The University of the State of New York

The State Education Department
State Review Officer

No. 07-123

Application of a CHILD WITH A DISABILITY, by his parent, for review of a determination of a hearing officer relating to the provision of educational services by the McGraw Central School District

Appearances:
Law Office of Andrew K. Cuddy, attorney for petitioner, Andrew K. Cuddy, Esq. and Jason H. Sterne, Esq., of counsel

Hogan, Sarzynski, Lynch, Surowka & DeWind, LLP, attorney for respondent, Edward Sarzynski, Esq., of counsel

DECISION

Petitioner appeals from a decision of an impartial hearing officer which determined that claims pertaining to the educational program formulated by respondent's Committee on Special Education (CSE) for his son for the 2006-07 school year were moot, that the claim for a psychoeducational evaluation was also moot, and which declined to award compensatory additional services, but did order respondent to conduct a functional behavioral assessment (FBA) and develop a behavioral intervention plan (BIP). The appeal must be sustained in part.

When the impartial hearing commenced on June 22, 2007, petitioner's son was attending eighth grade at respondent's junior/senior high school where he received 12:1+1 special class-integrated and direct consultant teacher services in the regular education setting for math and science (Tr. pp. 47, 274-75; Dist. Exs. 16 at p. 1; 54 at p. 5). The student has deficits in the areas of written expression and social/emotional skills (Dist. Exs. 6 at p. 5; 7 at p. 1). The student's eligibility for special education services and classification as a student having a learning disability (Dist. Ex. 54 at p. 1; see 34 C.F.R. § 300.8[c][10]; 8 NYCRR 200.1[zz][6]) are not in dispute in this appeal.

Preliminarily, I will address a procedural issue raised by respondent in its answer to the petition. Respondent asserts that petitioner's Notice of Intention to Seek Review was neither timely nor properly served (8 NYCRR 279.2[b]). Petitioner did not file a Reply (8 NYCRR 279.6) to

respondent's procedural defense, however, the hearing record in this matter was received by the Office of State Review in a timely manner and I decline to dismiss the appeal (see Application of a Child with a Disability, Appeal No. 05-106; Application of a Child with a Disability, Appeal No. 04-018). I do caution petitioner's counsel to comply in the future with the requirements of the Regulations of the Commissioner Part 279.

A review of the hearing record shows that the student was initially classified as speech impaired by a CSE in a prior school district during the 2000-01 school year, when he was in the second grade after having repeated the first grade (Dist. Ex. 4 at p. 1). Shortly thereafter, the student moved out of the prior school district and was declassified, returning to the prior school district approximately one year later when he was in the third grade (id.). In the fourth grade, due to teacher concerns regarding his academic deficits, the student was again referred to the CSE in the prior school district (id.). Following cognitive and achievement testing, the prior school district's CSE found the student eligible for special education programs and services as a student with a learning disability and recommended that he receive resource room support services (id. at pp. 2-4).

Administration of the Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV) in March 2005 yielded a verbal comprehension score of 79, a perceptual reasoning score of 82, a working memory score of 91, a processing speed score of 80 and a full scale IQ score of 78, indicating that the student was functioning in the borderline range of intelligence (Dist. Ex. 14 at pp. 2-3).[1] The evaluator also administered the Wechsler Individual Achievement Test – Second Edition (WIAT-II) which yielded composite scores in the low average range in reading (87), mathematics (84), and writing (81) (id. at p. 3). The student achieved standard and (percentile) subtest scores of 94 (34) in word reading, 87 (19) in reading comprehension, 89 (23) in pseudoword decoding, 86 (18) in numerical operations, 85 (16) in math reasoning, 89 (9) in spelling, and 84 (14) in written expression (id.). On the Beery-Buktenica Developmental Test of Visual-Motor Integration (VMI), the student achieved a standard score of 98, suggesting that his ability to perceive and reproduce visual images is in the average range (id. at p. 4).

In May and June 2005, the prior school district conducted a psychological and educational evaluation of the student to provide updated information and determine his need for continued support through the CSE (Dist. Ex. 6 at p. 1). Administration of the Differential Ability Scales (DAS) yielded a verbal cluster score of 85 (low average), a nonverbal cluster score of 97 (average), a spatial cluster score of 88 (low average/average), and a general cognitive ability score of 88 (low average/average) (id. at p. 3). The student achieved his lowest score on the word definitions subtest (10th percentile) which the evaluator determined could suggest that the student may have difficulty understanding and using age-level vocabulary (id. at p. 5). On the Naglieri Nonverbal Ability Test, which provides information about a student's academic potential, the student achieved a quotient score of 102, which is in the average range when compared to others his age (id. at p. 4). The evaluator reported that the student was likely to learn best through nonverbal and visual means (id. at p. 5). The student's teacher completed the Behavioral Assessment System for Children

[1] The evaluator noted that on the morning of the cognitive portion of the testing, the student had been in the school office due to work refusal and although he transitioned easily for the testing he seemed to put forth minimal effort and, therefore, the test results might be an underestimate of the student's cognitive ability (Dist. Ex. 14 at p. 1).

based on the student's behavior in the classroom (id. at p. 4). Based on the teacher's responses, the evaluator determined that the student exhibited "at risk" behaviors on the learning problems, withdrawal, and study skills scales, and "clinically significant" behaviors on the social skills and leadership scales (id. at pp. 4-5). The evaluator opined that the student's difficulty attending school, lack of motivation, and difficulty with work completion were serious problems that required ongoing monitoring and intervention particularly when he entered the junior high school (id. at p. 5).

