The University of the State of New York

The State Education Department
State Review Officer
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No. 11-162

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

Appearances:
John J. McGrath, Esq., attorney for petitioner

Hamburger, Maxson, Yaffe, Knauer & McNally, LLP, attorneys for respondent, David H. Pearl, Esq., of counsel

DECISION

Petitioner (the parent) appeals from the decision of an impartial hearing officer which denied her request to be reimbursed for her son's tuition costs at the Kildonan School (Kildonan) for the 2009-10 school year. The appeal must be dismissed.

At the time of the impartial hearing, the student was attending Kildonan in an eighth grade classroom (Tr. p. 943). Kildonan has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (Tr. p. 874; see 8 NYCRR 200.1[d], 200.7). The student's eligibility for special education programs and related services as a student with a learning disability is not in dispute in this appeal (see 34 C.F.R. § 300.9[c][10]; 8 NYCRR 200.1[zz][6]).

Background

According to the parent, her son exhibited difficulty with reading, math, and writing beginning in kindergarten through the third grade while attending the district's elementary school (Tr. pp. 705-10; Dist. Ex. 59 at pp. 2-3).[1] During the 2005-06 school year (third grade), an evaluator reported that the student met the criteria for a diagnosis of an attention deficit

[1] The exhibits submitted by the parent are not consecutively numbered, and the exhibits submitted by the district were consecutively numbered as a whole, rather than individually. References to the exhibits in this decision will be by the order of pages within the individual exhibits.

hyperactivity disorder (ADHD) and in spring 2006, the Committee on Special Education (CSE) determined that he was eligible for special education and related services as a student with an other health-impairment (Tr. pp. 710-11; Dist. Ex. 59 at p. 2). During the 2006-07 school year (fourth grade), the student received special education programs and related services at a district school including the Wilson Reading Program (Wilson) as an instructional strategy (Dist. Ex. 59 at p. 2).[2]

Over three dates between February 28 and March 27, 2007, two private psychologists conducted a psychological evaluation of the student (Dist. Ex. 59). The evaluators administered a battery of assessments measuring the student's cognitive, academic, and behavioral skills; completed interviews with the parent and the student; and reviewed teacher reports and educational records (id. at p. 1). Assessments of the student's cognitive skills indicated that he generally functioned within the average range of intelligence; however, the evaluators reported that significant discrepancies were noted between the student's verbal comprehension index score of 124 and the other three index scores (perceptual reasoning, 92; working memory, 88; processing speed, 88) (id. at pp. 4, 12). Achievement testing yielded broad reading (76) and written language (78) standard scores within the borderline range, indicating specific weaknesses in basic reading skills, reading comprehension, and basic writing skills, as well as a total achievement score in the borderline range (id. at p. 12). The student achieved a broad mathematics (89) standard score within the low average range, with math calculation, math reasoning, and math fluency identified as specific areas of weakness (id. at pp. 5, 9, 12). The evaluators concluded that the student's scores reflected a significant discrepancy between his ability and skill levels, indicating that he met the criteria for learning disorders in the areas of reading, mathematics, and written expression (id. at pp. 12-13).

Results of the teachers' completion of behavior rating scales indicated "a measure of learning problems as within the clinically significant range," which specifically identified the student's difficulty completing tests and keeping up with the class, as well as reading, writing and spelling difficulties (Dist. Ex. 59 at p. 12). The parent's rating of the student's organizational skills resulted in an "organization of materials" score within the clinically significant range (id. at pp. 12-13). The evaluators reported that the evaluative information before them revealed a profile consistent with a diagnosis of an ADHD-predominantly inattentive type (id. at p. 13). Their report contained specific recommendations including that the CSE consider adding specific program modifications and goals related to the student's basic reading, math, writing, and organizational skill deficits to the student's individualized education program (IEP); continuing participation in Wilson instruction, occupational therapy (OT) services, and individual counseling; and that the parents implement organizational strategies with the student at home (id. at p. 14).[3]

On February 28, 2008, a special education teacher administered the Wechsler Individual Achievement Test - Second Edition (WIAT-II) to the student (Dist. Ex. 55 at p. 2). The student achieved the following subtest standard scores (percentile): word reading, 74 (4th); reading

[2] The district's director of special education described Wilson as a "multisensory approach" to reading instruction that focuses on improving decoding skills, designed for students with reading disorders (Tr. pp. 108, 222, 233-34).

[3] The evaluators noted that the student's then-current IEP goals, use of Wilson as an instructional strategy, testing accommodations, and resource room placement were appropriate (Dist. Ex. 59 at pp. 13-14).

comprehension, 107 (68th); pseudoword decoding, 86 (18th); numerical operations, 96 (39th); math reasoning, 95 (37th); and spelling, 77 (6th) (id.).

On April 8, 2008, a subcommittee of the CSE convened for the student's annual review and to develop his IEP for the 2008-09 (sixth grade) school year (Dist. Ex. 53). The CSE recommended continuing the student's inclusion class placement, and also provided for one session per month of OT consultant services; preferential seating; and testing accommodations including small group separate location, tests read, and extended time (id. at pp. 1-2, 4).[4] Beginning in May 2008, the parents obtained one session per week of private reading tutoring services that used the Wilson method (Tr. pp. 611, 628, 696-97).[5]

At the conclusion of fifth grade, the student's report card reflected designations of "2" (working to meet expectations) in mathematics, and the English language arts (ELA) areas of reading and writing (Dist. Ex. 57). The student received designations of "3" (demonstrates consistent, competent performance) in the areas of ELA listening and speaking, science and health, and social studies (id.).

