).

However, the public agency may not require the parent to provide an explanation and may not unreasonably delay either providing the independent evaluation at public expense or filing a due process complaint to request a due process hearing to defend the public evaluation" (Independent Educational Evaluation, 71 Fed. Reg. 46791-92 [Aug. 14, 2006]). In view of the foregoing, I will not disturb the impartial hearing officer's decision to grant reimbursement for the IEE.

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

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the portions of the impartial hearing officer's decision dated August 31, 2011 regarding the parents' compensatory education claims under the IDEA are annulled.

Dated: **Albany, New York**
October 28, 2011

JUSTYN P. BATES
STATE REVIEW OFFICER