During the 2005-06 school year in his seventh grade year, the student participated in regular education classes for science, home and careers, social studies, music, art, and physical education, where he reportedly achieved success with limited special education assistance (Dist. Ex. 15 at pp. 1, 2). On the student's March 2006 individualized education program (IEP) developed by the prior school district, his reading and comprehension skills were reported to be well developed and he was described as a willing worker who took pride in scholastic accomplishments (id. at p. 2). The March 2006 IEP stated that math appeared to be an area of weakness for the student and that he was often unsure of the appropriate process to find the solution to an equation (id. at p. 3). The student reportedly interacted well with his peers, but could get in trouble during unstructured times such as lunch periods or while on the bus, although his attitude toward school and authority were improving (id.).

On October 11, 2006, the student enrolled in respondent's district and was placed in a program similar to that which he had received in his prior district (Parent Ex. A at p. 1). In November 2006, the student was disciplined for failure to comply and insubordination following a refusal to work in a study hall and as a result of fighting, was subsequently placed on out-of-school suspension for three days (id.).

A subcommittee of respondent's CSE convened on November 8, 2006 to review the student's program and to develop the student's IEP (Parent Ex. A at pp. 1, 2). The student was reported to be making a good adjustment to his new school setting, but found most academic work difficult (id. at p. 1). The CSE subcommittee recommended placement in a 12:1+1 special class "integrated" for English and social studies, direct consultant teacher services in regular education math and science, and individual 30 minute bi-weekly counseling with program modifications of preferential seating as needed to avoid conflict with peers, individualized expectations, and modified grading and instruction (Dist. Ex. 16 at pp. 1-2, 4). The CSE subcommittee recommended the following testing accommodations: extended time (2.0), minimal distractions, language in directions simplified, calculator use, preferential seating as needed to avoid conflict with peers, additional examples provided, tests read, directions repeated, and spelling requirements waived (id. at p. 2). The student's academic achievement, functional performance, and learning characteristics indicated that the student demonstrated the ability to do math calculations mentally and to complete some written assignments without assistance; however, he frequently refused to do work even with constant reminders (id. at p. 3). In the area of social development, the November 2006 IEP indicated that the student understood what appropriate social behaviors were and was capable of interacting appropriately with peers and adults, but at times he became involved in conflicts with peers (id.). Management needs identified that the student needed support with organization and course assignments and that he needed to learn to monitor his own behavior

without constant redirection (id.). The November 2006 IEP contained goals related to the student's writing and social/emotional/behavioral deficits (id. at p. 4).

The student's November 9, 2006 report card indicated that the student received passing grades in all subject areas (Parent Ex. A at p. 3). The student demonstrated some progress in his IEP goal for written expression and was progressing satisfactorily in his IEP goal related to self-awareness and self-concept (id.). On November 20, 2006, the student's father provided written consent for respondent to initiate the special education services proposed in the November 8, 2006 IEP (Dist. Ex. 21).

On December 14, 2006, the student was placed on out-of-school suspension for three days (Parent Ex. A at p. 3). In an email to respondent's staff dated December 20, 2006, the student's special education teacher, who also functioned as a "case manager" for the student, reported that for the last several weeks the student had consistently refused to do work (Tr. pp. 140-41; Parent Ex. A at p. 3). With the exception of marginal participation in Math 8, the student had not completed homework assignments, taken quizzes or tests, taken notes, or participated in class activities (Parent Ex. A at p. 3). The special education teacher reported that the student exhibited violent outbursts, used profane language with adults, and instigated fights with peers (id.). She also stated that she had spoken with petitioner repeatedly about the situation, but that he was not currently returning her telephone calls (id.).

On January 8, 2007, respondent's director of special education, principal and the student's teachers convened for a multidisciplinary meeting to discuss the student's behavior (Parent Ex. A at p. 4). Team members reported that the student was not submitting his assignments and that in most of his classes the student created disturbances, colored on his hand, or slept through the class (id.). The team determined that the student was capable of following the school rules and completing the highly modified work that was assigned to him (id.). They further determined that an FBA[2] was not warranted as the student's behaviors did not appear to be linked to his learning disability, and that he would be held to the same disciplinary standards as all other students (id.). The multidisciplinary team also determined to file a Persons in Need of Supervision (PINS) diversion referral regarding the student (Tr. pp. 139-40).

Between January 9 and 18, 2007, the student was involved in three separate behavioral incidents resulting in detention for skipping class, out-of-school suspension for noncompliance and insubordination to the principal, and in-school suspension for skipping class (Parent Ex. B at p. 1).

