The University of the State of New York

The State Education Department
State Review Officer

No. 07-130

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 New York City Department of Education

Appearances:
Law Offices of Anton Papakhin PC, attorney for petitioner, Anton Papakhin, Esq., of counsel

Michael Best, Special Assistant Corporation Counsel, attorney for respondent, Emily R. Goldman, Esq., of counsel

DECISION

Petitioner appeals from a decision of an impartial hearing officer which determined that the educational program and services respondent's Committee on Special Education (CSE) had recommended for the student for the 2006-07 school year were appropriate. The appeal must be sustained in part.

At the commencement of the impartial hearing in November 2006, the student was 20 years old and attending the Judge Rotenberg Educational Center (JRC) in Massachusetts (Tr. p. 111; Parent Ex. A at p. 1). JRC is a private school which has been approved by the Commissioner of Education as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7). The student's eligibility for special education programs and services as a student with autism are not in dispute in this appeal (see 34 C.F.R. § 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

The student has a history of aggressive and self-injurious behavior (Tr. pp. 111-19; Parent Ex. P at p. 2). He has reportedly received various diagnoses including pervasive developmental disorder, autism and severe mental retardation (Tr. pp. 336, 567-68; Dist. Exs. 1 at pp. 1, 3; 2 at p. 1; Parent Ex. P at p. 3). As a young child, the student attended a series of special class placements in public school, in which he exhibited episodes of head banging and aggressive behavior toward staff and other students (Tr. p. 118; Parent Ex. P at p. 2). The student was assigned a 1:1 crisis management paraprofessional and wore a helmet to prevent injuries due to self abuse (Tr. pp. 116-17; Dist. Ex. 2 at p. 1; Parent Ex. P at p. 2). In addition, petitioner authorized numerous trials of

medication in an effort to control the student's behavior (Tr. pp. 111-14). When the student was ten years old, respondent reportedly informed petitioner that it did not operate an appropriate special education program for the student and recommended placing him in a State approved private school (Parent Ex. P at p. 2). On February 1, 1999, the student was placed by respondent at JRC (Tr. pp. 125, 334; Parent Ex. P at pp. 2-3).

When the student first entered JRC, he received a "positive only" program in which he was rewarded for appropriate behavior (Tr. pp. 341-43; Parent Ex. P at p. 6). The student was weaned from medication (Tr. pp. 114, 337-39, 566, 573). Although there was some improvement in the student's behavior, he continued to require frequent emergency restraints and an additional trial of medication was attempted (Tr. pp. 566, 630-31; Parent Ex. P at pp. 6-7). The staff at JRC, with petitioner's consent, determined that supplemental aversive procedures, specifically the use of a graduated electronic decelerator (GED) device,[1] should be added to the student's program to target his aggressive and health dangerous behaviors (Tr. pp. 125-29; Parent Ex. P at pp. 6-7). Application of the GED is described as a "Level III" aversive for which prior authorization of a court is required (Tr. pp. 549-51, 564; Parent Exs. F; G).[2] Three months after the student entered JRC, the Massachusetts Probate and Family Court authorized use of the GED for the student's aggressive and health dangerous behaviors (Parent Ex. P at p. 6; see, e.g., Parent Exs. F at pp. 2-3; G). Over the following two and one half years, GED procedures were expanded to target additional behaviors (id.). In addition, a contingent food program was added to the student's behavior plan in 2001 (Tr. pp. 411-12; Parent Ex. P at p. 6).[3] According to a behavior modification treatment plan, the student's interfering behaviors were tracked by JRC using the following categories: aggressive behaviors, health dangerous behavior, destructive behavior, major disruptive behavior, non-compliance behavior, educationally/socially interfering behavior and inappropriate verbal behavior (Parent Ex. P at pp. 4-5).

On May 25, 2006, respondent's CSE met for the student's annual review to develop an individualized education program (IEP) for the 2006-07 school year (Parent Ex. C at p. 2). The CSE recommended that the student continue his previously recommended nonpublic school 12-month residential placement at JRC, and among other things, continued implementation of the student's behavior plan, including the Level III aversive behavioral interventions to address the student's major problematic behaviors (Parent Ex. C at pp. 1, 13). Petitioner participated in the

[1] Clinical staff from JRC described the GED as a device that is worn in a fanny pack, which delivers a low level electric shock to the skin's surface through one or more electrodes placed on a student's arms, legs or torso (Tr. pp. 366, 564, 610-12). Transmitters initiating the electric shock from the GED are held by school staff (Tr. p. 366). When the student exhibits a major inappropriate behavior, school staff administer a low level surface application lasting from 0.2 to 2 seconds (id.). The purpose of the application of the GED is to decelerate dangerous and aggressive behaviors (Tr. p. 367).