At the commencement of the 2008-09 school year, the student attended the district's middle school in an inclusion class placement with the exception of math, where he was placed in a special class (Tr. pp. 286-87, 495-96; Dist. Exs. 10 at p. 5; 53 at p. 1).[6] The hearing record reflects that the student received reading instruction using the Wilson program from the special education teacher of the inclusion class one to two times per week during his "literacy block" (Tr. pp. 286-87; Dist. Ex. 11). On October 7, 2008, the student's father indicated his disagreement with the April 2008 IEP and requested a CSE meeting (Dist. Ex. 10 at p. 4). On October 14, 2008, the student's father met with the district's director of special education (the director), who encouraged the parents to "urge" the student to attend scheduled extra help sessions, work with his teachers, and read to him at home (Dist. Ex. 43 at p. 1). On October 20, 2008, the student's father met with middle school staff including the student's special education teacher and the middle school special

[4] The April 2008 IEP reflected a recommendation for five 42-minute sessions per day of consultant teacher direct services to be provided to the student in the inclusion classroom (Dist. Ex. 53 at p. 1). A description of this service on the IEP stated "[i]ntegrated class is team-taught in a regular education class by a regular education teacher, a special education teacher or teacher assistant, with collaborative planning" (id.). The sixth grade special education teacher described the student's 2008-09 placement as being in an "inclusion class" (Tr. pp. 286-87).

[5] The student's private reading tutoring services continued through June 2009 (Tr. p. 611).

[6] Although it was not recommended on the 2008-09 IEP, the sixth grade math regular education teacher reported that the student began the school year in the math special class because he exhibited low basic math skills and that because the special class covered the same material as the general education math class but at a slower rate, it would have been easier for the student to succeed in the smaller setting (Tr. p. 497; see Dist. Ex. 53). In a November 10, 2008 letter to the parents, the director stated that the math special class could not have been recommended on the student's April 2008 IEP, as the program was not approved by the Board of Education until May 2008 (Dist. Ex. 44 at p. 2). The hearing record reflects that the district unsuccessfully sought the parents' consent to the change in placement in October 2008 (Dist. Ex. 10 at p. 5).

education department chairperson, regarding his concerns with the student's program (Tr. pp. 286-87, 431; Dist. Ex. 44).[7]

In a letter dated October 29, 2008, the director, in reply to a request from the parents for reimbursement for the privately obtained reading tutoring services using the Wilson program, stated that the parents were incorrect in their belief that the student was no longer receiving instruction using Wilson, and confirmed that the student was receiving "all services outline in his IEP" (Dist. Ex. 43 at p. 1). The director went on to state that the Wilson program was "not a service listed on your child's IEP nor will it be," as it was "one, among several, scientifically researched based instructional strategies" the district employed and the district did "not list specific instructional strategies as services" on an IEP (id.). The director further indicated that the student was in the average range for reading comprehension and intellectual functioning, with "weaknesses in decoding and spelling that will be addressed by . . . the [c]onsultant [t]eacher [d]irect [and] by a variety of instructional strategies including Wilson" (id.).

Toward the end of October or beginning of November 2008, the student exited the math special class and began attending the inclusion math class at the parents' request (Tr. pp. 505-06; Dist. Ex. 10 at pp. 4-5). In a letter dated November 14, 2008, the parents requested that the student receive Wilson instruction five times per week, rather than once, and that he not be pulled out of his literacy class to receive it (Dist. Ex. 41 at pp. 1-2).

On December 16, 2008, a special education teacher administered the WIAT-II to the student (Dist. Ex. 55). The student achieved the following subtest standard scores (percentile): word reading, 75 (5th); reading comprehension, 104 (61st); pseudoword decoding, 89 (23rd); numerical operations, 89 (23rd); math reasoning, 98 (45th); and spelling, 73 (4th) (id. at p. 1).

On April 21, 2009 the CSE convened for the student's annual review and to develop his 2009-10 IEP (Dist. Ex. 49). Comments contained in the resultant IEP indicated that the CSE reviewed the student's report card and grades, and the results of academic testing in making its recommendations (id.). For the 2009-10 school year, the CSE recommended that the student continue his placement in the consultant teacher direct program, in conjunction with 15:1 "Learning Lab" classes for study skills and ELA (id.). Following a discussion of the program modifications, testing accommodations and annual goals, the CSE added a copy of class notes, use of a word processor, and assistive technology consultation services to the student's IEP (compare Dist. Ex. 49 at pp. 2, 4, with Dist. Ex. 53 at pp. 1-2). The IEP indicates that the student's father was in agreement with the recommendations (Dist. Exs. 49 at p. 4; 50).

By letter dated July 10, 2009, the student's father requested that the district fund a neuropsychological independent educational evaluation (IEE) by a specific private provider because of the father's "disagreement with the evaluations performed by school district personnel and which were used to develop [the student's IEP] and special education program" (Dist. Ex. 16).[8]

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[7] The hearing record reflects that the parents requested and cancelled numerous CSE meetings throughout the 2008-09 school year (Dist. Exs. 22; 32; 33; 35; 41 at p. 2; 43 at p. 2; 45).

[8] On July 13 and September 2, 2009, the private neuropsychologist conducted a neuropsychological evaluation of the student (Tr. p. 1070; Parent Ex. J). The parent testified that the resultant report was not provided to the district (Tr. pp. 705, 771-73).