The student's January 26, 2007 report card indicated that he had achieved grades of 82 in physical education, 45 in English, 91 in technology education, 47 in math, 33 in science, and 39 in social studies; that he had "a poor attitude," was inattentive in class and seldom prepared, and

[2] A functional behavioral assessment means the process of determining why a student engages in behaviors that impede learning and how the student's behavior relates to the environment. It shall include, but is not limited to, the identification of the problem behavior, the definition of the behavior in concrete terms, the identification of the contextual factors that contribute to the behavior (including cognitive and affective factors) and the formulation of a hypothesis regarding the general conditions under which a behavior usually occurs and probable consequences that serve to maintain it (8 NYCRR 200.1[r]).

was a "potentially good student but needs to do homework" (Parent Ex. A at p. 5). The student demonstrated some progress in his IEP goal for written expression and in his goal related to self-awareness and self-concept (id.).

On February 5, 2007, the student refused to work in study hall, threatened to hit another student, hid in the closets, and threw papers (Parent Ex. A at p. 5). He was subsequently placed on in-school suspension for one day (id.). On February 13, 2007, the student was placed on out-of-school suspension for two days following several minor infractions of insubordination, and work refusal and an incident in which he was disruptive in class and pushed another student (id.). On March 14, 2007, a teacher reportedly overheard the student making statements to a classmate about bringing a gun to school (id.). The student was placed on out-of-school suspension for five days and referred to the superintendent for a disciplinary hearing (id.). Respondent conducted a manifestation determination meeting on March 21, 2007 (id. at p. 6). Meeting attendees included the director of special education, the student's special education teacher, the student's father, petitioner's advocate, and the student (id.). The manifestation team determined that the student's behavior was not a manifestation of his disability and did not recommend modification of his IEP (Dist. Ex. 25; Parent Ex. A at p. 6). The subsequent superintendent's disciplinary hearing resulted in a finding of guilt and the student was placed on out-of-school suspension until May 18, 2007 (Dist. Ex. 23; Parent Ex. A at p. 6).

A report card issued on March 30, 2007 indicated that the student had achieved grades of "incomplete" in physical education, 65 in English, 91 in technology education, 65 in math, 27 in science, and 65 in social studies (Parent Ex. A at p. 6). The student's science teacher commented that the student failed to complete assignments and was seldom prepared for class (id.). The student was not progressing satisfactorily in his IEP goal for written expression and his goal related to self-awareness and self-concept was stated to be "NA-Not Achieved" (id.).

On April 4, 2007, petitioner appealed the superintendent's disciplinary action to respondent's board of education (Parent Ex. A at p. 6). Following a hearing, petitioner's appeal was dismissed by respondent's board of education on April 19, 2007 (Dist. Ex. 24; Parent Ex. A at pp. 6-7).[3]

In a due process complaint notice dated May 7, 2007, petitioner requested an impartial hearing (Dist. Ex. 1). Petitioner alleged that: 1) the 2006-07 IEP was deficient and did not provide special education services that would allow the student to make appropriate progress; 2) respondent did not comply with state disciplinary regulations; 3) respondent's evaluations of the student were deficient; 4) the IEP did not indicate necessary supports or training for staff; 5) respondent's determination that the student's behaviors were not a manifestation of his disability was erroneous; and 6) the student's counseling services were not provided according to the IEP throughout the school year (id. at p. 2). Petitioner requested, among other things, the return of the student to his school-based placement and the annulment of the manifestation determination; the annulment of the November 2006 IEP and the development of an appropriate IEP; an FBA;

[3] An appeal of a decision made by a board of education pertaining to a superintendent's disciplinary proceeding may be appealed to the New York State Commissioner of Education pursuant to NY Education Law § 310.

psychological, speech-language, vocational, reading and math evaluations; the provision of "corrective services;" and attorneys' fees (id. at p. 3).

In response to the due process complaint notice, prior to the impartial hearing, respondent agreed at a resolution session to provide petitioner with all his requested relief but for payment of his counsel's attorney fees and additional staff training (Dist. Ex. 2). Respondent agreed to conduct an FBA and implement a BIP, and to provide for vocational, speech and language, and reading and math evaluations (id.). Respondent also convened a CSE meeting on June 6, 2007 and formulated an IEP, which was approved by respondent's Board of Education, which agreed to petitioner's requests for relief but for payment of his counsel's attorney fees and additional staff training (Dist. Ex. 54). The IEP was formulated to agree with petitioner's requests for more evaluations at public expense with the CSE's intention to reconvene another CSE on September 1, 2007 (id. at p. 1), after completion of the evaluations and before the 2007-08 school year, to review the additional data and formulate a new program consistent with petitioner's wishes (Tr. p. 110). Per petitioner's request, the June 6, 2007 IEP annulled the November 6, 2006 IEP and also states "THE PARENT HAS THE RIGHT TO REQUEST ANY EVALUATION, PROGRAM OR SERVICE, AND TO EDIT THIS IEP IN ANY MANNER"…"[t]he District will provide any program and services that the parent requests immediately" (Ex. 54 at p. 5). Petitioner was invited, with five day notice, but did not attend or participate in the CSE meeting (Tr. p. 67). There is conflicting testimony as to why the parent did not attend (Tr. pp. 67-68, 222-23). Petitioner rejected the June 6, 2007 IEP as incomplete (Tr. pp. 222-23, 260) and later asserted that no CSE meeting should have been convened (Tr. p. 252).[4] Respondent had also agreed to expunge the student's record regarding the manifestation determination and disciplinary findings (Dist. Ex. 55; Tr. pp. 116-18, 270).