[2] Although not fully developed in the hearing record, "Level III" appears to refer to Level III interventions, including a GED, for behavioral modification as defined by Massachusetts regulation, which applies to all mental retardation programs operated, funded or licensed by the Massachusetts Department of Mental Retardation (Tr. p. 564; see Mass. Regs. Code tit. 115, § 5.14[1][b], [3][d]).

[3] According to the student's clinician at JRC, a student on a contingent food program earns his food by not exhibiting inappropriate behaviors (Tr. pp. 411-12).

May 2006 CSE meeting by telephone and was in agreement with the CSE's recommendations (Tr. pp. 146-49).

According to a progress report for the period from June 18, 2006 to September 16, 2006, JRC discontinued using the GED in June 2006 to decelerate the student's impeding behaviors in the categories of "destructive, major disruptive [and] noncompliant" behavior (Parent Ex. O at p. 2). The progress report concluded that reduction in the use of the GED was due to the June 2006 promulgation of amended regulations by the "NY Board of Education" related to behavioral intervention (id.). The student continued to receive GED applications for behaviors in the categories of "aggressive and health dangerous" behavior (id.). In September 2006, JRC resumed using the GED for behaviors in the categories of major disruptive and noncompliant behavior after a preliminary injunction was issued by the United States District Court for the Northern District of New York (District Court) (id. at p. 2; see Parent Ex. E at pp. 6-7).

On September 25, 2006, the CSE reconvened to review the student's IEP, after amendments to the Commissioner's regulations with regard to behavioral interventions became effective (Tr. pp. 201-02). Meeting attendees included a district representative, who was also a school social worker; a regular education teacher; a special education teacher; a school psychologist; an additional parent member and petitioner's attorney (Parent Ex. B at p. 2). Petitioner and staff members from JRC, including the director of clinical services, assistant director of education and the student's special education teacher, all participated in the September 2006 CSE meeting by telephone (Tr. pp. 248-49, 662-63; Parent Ex. B at p. 2). Respondent's school psychologist reported that the purpose of the meeting was to review the student's IEP in light of the amended Commissioner's regulations (Tr. pp. 201-02, 289-90). Petitioner was under the impression, after a telephone call with respondent, that the purpose of the meeting was to remove aversive behavioral interventions from the student's IEP (Tr. pp. 153-54).

The CSE updated the student's present levels of performance on the September 2006 IEP (compare Parent Ex. C at pp. 3-5, with Parent Ex. B at pp. 3-5). In addition, the student's behavioral intervention plan (BIP) was modified and Level III aversive behavioral interventions were removed from the September 2006 IEP (Parent Ex. B at pp. 2, 10, 14). The CSE recommended that the student continue to attend JRC (id. at p. 1). Petitioner and staff from JRC objected to the removal of aversive behavioral interventions from the student's IEP (Tr. pp. 178-79, 183-84, 257, 664; Parent Ex. B at p. 10).

In a due process complaint notice dated November 20, 2006, petitioner requested an impartial hearing, asserting that the September 2006 IEP developed for the student was substantively inappropriate to the extent that it modified the student's BIP by removing aversive behavioral interventions (Parent Ex. A at p. 2). Petitioner asserted that the September 2006 CSE failed to conduct a full and individualized review of the student's educational and treatment needs, including the need for aversive behavioral interventions (id. at p. 3). Among other things, petitioner also asserted that the impartial hearing officer should find that the September 2006 CSE failed to file an application for a child-specific exception with the Commissioner of Education as required by the Commissioner's regulations and that it violated a preliminary injunction issued by the District Court (id. at pp. 2-3). As relief petitioner requested, among other things, that the student's May 25, 2006 IEP remain in full force and effect (Parent Ex. A at pp. 2-3).

An impartial hearing was convened in February 2007 and concluded September 2007 after six days of testimony. In a decision dated November 24, 2007, the impartial hearing officer denied petitioner's requested relief (IHO Decision at p. 23). The impartial hearing officer determined that the Commissioner's regulations regarding the need for a child-specific exception were not enjoined by the District Court (id. at p. 20). The impartial hearing officer also found that petitioner failed to submit any evidence supporting her claim that respondent had decided to remove aversive behavioral interventions from the student's IEP prior to participating in the September 2006 CSE (id.).