In a letter to the student's father dated July 21, 2009, the director replied that the district had not conducted a neuropsychological evaluation of the student, nor had it relied on one in developing the April 2009 IEP (Dist. Ex. 17). She further indicated that the father had agreed with the recommendations made on the April 2009 IEP by signing the IEP (id.). Furthermore, the director opined that, as the district had not conducted a neuropsychological evaluation, the parents were not entitled to one at district expense (id.). The director further stated that "[i]f you disagree with this determination, you may exercise your Due Process Rights as set forth in the Procedural Safeguards Notice, a copy of which is enclosed" (id.).

By letter dated August 26, 2009, the parents provided the district with notice that they intended "to unilaterally place [the student] in a private school no sooner than September 10, 2009" (Dist. Ex. 28). The student attended Kildonan during the 2009-10 school year, where he received instruction in courses such as mathematics, literature, history, and science, as well as daily 1:1 sessions of "language training" using the Orton-Gillingham method (Tr. p. 836; Parent Exs. M-S).

Due Process Complaint Notice

In a due process complaint notice dated June 15, 2010, the parents requested an impartial hearing (Dist. Ex. 1 at p. 2). The parents contended that the district had denied the student a free appropriate public education (FAPE) since kindergarten and detailed the district's alleged failures to fulfill its obligation to recognize and address the student's weaknesses, specifically with regard to reading comprehension, decoding, writing, mathematics, organizational and attentional skills, and social/emotional performance (id. at pp. 2-38).

With respect to the June 2007 IEP developed for the student's fifth grade (2007-08) school year, the parents asserted that the recommended special education programs and related services were "stated vaguely and insufficiently detailed;" the district ignored recommendations by professionals who had evaluated the student; the IEP was "internally inconsistent;" the present levels of performance as stated in the IEP did not fully and accurately describe the student; the goals were vague and incapable of objective measurement; and the district improperly failed to find the student to be eligible for extended school year (ESY) services (Dist. Ex. 1 at pp. 27-28). With respect to the April 2008 IEP developed for the student's sixth grade (2008-09) school year, the parents asserted that it was deficient for the same reasons that the June 2007 IEP was deficient, and further asserted that the April 2008 IEP, which was to be implemented in the district's middle school, could not offer the student a FAPE (id. at pp. 29-30).[9] With respect to the April 2009 IEP developed for the student's seventh grade (2009-10) school year, the parents asserted that the district failed to offer the student a FAPE by not recommending ESY services; by recommending an integrated classroom placement that was inappropriate for the student because it did not lead to progress in sixth grade and failed to comport with State regulations; by failing to conduct an assistive technology evaluation or specify assistive technology goals on the IEP; by failing to sufficiently specify the student's present levels of performance; and by recommending goals that did not relate to the student's identified areas of need or were vague and incapable of being

[9] The due process complaint notice refers to the 2006-07 school year as the student's fourth grade year (Dist. Ex. 1 at p. 25) and 2007-08 as his fifth grade year (id. at pp. 27-28), but then erroneously refers to the 2007-08 school year as the student's sixth grade year (id. at p. 30). Based on the hearing record, references in this decision to the student's sixth grade year refer to the 2008-09 school year, references to the student's seventh grade year refer to the 2009-10 school year, and so on.

objectively measured (id. at pp. 34-36). The parents also contended that the district improperly denied their request for an independent neuropsychological evaluation and failed to initiate an impartial hearing to defend its evaluations (id. at pp. 37-38). For relief, the parents requested reimbursement for the neuropsychological IEE, private tutoring costs, and "all costs" associated with the parents' unilateral placement of the student at Kildonan for the 2009-10 school year, including costs incurred by the parents in order to visit the student (id. at pp. 38-39).

On June 21, 2010, the district challenged the sufficiency of the parents' due process complaint notice, alleging that it was insufficient for "cover[ing] a period beyond that allowed under 8 NYCRR Section 200.5 (j)[,] fail[ing] to specifically describe the nature of the problem and fail[ing] to provide a specific resolution" (Dist. Ex. 7).

In a response to the parents' due process complaint notice, dated June 23, 2010, the district asserted that the April 2009 CSE was properly composed and that the April 2009 IEP offered the student a FAPE for the 2009-10 school year (Dist. Ex. 6 at p. 2). Additionally, the district contended that the parents agreed with the recommendations made by the CSE and did not state any dissatisfaction with the April 2009 IEP prior to withdrawing the student from the district and unilaterally enrolling him in a private school (id. at pp. 2, 5). Specifically, the district asserted that the April 2009 CSE considered the April 2007 psychological evaluation and made recommendations based in part on that evaluation; an assistive technology evaluation was not necessary because of motor skills testing results and the district provided the student with an assistive technology consult to enable him to adjust to the recommended word processor; and program modifications and testing accommodations were recommended as necessary (id. at p. 3). The district contended that the April 2009 IEP was based on sufficient evaluative information, including career assessment reports, parent reports, teacher reports, an OT progress report summary, and a December 2008 educational evaluation (id. at pp. 4-5). The district also asserted that the student had made progress, as measured by State assessments (id. at p. 3). The district further asserted that the CSE considered a general education setting as well as the programs recommended on the IEP and that it considered the provision of ESY services, but that there was no evidence of substantial regression (id. at p. 4). With respect to the parents' request for an IEE, the district argued that the parents never requested that the district conduct a neuropsychological evaluation and that it had not conducted a neuropsychological evaluation with which the parents could disagree (id. at p. 5).