The impartial hearing commenced on June 22, 2007 and ended on June 25, 2007, after two days of testimony. By decision dated September 21, 2007, the impartial hearing officer declined to dismiss petitioner's claim as a result of petitioner's refusal to settle the dispute in the absence of an agreement that directly or indirectly addressed attorney fees (IHO Decision at pp. 10-11), but rather dismissed petitioner's claims regarding the November 2006 IEP and request for a psychological evaluation as moot (id. at p. 12). The impartial hearing officer found that: 1) respondent improperly conducted the student's manifestation determination prior to his disciplinary hearing (id. at p. 13); 2) respondent should have conducted an FBA and BIP (id. at p. 15); 3) respondent's manifestation review and special education services provided during the suspension were lawful (id. at p. 14); 4) petitioner did not sustain his burden of proof regarding the need for speech-language, reading and math evaluations (id. at p. 16); and 5) the student received counseling services over the course of the year (id.). The impartial hearing officer denied

[4] Conducting CSE meetings and formulating and offering new IEPs during the course of pending litigation is not prohibited under the IDEA provided that there is adherence to pendency requirements (Letter to Watson, 48 IDELR 284 [OSEP 2007]; see Application of a Child with a Disability, Appeal No. 07-122). In addition, the federal and state statutes and regulations concerning the education of children with disabilities provide for a collaborative process between parents and school districts in planning and providing appropriate special education services through the IEP process (see Schaffer v. Weast, 546 U.S. 49, 53 [2005]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192-93 [2d Cir. 2005]).

petitioner's claim for "corrective" services regarding reading and math skills and counseling services and did not decide the issue of staff training (id.).

On appeal, petitioner asserts that the impartial hearing officer erred in failing to: 1) consider the educational claims relating to the November 2006 IEP; 2) annul the November 2006 IEP; 3) find a denial of a free appropriate public education (FAPE)[5] due to substantial inadequacies in the November 2006 IEP, including inadequate goals and objectives and an inadequate description of the student's present levels of performance; 4) award additional services in reading and math; 5) order psychological, reading, math, and speech-language evaluations; 6) grant relief regarding respondent's violation of 8 NYCRR 201; and 7) find a nexus between the student's disability and the incident that led to the suspension.

Respondent does not cross-appeal from the impartial hearing officer's decision.[6] Respondent does assert in its answer that: 1) upon receipt of the due process complaint notice, respondent offered to provide petitioner's son with an FBA and a BIP; 2) the June 6, 2007 IEP provides for independent educational evaluations at respondent's expense, including psychological and speech-language evaluations; 3) the dispute between the parties is not real and live and any finding of a denial of a FAPE is academic or moot; 4) the issue of corrective services or additional services is moot; 5) the hearing record does not support the provision of services in math and reading; 6) respondent provided counseling to petitioner's son; 7) the manifestation review itself was appropriate and the issue is moot; 8) the impartial hearing officer correctly held that special education services provided to the student during his suspension were lawful; 9) petitioner's due process complaint notice was insufficient; and 10) the impartial hearing officer correctly held that an impartial hearing officer cannot order respondent to correct its procedures and practices regarding students with disabilities, order that respondent's staff obtain additional training, or order attorney's fees.

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[5] The term "free appropriate public education" means special education and related services that--

(A) have been provided at public expense, under public supervision and direction, and without charge;

(B) meet the standards of the State educational agency;

(C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and

(D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

(20 U.S.C. § 1401[9]).

[6] Respondent does not appeal from the impartial hearing officer's determinations pertaining to the FBA and BIP, sufficiency of petitioner's due process complaint notice, and attorney's fees. An impartial hearing officer's decision is final and binding upon the parties unless appealed to a State Review Officer (34 C.F.R. § 300.510[a]; 8 NYCRR 200.5[k]). Consequently, these parts of the decision are final and binding (Application of a Child Suspected of Having a Disability, Appeal No. 06-092; Application of a Child with a Disability, Appeal No. 06-085; Application of a Child with a Disability, Appeal No. 04-024; Application of a Child with a Disability, Appeal No. 03-108; Application of a Child with a Disability, Appeal No. 02-100; Application of a Child with a Disability, Appeal No. 02-073) and will not be reviewed in this decision.