Applying the criteria for the use of aversive behavioral interventions, the impartial hearing officer determined that JRC was required to show that the aversive use was limited to self-injurious or aggressive behavior that would pose a physical threat to the student or others, and that a full range of evidence-based positive behavioral interventions had been attempted over a sufficient period of time and proved ineffective (IHO Decision at p. 20). With regard to the positive program, the impartial hearing officer found, among other things, that JRC failed to employ positive behavioral interventions for a sufficient time before determining they were ineffective, and that JRC did not employ what he characterized as "positive approaches," including timeouts, restrictive movement overcorrection, picture exchange communication system (PECS) or applied behavioral analysis (ABA) therapy (id. at pp. 21-22). The impartial hearing officer noted that the GED had been used with the student for eight years and determined that the use of the GED was not effective (id. at p. 22). The impartial hearing officer concluded that the September 2006 decision to remove the aversive behavioral interventions from the student's IEP was appropriate because petitioner was able to voice her concerns, JRC staff conducted the assessments of the student and JRC failed to show that the student met the criteria for use of aversive behavioral interventions (id. at pp. 22-23).

Petitioner appeals, arguing that the September 2006 CSE's removal of the aversive behavioral interventions from the student's IEP, was not based upon any credible clinical/educational opinions or data. Petitioner also contends that the September 2006 CSE's decision to remove aversive behavioral interventions was based on a mistaken belief that the Commissioner's regulations mandated removal of the aversive behavioral interventions. According to petitioner, the evidence at the impartial hearing supports the conclusion that, without Level III aversive behavioral interventions, implementation of the proposed IEP would result in behavioral regression and a denial of a free appropriate public education (FAPE) to the student. Petitioner asserts that the impartial hearing officer erred by finding that the September 2006 IEP was appropriate, that there was a failure to show that aversive behavioral interventions were limited to self-injurious and aggressive behavior, that the IEP was not predetermined, that the GED has not been effective, and that the hearing record did not show that positive behavioral interventions were attempted over a sufficient period of time and proved ineffective. Petitioner contends that the impartial hearing officer's decision is contradictory insofar as it finds that the student's inappropriate behaviors were reduced while also finding that the GED has not been effective. Petitioner further alleges that the impartial hearing officer failed to consider relevant documents from the Massachusetts Probate and Family Court, raised irrelevant and undisputed issues, improperly "injected" himself into the proceedings, improperly sustained his own objections, and was biased against petitioner.

Petitioner argues that the student has filed suit in the District Court on a related issue, and that the District Court has issued three injunctions that prevent respondent from discontinuing the Level III aversive behavioral interventions set forth in the student's May 2006 IEP. Petitioner also asserts that the student should have received partial "grandfathered" treatment with respect to the newly promulgated Commissioner's regulations on aversive behavioral interventions and that the September 2006 CSE should have recommended continued aversive behavioral interventions while sending the existing IEP to the Commissioner of Education (or state panel) with supporting information prior to October 1, 2006. Petitioner contends that respondent scheduled the September 2006 CSE meeting for the predetermined purpose of removing aversive behavioral interventions, thus denying petitioner an opportunity for meaningful participation. Petitioner argues that respondent did not issue prior written notice, and did not conduct an observation or a functional behavioral assessment (FBA) of the student prior to changing his BIP. Petitioner contends that the September 2006 CSE's failures denied the student a FAPE. Petitioner also notes that respondent failed to file a response to the due process complaint notice. As relief, petitioner requests that the impartial hearing officer's decision be annulled and that respondent be directed to implement the student's May 2006 IEP.

In its answer, respondent denies many of petitioner's allegations. According to respondent, the student has made academic, behavioral and social gains since entering JRC. Respondent argues that JRC reduced the use of the GED as the student's behavior improved. Respondent notes that the GED has not been used during the student's home visits in two years and that the student achieved all of his major behavior goals from December 2006 to March 2007. Respondent contends that the September 2006 CSE met and considered the District Court's preliminary injunction. According to respondent, it is not a party to the District Court proceeding, and the injunctions do not apply. Respondent asserts that the CSE discussed the new Commissioner's regulations and appropriately removed all aversive behavioral interventions because the student no longer exhibited dangerous or self-injurious behaviors, and the September 2006 CSE recommended that JRC could use nonaversive techniques. Respondent contends that the CSE ensured that the student was offered a FAPE, and that it was unnecessary, under the Commissioner's regulations, for the September 2006 CSE to notify the child-specific panel with regard to the students for whom the CSE was considering the use of aversive behavioral interventions.

Respondent further argues that the dispute over the September 2006 IEP has been rendered moot due to the passage of time. Respondent alleges that a new IEP was developed for the 2007-08 school year, and that a dispute over that IEP was settled pending the outcome of the 2006-07 school year dispute. Respondent notes that the terms of the parties' settlement would permit petitioner to refile her claims regarding the 2007-08 school year and contends that the instant petition for review should be dismissed in its entirety.