In a decision dated June 30, 2010, the impartial hearing officer found the due process complaint notice to sufficiently describe the nature of the problem and a proposed resolution, and noted that raising claims in a due process complaint notice beyond the period permitted by law is not a reason for a declaration of insufficiency (Dist. Ex. 9 at p. 2).

Impartial Hearing Officer Decision

An impartial hearing was convened on November 5, 2010, and concluded on August 9,

2011, after seven days of proceedings.[10]

In a decision dated October 31, 2011, the impartial hearing officer noted that the parents were seeking reimbursement for private tutoring services provided to the student during the 2008-09 school year, reimbursement for the student's tuition costs at Kildonan for the 2009-10 school year, and reimbursement for an IEE (IHO Decision at p. 1). The impartial hearing officer found that the district had sustained its burden of establishing that it offered the student a FAPE for the 2008-09 and 2009-10 school years (id. at p. 26). Specifically, the impartial hearing officer noted that district's and parent's witnesses agreed that the student made "slow but steady" progress, and that he made some improvement during the first part of sixth grade (id.). The impartial hearing officer also found that the increase in the student's scores on State assessment exams indicated progress (id. at p. 27). With respect to the 2009-10 school year, the impartial hearing officer found that the April 2009 IEP "specifically addressed the child's several deficits and the recommendations made [in a 2007 psychological evaluation report], adding testing accommodations and program modifications . . . special class learning lab to address deficits in reading, writing and spelling, and special class learning lab for study skills to address organizational skill development and test taking strategies" (id.). She further found that the goals contained in the April 2009 IEP "address[ed] his primary deficits in study skills and decoding, as well as writing, spelling, and math skills" (id.). The impartial hearing officer found that "there was no evidence that [the student] would be able to make any better progress . . . with a different program or services" (id. at p. 28). The impartial hearing officer noted that the student's father indicated his agreement with the April 2009 IEP at the time of the CSE meeting, and did not subsequently inform the district of his disagreement (id.). Finally, the impartial hearing officer found that the student's difficulties toward the end of the 2008-09 school year and the subsequent neuropsychological evaluation were not relevant to the appropriateness of the April 2009 IEP (id.).

Despite finding that the district had provided an appropriate program for the 2008-09 and 2009-10 school years, the impartial hearing officer went on to find that the parent had not established that the private tutoring she obtained and her unilateral placement of the student at Kildonan were appropriate to meet the student's needs (IHO Decision at pp. 29-34). She further

[10] The impartial hearing officer is commended for documenting the reasons for each extension granted in the hearing record (IHO Ex. I at pp. 1-14; see 8 NYCRR 200.5[j][5][i], [iv]). However, the impartial hearing officer on several occasions stated that she had "a continuing request for an extension of time for decision in this matter from both parties" (Tr. pp. 145, 343, 783-84, 995, 1103), and expressly stated on one occasion that she had already determined to grant multiple extensions to accommodate the hearing schedule (Tr. pp. 343-44), in violation of State regulation (8 NYCRR 200.5[j][5][i]; see 34 C.F.R. § 300.515). Furthermore, after granting an extension of time on the final hearing date (IHO Ex. I at p. 13) to accommodate a posthearing submission date of September 23, 2011 (Tr. p. 1102), the hearing record indicates that the impartial hearing officer granted a subsequent extension of time (IHO Decision at p. 2; IHO Ex. I at p. 14). It is unclear from the hearing record when the parties submitted their posthearing memoranda, or why the parties required more than six weeks to submit them, and State regulation requires that when extensions of time to render a decision have been granted, the decision must be rendered no later than 14 days from the date of the record closure (8 NYCRR 200.5[j][5]; see "Changes in the Impartial Hearing Reporting System," Office of Special Education [Aug. 2011], available at http://www.p12.nysed.gov/specialed/dueprocess/ChangesinIHRS-aug2011.pdf). I remind the impartial hearing officer that it is her obligation to ensure compliance with the timeline for issuing a decision (Application of a Student with a Disability, Appeal No. 11-115; Application of the Dep't of Educ., Appeal No. 11-095). In addition, the parties' posthearing memoranda do not appear in the hearing record, and I remind the impartial hearing officer that State regulations require her to identify (i.e. mark) and enter into the hearing record "all other items" she considers (8 NYCRR 200.5[j][5][v]; see 8 NYCRR 200.5[j][3][xii]).

found that equitable considerations weighed against an award for the costs of privately obtained tutoring, but did not weigh against reimbursement for the student's tuition at Kildonan, although she found that the parent would not have been entitled to reimbursement for the portion of tuition related to the residential component (id. at pp. 33 n.4, 35-36). With respect to the parents' request for an IEE, the impartial hearing officer found that while the parents stated their disagreement in general with evaluations conducted by the district, the only evaluation comparable to a neuropsychological evaluation—the 2007 psychological evaluation—was also privately obtained, such that there was no comparable evaluation conducted by the district on which the parents' request could be based (id. at p. 37). Accordingly, she denied the parents' request for reimbursement of the IEE (id.).