The central purpose of the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) is to ensure that students with disabilities have available to them a FAPE (20 U.S.C. § 1400[d][1][A]; see Schaffer v. Weast, 546 U.S. 49, 51 [2005]; Bd. of Educ. v. Rowley, 458 U.S. 176, 179-81, 200-01 [1982]; Frank G. v. Bd. of Educ., 459 F.3d 356, 371 [2d Cir. 2006]). A FAPE includes special education and related services designed to meet the student's unique needs, provided in conformity with a written IEP (20 U.S.C. § 1401[9][D]; 34 C.F.R. § 300.17[d];[7] see 20 U.S.C. § 1414[d]; 34 C.F.R. § 300.320).

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 (Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 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]; 8 NYCRR 200.5[j][4]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the student 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 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).

[7] The Code of Federal Regulations (34 C.F.R. Parts 300 and 301) has been amended to implement changes made to the IDEA, as amended by the Individuals with Disabilities Education Improvement Act of 2004. The amended regulations became effective October 13, 2006. For convenience, citations in this decision refer to the regulations as amended because the regulations have been reorganized and renumbered.

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 200.6[a][1]; see Walczak, 142 F.3d. at 132). The burden of persuasion in an administrative hearing challenging an IEP is on the party seeking relief (see Schaffer, 546 U.S. at 59-62 [finding it improper under the IDEA to assume that every IEP is invalid until the school district demonstrates that it is not]).

I will first address petitioner's argument that the impartial hearing officer erred in concluding the complaint is moot because: 1) the challenged November 2006 IEP has been superseded by a new IEP developed in June 2007, and 2) the 2006-07 school year has ended.

The dispute between the parties in an appeal must at all stages be "real and live," and not "academic," or it risks becoming moot (see Lillbask v. State of Conn. Dep't of Educ., 397 F.3d 77, 84 [2d Cir. 2005]). In general, cases dealing with issues such as desired changes in IEPs, specific placements, and implementation disputes are moot at the end of the school year because no meaningful relief can be granted (see, e.g., Application of the Bd. of Educ., Appeal No. 06-044; Application of the Bd. of Educ., Appeal No. 05-058; Application of a Child with a Disability, Appeal No. 04-027; Application of a Child with a Disability, Appeal No. 00-037; Application of the Bd. of Educ., Appeal No. 00-016; Application of a Child with a Disability, Appeal No. 96-37). Administrative decisions rendered in cases that concern such issues that arise out of school years since expired may no longer appropriately address the current needs of the student (Application of the Bd. of Educ., Appeal No. 07-028; Application of a Child with a Disability, Appeal No. 06-070; Application of a Child with a Disability, Appeal No. 04-007).

However, a claim may not be moot despite the end of a school year for which the student's IEP was written, if the conduct complained of is "capable of repetition, yet evading review" (see Honig v. Doe, 484 U.S. 305, 318 [1988]; Lillbask, 397 F.3d at 84-85; Daniel R.R. v. El Paso Indep. Sch. Dist., 874 F.2d 1036 [5th Cir. 1989]; Application of a Child with a Disability, Appeal No. 04-038). The exception applies only in limited situations (City of Los Angeles v. Lyons, 461 U.S. 95, 109 [1983]), and is severely circumscribed (Knaust v. City of Kingston, 157 F.3d 86, 88 [2d Cir. 1998]). Controversies are "capable of repetition" when there is a reasonable expectation that the same complaining party would be subjected to the same action again (Weinstein v. Bradford, 423 U.S. 147, 149 [1975]). To create a reasonable expectation of recurrence, repetition must be more than theoretically possible (Russman v. Bd. of Educ., 260 F.3d 114, 120 [2d Cir. 2001]). Mere speculation that the parties will be involved in a dispute over the same issue does not rise to the level of a reasonable expectation or demonstrated probability of recurrence (id.).

Petitioner alleges that the November 2006 IEP was deficient and seeks compensatory additional services to remedy respondent's alleged failure to offer a FAPE to the student for the 2006-07 school year. Under the circumstances, I find respondent's mootness argument unpersuasive given petitioner's claim for additional services (see Application of the Bd. of Educ., Appeal No. 07-031; Application of a Child with a Disability, Appeal No. 02-030). As such, I will initially review the appropriateness of the November 6, 2006 IEP.

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs, establishes annual goals related to those needs, and provides for the use of appropriate special education services (Application of the Dep't of Educ.,

Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

Petitioner contends that the impartial hearing officer erred in failing to consider educational allegations relating to the November 2006 IEP and alleges that the present levels of performance did not include testing results, noting that even the student's IQ scores were absent from the IEP. Petitioner also contends that the November 2006 IEP lacks appropriate goals and objectives, specifically in math, science, and reading.

The student's academic achievement and functional performance learning characteristics on the November 2006 IEP state that the student's teacher from the prior school district reported that the student was capable of "keeping up" with his regular education peers when he was provided with special education support in regular education classes (Dist. Ex. 16 at p. 3). The November 2006 IEP further stated that the student demonstrated the ability to complete math calculations mentally and to complete some written assignments without assistance; however, he frequently refused to do work, even with constant reminders (id.). The November 2006 IEP also stated that achievement testing indicated that the student's skills were in the below average range across all subject areas, that the student's significant delay in written expression affected his ability to complete coursework in core subjects, that the student required support with some math and writing activities, and that the student seemed to struggle with reading (id.).