Appeal for State-Level Review

The parent appeals, contending that the impartial hearing officer erred in finding that the district offered the student a FAPE for the 2008-09 and 2009-10 school years and denying her requests for reimbursement.[11] Procedurally, the parent acknowledges that the notice of intention to seek review was not timely served upon the district, but argues that as the petition was timely served, her failure to timely serve the notice of intention to seek review should be excused. Substantively, the parent contends that the impartial hearing officer's determination that the student made progress during the 2008-09 school year was not supported by the evidence presented at the impartial hearing. The parent also asserts that even if the student had made progress, he was sufficiently below State standards to the extent that the IEPs were not appropriate.[12] The parent further argues that the student's IEPs failed to acknowledge his organizational difficulties and failed to address these difficulties through appropriate goals. The parent also contends that while the April 2009 IEP incorporated recommendations from the 2007 private psychological evaluation, the April 2008 IEP did not; accordingly, the parent argues that the April 2008 IEP was insufficient to meet the student's needs.[13] In addition, the parent argues that the impartial hearing officer improperly failed to consider the student's academic difficulties at the end of the 2008-09 school year or the private neuropsychological evaluation when determining whether the April 2009 IEP was appropriate.

With respect to the appropriateness of the unilateral placement of the student at Kildonan, the parent argues that the impartial hearing officer erred in finding Kildonan to be inappropriate because of the methodology it used to address the student's reading deficits; the fact that the student's teachers and Kildonan were not State-certified; or because of the student's behavioral difficulties at Kildonan. With respect to the request for reimbursement for the IEE obtained by the parents, the parent argues that the district had conducted evaluations with which the parents disagreed, a neuropsychological evaluation was appropriate, and the impartial hearing officer

[11] The petition refers to 2008-09 as the student's fifth grade year, 2009-10 as his sixth grade year, and 2010-11 as his seventh grade year. As noted above, 2008-09 was the student's sixth grade year.

[12] Many of the allegations contained in the petition are not directed with specificity at either the April 2008 or April 2009 IEP.

[13] The petition refers to the student's fifth and sixth grade IEPs, rather than the April 2008 and April 2009 IEPs. In context, and referencing the cited portions of the hearing record, it appears that the allegations are raised with respect to the IEPs at issue in this hearing.

failed to address the district's failure to initiate an impartial hearing as required by State regulation. For relief, the parent requests tuition reimbursement for Kildonan, reimbursement for tutoring costs, and reimbursement for the IEE.

In an answer, the district responds with general admissions and denials to the parent's material allegations in the petition. In addition, the district asserts that: (1) the notice of intention to seek review was untimely served; (2) the notice of intention to seek review was not served 10 days before service of the petition; (3) the petition was not endorsed with counsel for the parent's address and telephone number; (4) the petition was not timely served; (5) the petition did not contain sufficient evidentiary affidavits to allow a State Review Officer to exercise his or her discretion to excuse petitioner's failure to timely serve the petition; and (6) the impartial hearing officer erred in finding that equitable considerations would not weigh against reimbursing the parent for the student's Kildonan tuition, if the district had not offered the student a FAPE for the 2009-10 school year and Kildonan was an appropriate unilateral placement. The district attaches additional evidence to its answer.

In a reply, the parent asserts that: (1) although the notice of intention to seek review was untimely, it is timely service of the petition that governs whether an appeal is timely; (2) the failure to properly endorse the petition with counsel for the parent's address and telephone number should be excused; (3) the district's contention that a State Review Officer does not have discretion to excuse the failure to comply with practice requirements is inaccurate; and (4) the additional evidence submitted by the district in support of its contention that the petition was untimely should not be considered, the postmark on the envelope containing the impartial hearing officer's decision is dispositive with regard to when the decision was mailed, and the petition was timely served.[14] The parent attaches additional evidence to her reply.

Discussion

Preliminary Procedural Matters

First, I will address the district's arguments regarding the service of the notice of intention to seek review. A parent who seeks review of an impartial hearing officer's decision by a State Review Officer shall serve upon the school district a notice of intention to seek review (8 NYCRR 279.2[a]). The notice of intention to seek review must be personally served upon the school district not less then 10 days before service of a copy of the petition for review upon such school district, and within 25 days from the date of the decision sought to be reviewed (8 NYCRR 279.2[b]). If the decision has been served by mail upon petitioner, the date of mailing and the four days subsequent thereto shall be excluded in computing the 25-day period (id.). The impartial hearing officer's decision was dated October 31, 2011 (IHO Decision at p. 38). Accordingly, the notice of intention to seek review should have been served by November 29, 2011 (8 NYCRR 279.2[b]). The affirmation of service indicates that the notice of intention to seek review was personally served on the district on December 6, 2011; therefore, it was untimely. The notice of intention to seek review serves the purpose of facilitating the timely filing of the hearing record by the district with the Office of State Review (Application of a Student with a Disability, Appeal No. 10-038;

[14] I note that the parent's reply was not verified and, therefore, does not comply with State regulations (see 8 NYCRR 279.7).

Application of a Child with a Disability, Appeal No. 04-018). Both the hearing record and the answer to the petition in this matter were received by the Office of State Review in a timely manner and I accordingly decline to dismiss this appeal on this ground (Application of a Student with a Disability, Appeal No. 10-096; Application of a Child with a Disability, Appeal No. 07-123; Application of a Child with a Disability, Appeal No. 04-014; Application of a Child with a Disability, Appeal No. 02-009; Application of a Child with a Disability, Appeal No. 98-21). In any event, it is the service of the petition, not the notice of intention to seek review, that determines whether an appeal is timely initiated (see Keramaty v. Arlington Cent. Sch. Dist., 05 Civ. 0006 [S.D.N.Y. Jan. 24, 2006]; Application of a Student with a Disability, Appeal No. 08-031).