As noted above, cognitive testing completed in March 2005 indicated that the student was functioning in the borderline range of intelligence, which the evaluator noted might be an underestimate of the student's cognitive ability (Dist. Ex. 14 at pp. 1, 2-3). Subsequent cognitive testing completed in May/June 2005 yielded significantly higher scores and indicated that the student's cognitive ability was in the average/low average range, which is consistent with results from cognitive testing conducted in 2000 and 2002 (Dist. Ex. 6 at pp. 1, 2-3, 5). Administration of the WIAT II in March 2005 yielded composite scores in the low average range in reading, mathematics, and writing (Dist. Ex. 14 at p. 3). The student achieved subtest scores in the average range for word reading; in the low average range for reading comprehension, pseudoword decoding, numerical operations, math reasoning, and written expression; and in the borderline/low average range for spelling (id.). The evaluator opined that the student's score on the word reading subtest suggested that the student had an adequate sight vocabulary, and that based on results from administration of the VMI, the student's ability to perceive and reproduce visual images was in the average range (id. at p. 4). On the Naglieri Nonverbal Ability Test which was administered in May/June 2005, the student achieved a quotient score in the average range (Dist. Ex. 6 at p. 4).

During the 2005-06 school year in the student's seventh grade year at the prior school district, the student participated in regular education classes for science, home and careers, social studies, music, art, and physical education, where he reportedly achieved success with limited special education assistance (Dist. Ex. 15 at pp. 1, 2). On the student's March 2006 IEP developed by the prior school district, his reading and comprehension skills were reported to be well developed and he was described as a willing worker who took pride in scholastic accomplishments

(id. at p. 2). The March 2006 IEP also stated that math appeared to be an area of weakness for the student and that he was often unsure of the appropriate process to find the solution to an equation (id. at p. 3). The March 2006 meeting minutes reflected that the student was recommended to participate in regular education classes for all subjects with support and counseling (Dist. Ex. 10).

Respondent's director of special education testified that respondent did not conduct any new evaluations of the student prior to convening the CSE subcommittee meeting on November 8, 2006, but relied on the student's records from the prior school district and telephone conversations with that school's staff which provided information about the student's present levels of educational performance, and his management needs in academic, social, and physical areas, to develop an IEP for the student (Tr. pp. 48, 85-86). The director of special education further testified that at the time of the CSE subcommittee meeting, the student was "doing exceptionally well" and completing assignments (Tr. pp. 48, 86). Documentary evidence contained in the hearing record indicates that on a report card issued on November 9, 2006, the student received grades of 92 in physical education, 95 in English, 80 in technology education, 65 in math, 70 in science, and 65 in social studies (Parent Ex. A at p. 3). Comments contained in the report card indicated that the student was "a pleasure to have in class," "showing improvement," and a "fine student but needs to be more consistent" (id.).

The subcommittee of respondent's CSE recommended a program consisting of a 12:1+1 special class "integrated" for English and social studies, direct consultant teacher services in regular education math and science, and individual 30 minute bi-weekly counseling with program modifications of preferential seating as needed to avoid conflict with peers, individualized expectations, modified grading and instruction (Dist. Ex. 16 at pp. 1-2, 4). The CSE subcommittee recommended the following testing accommodations: extended time (2.0), minimal distractions, language in directions simplified, calculator use, preferential seating as needed to avoid conflict with peers, additional examples provided, tests read, directions repeated, and spelling requirements waived (id. at p. 2).

Respondent's director of special education testified that following its review of the student's present levels of performance, the November 2006 subcommittee of the CSE determined that based on the student's language-based learning disability and history of behavioral difficulties in his prior school district, the student required an IEP goal and support in the area of written language, and a goal in the areas of self-awareness, self-concept, and avoiding conflict (Tr. p. 50). The 12:1+1 special class-integrated proposed by the CSE subcommittee for the student for English and social studies was taught by a special education teacher and a regular education teacher, and was comprised of students with learning disabilities who were working toward receipt of a Regents or local diploma (Tr. pp. 51-52). The director of special education defined the consultant teacher service in the student's proposed math and science classes as a full-time special education teacher and a certified full-time math and full-time certified science teacher in the room at all times presenting a very modified, very adapted curriculum (Tr. p. 51). The student was also assigned to a daily study hall that was taught by the same special education teacher that taught his special class and "pushed in" to the consultant teacher classes (Tr. p. 52). In the daily study hall, the special education teacher worked with the four students assigned to the group to ensure mastery of their required course assignments (id.). The director of special education also testified that the student's reading achievement was commensurate with his intellectual ability as measured in March 2005,

that his reading difficulties were addressed by reading tests to him, and that the student's spelling deficits were addressed through accommodations that waived spelling requirements and through daily teacher feedback on writing assignments (Tr. pp. 81-83).