Regarding the district's argument that the petition was not endorsed with counsel for the parent's address and telephone number, State regulations provide that all pleadings and papers must be endorsed with the name, post office address, and telephone number of the party submitting the same (8 NYCRR 275.4[a]). Documents that fail to comply with these requirements may be rejected in the discretion of a State Review Officer (8 NYCRR 279.8[a]). The petition in this case is not endorsed with the post office address and telephone number of counsel for the parent. I note, however, that the notice of intention to seek review, which was personally served on the district, contains the post office address and telephone number of counsel for the parent. Absent any demonstrated prejudice to the district—which, as noted above, was able to timely serve the hearing record and a responsive answer to the petition—I decline to dismiss the appeal on this ground (see Application of a Child with a Disability, Appeal No. 07-133).[15, 16]

Timeliness of the Appeal

The district also asserts that the petition was untimely served. 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

[15] I reject the contention in the reply that this allegation was "not properly pleaded" because the district did not "repeat and re-allege" the facts stated earlier in the answer.

[16] Regarding the district's contention that a State Review Officer is without the discretion to excuse the failure to comply with regulations governing practice before the Office of State Review, the district supports this argument by citation to civil cases involving application of the CPLR's provisions relating to reopening of default judgments. However, the relevant State regulations provide that a State Review Officer "in his or her sole discretion, may excuse a failure to timely serve or file a petition for review within the time specified for good cause shown" (8 NYCRR 279.13). The district has pointed to no authority restricting this discretion, or provided an argument to support importing provisions of the CPLR into the impartial hearing appeals process.

279.2[b], [c]). 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]).

In this case, the parent failed to timely initiate the instant appeal and failed to include good cause to excuse the failure to timely initiate the appeal in the petition. The impartial hearing officer's decision is dated October 31. 2011 (IHO Decision at p. 38).[17] Although there is generally a presumption that the date of mailing is the day after the date of the decision (see Application of a Student with a Disability, Appeal No. 11-117), here the district has submitted proof that the date of mailing and the date of decision were the same (Answer Ex. A at p. 2).[18] Although the parent objects to consideration of the additional evidence submitted by the district, she does not contend that the e-mail was not received by her counsel and I accept it as necessary to my decision. Furthermore, while the parent argues that the date the envelope containing the impartial hearing

[17] The impartial hearing officer's decision included the required statement advising the parent and the district of their rights to seek review of the decision by a State Review Office and, further, provided notice of the time requirements for filing an appeal in bold text under the caption "PLEASE TAKE NOTICE," which was also in bold text and underlined (IHO Decision at p. 38; see 8 NYCRR 200.5[j][5][v]).

[18] This proof consists of an exhibit submitted by the district with its answer indicating that the impartial hearing officer by e-mail dated December 6, 2011, informed counsel for the district and counsel for the parent that the decision was mailed on October 31, 2011 (Answer Ex. A at p. 2). Accordingly, it appears that counsel for the parent was aware several days prior to the day the petition was due to be served that the impartial hearing officer had mailed the decision on October 31, 2011.

officer's decision was postmarked should control for purposes of determining the date of mailing, and submits as additional evidence a copy of the envelope bearing a postmark date of November 1, 2011, I note that pleadings are considered mailed as of the date they are deposited in a postpaid properly addressed wrapper in a post office or official post office depository, and I see no reason to depart from the general rule with regard to an impartial hearing officer's decision (see 8 NYCRR 275.8[b]; Application of a Student with a Disability, Appeal No. 09-122; Application of a Child with a Handicapping Condition, Appeal No. 92-33). Accordingly, in calculating the 35-day period in which the petition was required to be personally served from the impartial hearing officer decision dated October 31, 2011, and excluding the date of mailing and the four days subsequent thereto, the parent had until December 9, 2011 to timely serve the petition upon the district (8 NYCRR 279.2[b]). The parent admits that the petition was personally served on the district on December 12, 2011 and therefore the petition was untimely served in violation of State regulations (see 8 NYCRR 279.2[b]). The petition does not acknowledge that it was untimely served or set forth good cause for the delay (8 NYCRR 279.13). I further find that the cause stated for the delay in serving the notice of intention to seek review does not constitute good cause for failure to timely serve the petition (id.).

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 for reimbursement for tutoring costs incurred during the 2008-09 school year and reimbursement for the student's tuition at Kildonan for the 2009-10 school year, are without merit.

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]-[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 IDEA directs that, in general, an impartial hearing officer's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 130 [2d Cir. 1998]; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs (34 C.F.R. § 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. Dep't of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008]), establishes annual goals related to those needs (34 C.F.R. § 300.320[a][2]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (34 C.F.R. § 300.320[a][4]; 8 NYCRR

200.4[d][2][v]; see Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 C.F.R. § 300.148).

The 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]).

2008-09 School Year

Because the parent did not appeal the impartial hearing officer's determinations that the private tutoring services obtained for the student during the 2008-09 school year were not appropriate for the student and that equitable considerations weighed against reimbursement for such services, those determinations are final and binding on the parties and no relief can be granted (34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[j][5][v]). Accordingly, I decline to address whether the April 2008 IEP offered the student a FAPE.[19]

2009-10 School Year

The impartial hearing officer determined that the April 2009 IEP offered the student a FAPE (IHO Decision at pp. 27-28). The parent appeals and argues that the student did not make the amount of progress during the 2008-09 school year that the district asserts, that the impartial hearing officer's reliance on the district witnesses' testimony to that effect was misplaced, and that the IEP did not appropriately address the student's organizational needs. As described below, the impartial hearing officer's finding is supported by the hearing record.