The hearing record shows that there was no evidence or testimony presented that refuted the results of the evaluations considered by respondent or the testimony of the special education director regarding the student's special education needs. Moreover, the IEP had adequate goals related to the student's identified special education needs. Based on the information before the CSE at the time it was devised, I find that the November 8, 2006 IEP was reasonably calculated to enable the student to receive educational benefits and did not result in a denial of a FAPE (Rowley, 458 U.S. at 206-07; see Viola v. Arlington Cent. Sch. Dist., 414 F. Supp. 2d 366, 382 [S.D.N.Y. 2006] [citing J.R. v. Bd. of Educ., 345 F. Supp. 2d 386, 395 n.13 [S.D.N.Y. 2004]]; Cerra, 427 F.3d at 192; Antonaccio v. Bd. of Educ., 281 F. Supp. 2d 710, 724 [S.D.N.Y. 2003]).

With respect to petitioner's request for additional services, State Review Officers have awarded additional services to students who remain eligible to attend school and have been denied appropriate services, if such deprivation of instruction could be remedied through the provision of additional services before the student becomes ineligible for instruction by reason of age or graduation (Application of the Bd. of Educ., Appeal No. 07-031; Application of a Child with a Disability, Appeal No. 05-041; Application of a Child with a Disability, Appeal No. 04-054; Application of the Bd. of Educ., Appeal No. 02-047). Having determined that respondent provided appropriate services to meet the student's needs, I find that petitioner is not entitled to the remedy of additional services based on the November 8, 2006 IEP.

I also agree with the impartial hearing officer's determination that the hearing record does not support the need for a speech-language evaluation (IHO Decision pp. 15-16). The student's counselor testified that, at times, the student had difficulty understanding vocabulary words that she used, but that she did not often have the impression that the student did not understand what she was saying to him (Tr. p. 193). She also testified that the student did not have difficulty with oral expression (Tr. p. 194). With the exception of a report from a psychological evaluation completed in October/November 2000 that stated that the student had "failed his Speech/Language evaluation," the hearing record contains no documentary or testimonial evidence supporting a current need for a speech-language evaluation of the student (Dist. Ex. 3 at p. 1). Likewise, I concur with the impartial hearing officer's dismissal of petitioner's claims for reading and math evaluations, as the hearing record does not support such a need (IHO Decision at p. 16).

Turning to the issue of the manifestation determination, petitioner asserts that respondent improperly conducted the manifestation meeting prior to the superintendent's hearing, and contends that respondent's failure to provide petitioner with copies of his son's educational records prior to the manifestation determination, deprived him of meaningful parental participation in the process. Petitioner seeks a determination finding a nexus between his son's disability and the incident that led to the March 2007 suspension, expungement of the student's suspension records, and additional services for respondent's failure to provide appropriate services to his son during his suspension period. In its answer, respondent states that it held the manifestation determination prior to the hearing on guilt in reliance on a January 2001 New York State Education Department guidance memorandum ("Discipline Procedures for Students with Disabilities" at p. 17; Office of

Vocational and Educational Services for Individuals with Disabilities [VESID]), and asserts that it has subsequently changed its practice to comply with 8 NYCRR 201. Respondent further alleges that the impartial hearing officer correctly determined that this de minimus procedural error does not warrant expunging the outcome of the manifestation hearing. For the reasons set forth below, I concur with the impartial hearing officer.

State regulations provide that a superintendent's hearing shall be conducted prior to a manifestation determination made by the manifestation team (see 8 NYCRR 201.9[c]). Here, the manifestation meeting was held prior to the superintendent's hearing (Tr. p. 154; see Dist. Exs. 22; 23) and therefore, did not comport with 8 NYCRR 201.9(c)(1). I concur with the impartial hearing officer and find the noncompliance with the regulations to be de minimus error. I also note that petitioner did not develop the hearing record to persuasively identify harm to petitioner resulting from this procedural error (see 20 U.S.C. § 1415[f][3][E][i]; 8 NYCRR 200.5[j][4]).

With regard to the substance of the manifestation determination, the manifestation team is charged with reviewing all relevant information in the student's file, including the student's IEP, any teacher observations, and any relevant information provided by the parents to determine if: 1) the conduct in question was caused by or had a direct and substantial relationship to the student's disability; or 2) the conduct in question was the direct result of the school district's failure to implement the IEP (see 8 NYCRR 201.4[c]).[8]

Here, the record shows that respondent convened a manifestation meeting on March 21, 2007, which was attended by the director of special education, the student's special education teacher, the student's father, petitioner's advocate, and for a limited time, the student (Tr. pp. 56-57). The student's father testified that the participants at the manifestation determination meeting did not review the student's IEP or any documents (Tr. pp. 212-13). Rather, most of the discussion during the meeting centered on what had been occurring in the classroom and disciplinary referrals (Tr. p. 213). More specifically, the director of special education testified that the meeting lasted approximately an hour and that lengthy discussion ensued among participants, including the student, about the statements made by the student, the other behavior problems that had been exhibited by the student during the year, whether the student's learning disability that affected his ability to complete written assignments was directly linked to those events, and whether the student knew right from wrong (Tr. pp. 57, 153). Testimony elicited from the student's school counselor indicated that the student is aware when he becomes angry and is aware of what triggers his anger; however, the student sometimes does not choose to avoid conflict situations (Tr. p. 182). The school counselor further testified that the student could tell right from wrong and that he understood his actions and their import (Tr. p. 202).