Attendees at the April 2009 CSE meeting included the director who acted as the CSE chairperson, a school psychologist, the special education department chairperson, a guidance counselor, a special education teacher, a regular education teacher, the student's father, and an additional parent member (Tr. pp. 95-97; Dist. Ex. 49 at p. 4). The hearing record reflects that the CSE reviewed the student's report card; the results of the April 2007 psychological evaluation,

[19] As noted above, the petition is exceedingly vague with respect to the manner in which the April 2008 IEP failed to offer the student a FAPE. To the extent that challenges are raised regarding the April 2008 IEP, my review of the hearing record reveals no reason to disturb the impartial hearing officer's determination that the district offered the student a FAPE for the 2008-09 school year.

December 2008 WIAT-II administration and State assessments; parent and teacher oral reports and observations; and the January 2009 OT progress summary report (Tr. pp. 98-99, 103, 187-88; Dist. Ex. 49 at p. 4). According to the CSE meeting information contained in the resultant IEP, the teachers reported that the student exhibited difficulty with writing, essay composition, spelling, and organization (Dist. Ex. 49 at p. 4). The CSE's review of the OT progress summary report indicated that the student had achieved all of his goals and no longer required OT consult services (Dist. Exs. 48; 49 at p. 4).

The present levels of academic achievement and functional performance contained in the April 2009 IEP described the student's rate of progress as "slow," and "below average," his mathematical operation/application and written expression skills as below grade level, and that he exhibited poor decoding and comprehension skills (Dist. Ex. 49 at p. 3). The present levels of performance further indicated that the student needed to demonstrate grade appropriate organization and study skills, the ability to write sufficient details, and the proper use of writing mechanics; develop mathematical application skills; and improve spelling, written expression, decoding, and comprehension skills (id.). The IEP stated that the student's social and emotional skills and physical levels and abilities were within age appropriate expectations (id. at pp. 3-4).

Although she did not attend the April 2009 CSE meeting, the student's sixth grade special education teacher testified that she was responsible for the development of the April 2009 IEP annual goals for the CSE's consideration (Tr. pp. 286-87, 1051-16, 1031-33). The IEP contains annual goals for the student in the areas of study skills, reading, writing, and mathematics (Dist. Ex. 49 at pp. 4-7). The special education teacher testified that she became aware of the student's specific organizational needs while working with him during the 2008-09 school year, and she modified the study skill goals contained in the 2009-10 IEP accordingly (Tr. pp. 1059-61). Study/organizational skills identified for improvement included the student's ability to identify and bring the necessary supplies to school; record all homework in a planner/assignment book; turn in homework assignments on time; self-check all school work for completeness, accuracy and writing errors; appropriately maintain a notebook with divisions for various subjects; and apply the test taking strategy of systematically narrowing choices (Dist. Ex. 49 at pp. 4-5). In mathematics, the IEP annual goals addressed the student's need to improve his ability to solve algebraic and multistep word problems (id. at p. 7).

To develop the student's annual reading goals, the special education teacher stated that she looked at all of the gains the student had made during the course of the 2008-09 school year and how the student was performing (Tr. pp. 1016-17). She testified that at the beginning of the 2008-09 school year, the student exhibited "some progress" toward his IEP reading goals and by the conclusion of that school year, he was "progressing satisfactorily" toward the same goals; information she took into account when developing the 2009-10 reading goals (Tr. pp. 292-94, 1019-20; Dist. Ex. 12 at p. 2). The special education teacher and the director reviewed the 2009-10 IEP reading goals during the impartial hearing and testified that the goals were sufficient given the student's level of need (Tr. pp. 227-29, 1032-33). The special education teacher further testified that the reading goals were related to the student's writing goals to address both decoding and spelling needs (Tr. p. 1017). The 2009-10 IEP reading goals addressed the student's need to improve his ability to orally identify word attack skills regarding consonants and digraphs, pronounce, and read words from a list; listen to a teacher presented story and answer comprehension questions; and answer comprehension questions and distinguish between relevant and non-relevant material following a reading of factual material (Dist. Ex. 49 at p. 6). The

student's writing goals focused on improving the student's ability to identify errors and correctly spell words; review written work and self-correct grammar errors; and use specified pre-writing strategies to prepare a logical, sequential, four paragraph composition including topic sentences and supporting details (id.).

For the 2009-10 school year, the April 2009 CSE recommended four daily sessions of consultant teacher direct services in the classroom, and 15:1 special class learning labs in ELA and study skills on alternating days (Dist. Ex. 49 at p. 1). The director testified that the addition of the special class learning labs to the student's 2009-10 IEP were to target skill development in reading, writing, spelling, organization, and test taking (Tr. pp. 100-01, 226, 236). The IEP also provided the student with preferential seating, a copy of class notes, and use of a word processor throughout the school day in all academic classes, as well as six assistive technology consult sessions to be provided between September 2, and October 30, 2009, to instruct the student in using the word processor (Dist. Ex. 49 at p. 2). Testing accommodations provided for in the IEP included administration of tests in small group in a separate location, tests read, extended time, and use of a word processor (id.). As the impartial hearing officer noted, many of the IEP program modifications and testing accommodations were recommended by the private evaluators in April 2007 (Tr. pp. 137-44; compare Dist. Ex. 49 at pp. 1-2, with Dist. Ex. 59 at pp. 13-14; see IHO Decision at p. 27).[20]

Upon a full review of the hearing record, I find that the April 2009 CSE addressed the student's academic and organizational needs through appropriate measurable annual goals, program modifications, and testing accommodations listed in the April 2009 IEP, in conjunction with four daily sessions of consultant teacher direct services, and a daily special class session specifically targeting either the student's reading, writing and spelling, or organizational deficits. Based upon a careful review of the evidence contained in the hearing record, I conclude that the April 2009 IEP proposed for the 2009-10 school year was reasonably calculated to enable the student to receive educational benefits in the LRE and that the student was offered a FAPE (see Rowley, 458 U.S. at 206-07; Cerra, 427 F.3d at 192).