During the impartial hearing, the director of special education stated that the manifestation meeting participants ultimately determined that there was no substantial direct connection between the student's learning disability and the statements he had made that led to the out-of-school

[8] Petitioners rely in part on an incorrect legal standard in making his argument that the manifestation determination was in error. Petitioner cites 34 C.F. R. § 300. 523 [c][2][i] which was repealed effective October 13, 2006 when new regulations became effective related to the IDEA 2004. The provision and standard cited by petitioner has been changed and replaced by 34 C.F.R. § 300. 530[e][1].

suspension (Tr. p. 57). He further testified that at the end of the manifestation meeting, the participants were "all absolutely in agreement" that the student knew right from wrong and that there were consequences to his actions (id.). Following the manifestation meeting, the student's father sent an email to the director of special education thanking the director for the support he had provided at the meeting and stating that he was looking forward to working more closely with the director in the future (Tr. p. 58; Parent Ex. A at p. 6). I do not find that any of the procedural irregularities regarding a review of the student's records rose to a level of denying the student a FAPE or significantly impeded parental participation (see 20 U.S.C. § 1415[f][3][E][i]; 8 NYCRR 200.5[j][4]).

Based on the hearing record, I agree with the impartial hearing officer and find that petitioner has not demonstrated that the student's behavior on March 14, 2007 which resulted in an out-of-school suspension, was a manifestation of his disability (IHO Decision at p. 14; 8 NYCRR 201.4[c]). I do, however, caution respondent to comply with all the requirements of 8 NYCRR 279.

Next, I will review petitioner's request for an award of "corrective" or additional services for special education services denied from the date of the student's suspension on March 14, 2007. In this regard, the impartial hearing officer found that the services provided by respondent during the student's out-of-school suspension were "lawful" (IHO Decision at p. 14). I concur with the impartial hearing officer's decision pertaining to the tutoring instruction, but do not agree with his conclusion regarding the counseling services. I find that the tutoring instruction was provided consistent with 8 NYCRR 80-5.6(b)(1)(i).

Respondent provided the student with two hours of tutoring daily by a certified teacher assistant employed by a Board of Cooperative Educational Services program for students with behavioral difficulties (Tr. pp. 59, 147). The student's special education teacher provided assignments for the student and provided the coordination between the student's regular education teachers, the guidance office, and the tutor (Tr. pp. 146-47). The director of special education testified that the special education teacher "was aware of exactly what the student owed, and what had been turned back in" (Tr. p. 147). The student did not receive counseling during the out-of-school suspension; however, the student's counselor testified that she was involved in the services provided to the student during his suspension, that she received communication from the tutor regarding the student, and that together with the student's special education teacher she acted as a liaison between the school and the tutor (Tr. pp. 61, 198-99).

Respondent's director of special education testified that he and the student's special education teacher discussed the services to be provided to the student and that their recommendation for two hours of tutoring daily by a certified teacher assistant was based on the teacher assistant's education and experience, the fact that the student's assignments and curriculum are adjusted to his level and need, and that the student had demonstrated both ability and independence when he received prompting (Tr. pp. 59, 132). The director further testified that the tutor held a Bachelor's degree in sociology and criminal justice as well as experience working with students who struggled with learning, and exhibited difficulty with behavioral or emotional decisions, and that the tutor could provide petitioner's son with instruction in both social decision-making skills and written language skills (Tr. pp. 59, 62).

Respondent's certified teacher assistant provided services consistent with 8 NYCRR 80-5.6(b)(1)(ii)(a) and consistent with the goals of the student's IEP (see 34 C.F.R. § 300.530[d][i]; 8 NYCRR 201[10][d]; Discipline Procedures 71 Fed. Reg. 46716 [a school district "is not required to provide children suspended for more than 10 school days in a school year with exactly the same services in exactly the same settings as they were receiving prior to the imposition of discipline"]). However, I do note that given the student's behavior and the concern that respondent had regarding the seriousness of the student's comments that led to the disciplinary charges, that he should have been provided with the counseling sessions during his suspension as identified on his IEP. I will, therefore, order that additional services be provided to petitioner's son in the amount requested by petitioner (four 30 minute counseling sessions).

I have considered petitioner's remaining contentions and I find them to be without merit.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the impartial hearing officer's decision is annulled to the extent that he did not award any additional services pertaining to counseling services during the student's suspension; and

IT IS FURTHER ORDERED that respondent provide petitioner's son with an additional four counseling sessions with each session lasting thirty minutes.

Dated: **Albany, New York**
December 10, 2007

PAUL F. KELLY
STATE REVIEW OFFICER