Independent Educational Evaluation

Given my decision that the parent's petition is untimely, I decline to review the impartial hearing officer's decision regarding reimbursement of an IEE. However, I note that it is well established that "[t]he core of the [IDEA] is the cooperative process that it establishes between parents and schools" (Schaffer v. Weast, 546 U.S. 49, 53 [2005]). In accord with the IDEA's general requirement that parents participate in determining the educational placement of their children (see 20 U.S.C. §§ 1414[e]; 1415[b][1]; 34 C.F.R. §§ 300.116, 300.327, 300.501[c]; see also Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 368 [1985] ["the Act emphasizes the participation of the parents in developing the child's educational program and assessing its effectiveness"]; Bd. of Educ. v. Rowley, 458 U.S. 176, 182 n.6 [1982] [Congress sought "to maximize parental involvement in the education of each handicapped child"]), districts are

[20] I note that the IEP indicated that at the April 2009 CSE meeting the student's father was "in attendance and was in agreement with the recommendations," and the director did not receive any indication prior to the parents' notice of removal that the student would not be attending a district school for the 2009-10 school year (Tr. pp. 103-04; Dist. Exs. 28; 49 at p. 4; 50).

specifically required to permit parents to participate in the evaluation process, including considering information provided by the parent about the student (see 34 C.F.R. § 300.304[b][1]).

One component of parental participation rights is the right to obtain an IEE (see 20 U.S.C. § 1415[b][1]; 34 C.F.R. § 300.502; 8 NYCRR 200.5[g]). Federal regulations define an IEE as "an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question" (34 C.F.R. § 300.502[a][3][i]; see 8 NYCRR 200.1[z]). An evaluation is defined in federal regulations as the "procedures used in accordance with [34 C.F.R.] §§ 300.304 through 300.311 to determine whether a child has a disability and the nature and extent of the special education and related services that the child needs" (34 C.F.R. § 300.15; see 8 NYCRR 200.11[aa] [defining "individual evaluation" as those "procedures, tests or assessments used selectively with an individual student, . . . and other appropriate assessments or evaluations as may be necessary to determine whether a student has a disability and the extent of his/her special education needs, but does not include basic tests administered to, or procedures used with, all students in a school grade or class."]). An evaluator is required to review existing evaluative data and identify what further data is necessary to determine the student's educational and developmental needs for special education and related services (34 C.F.R. § 300.305[a]; see 8 NYCRR 200.4[b][5]). If further data is necessary, the evaluator is required to gather relevant information about the student to make such a determination of the student's needs (34 C.F.R. § 300.304[b][1]; see Educ. Law § 4402[3][a]). In gathering such information, the evaluator is required to use multiple assessments to determine the scope of the student's needs and assess the student in all areas of disability in a sufficiently comprehensive manner "to identify all of the student's special education and related services needs" (34 C.F.R. § 300.304[b][2]; [c][4], [6]; see 34 C.F.R. § 300.306[c][1]; 8 NYCRR 200.4[b][6]).

In addition to the generalized right to an IEE, parents have the right to have an IEE conducted at public expense if the parent disagrees with an evaluation conducted by the district and requests that one be conducted at public expense, or if an impartial hearing officer requests that one be conducted as part of a hearing on a due process complaint notice (34 C.F.R § 300.502[b]; 8 NYCRR 200.5[g][1], [2]). If a parent requests an IEE at public expense, the school district must, without unnecessary delay, ensure that either an IEE is provided at public expense or initiate an impartial hearing to show that its evaluation is appropriate or that the evaluation obtained by the parent does not meet the school district criteria (34 C.F.R. § 300.502[b][2][i]-[ii]; 8 NYCRR 200.5[g][1][iv]; see, e.g., 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]; R.L. v. Plainville Bd. of Educ., 363 F. Supp. 2d. 222, 234-35 [D. Conn. 2005]; Application of the Bd. of Educ., Appeal No. 09-109; Application of a Student with a Disability, Appeal No. 08-101; (see also Letter to Anonymous, 56 IDELR 175 [OSEP 2010] [stating that the phrase "without unnecessary delay" permits school districts " 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"]). 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).

The United States Department of Education (DOE), in its Analysis of Comments and Changes to the federal regulations, has noted that as "the purpose of an evaluation under the Act

is to determine . . . the educational needs of the child[, i]t would be inconsistent with the Act for a public agency to limit the scope of an IEE in a way that would prevent an independent evaluator from fulfilling these purposes" (Independent Educational Evaluation, 71 Fed. Reg. 46,690 [Aug. 14, 2006]).

Conclusion

Although the petition was untimely, I would in any event decline to disturb the impartial hearing officer's decision. I have conducted an independent review of the impartial hearing and, on due consideration, find that it comported with the requirements of due process (34 C.F.R. § 300.514[b][2][ii]; see Educ. Law § 4404[2]). I have considered the parties' remaining contentions and find them to be without merit.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
January 17, 2012

_____
STEPHANIE DEYOE
STATE REVIEW OFFICER