Petitioner interposed a reply to the answer and argues, among other things, that the District Court's injunctions should apply because respondent is an agent of the State Education Department within the meaning of the Federal Rules of Civil Procedure. Petitioner asserts that respondent's mootness argument is not properly raised on appeal and should have been raised during the hearing below when the 2006-07 school year concluded. Petitioner also asserts that the issue remains a live controversy and that a decision on appeal will have an actual effect on the parties. Petitioner

further argues that the dispute will recur yet evade review if petitioner is forced to refile her petition for the 2007-08 school year.

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]; see 20 U.S.C. § 1414[d]; 34 C.F.R. § 300.320).[4]

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 a procedural violation is alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007]).

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).

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

[4] 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]).

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). If a student's behavior impedes his or her learning or the learning of others, the CSE must "consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior" when developing, reviewing and revising an IEP (20 U.S.C. § 1414[d][3][B][i]; see 34 C.F.R. § 300.324[a][2][i]; 8 NYCRR [d][3][i]).

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]).

At the outset, the parties have raised several procedural matters on appeal which must be addressed. First, in its answer, respondent objects to additional documents that were submitted with the petition for review. Petitioner objects to documents attached as exhibits to the answer by respondent. Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an impartial hearing officer's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of the Bd. of Educ., Appeal No. 06-044; Application of the Bd. of Educ., Appeal No. 06-040; Application of a Child with a Disability, Appeal No. 05-080; Application of a Child with a Disability, Appeal No. 05-068; Application of the Bd. of Educ., Appeal No. 04-068).

Petitioner submitted with her petition for review three injunctive orders totaling 12 pages that were issued by the District Court and were admitted into evidence at the impartial hearing (Tr. p. 323; Parent Ex. E). Accordingly, it is unnecessary to consider these orders because they must be produced as part of the hearing record and need not be reintroduced into evidence (8 NYCRR 279.9[a]; see Application of a Child with a Disability, Appeal No. 07-099). Petitioner also submitted a sworn statement of facts proffered by petitioner's attorney and an exhibit attempting to demonstrate the results of impartial hearings involving other students. Most of the information in these documents was available at the time of the impartial hearing and they are not necessary in order to render a decision. Consequently, I decline to accept the additional documents submitted by petitioner.

As for the two documents attached to respondent's answer, I find that the student's IEP for the 2007-08 school year was available at the time of the impartial hearing (Answer Ex. I), but the consent order from another related impartial hearing involving claims regarding the student's 2007-08 IEP, is dated after the impartial hearing officer's decision and it was not available at the time of the impartial hearing (Answer Ex. II). As further discussed below, these documents are necessary to resolve the parties' dispute regarding mootness of petitioner's 2006-07 claims, and therefore, I will consider them.[5]

[5] The issue of the appropriateness of the student's IEP for the 2007-08 school year was not raised at the impartial hearing for the 2006-07 school year and is not before me in this appeal. Thus, I do not address the merits of the parties' dispute for the 2007-08 school year.

Turning to respondent's procedural defense that the case is moot, 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]; see also Chenier v. Richard W., 82 N.Y.2d 830, 832 [1993]; Hearst Corp. v. Clyne, 50 N.Y.2d 707, 714 [1980]; Application of a Child with a Disability, Appeal No. 07-139). In general, cases dealing with issues such as desired changes in IEPs, specific placements, and implementation disputes may become moot at the end of the school year because no meaningful relief can be granted (see, e.g., 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 (see Daniel R.R. v. El Paso Indep. Sch. Dist., 874 F.2d 1036, 1040 [5th Cir. 1989]; Application of a Child with a Disability, Appeal No. 07-139; Application of the Bd. of Educ., Appeal No. 07-028; Application of a Child with a Disability, Appeal No. 06-070; Application of a Child with a Disability, Appeal No. 04-007). However, a claim may not be moot despite the end of a school year for which the student's IEP was written, if the conduct complained of is "capable of repetition, yet evading review" (see Honig v. Doe, 484 U.S. 305, 318-23 [1988]; Lillbask, 397 F.3d at 84-85; Daniel R.R., 874 F.2d at 1040; Application of a Child with a Disability, Appeal No. 04-038).

The exception 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]). It must be apparent that "the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration" (Murphy v. Hunt, 455 U.S. 478, 482 [1982]; see Knaust, 157 F.3d at 88; Application of a Child with a Disability, Appeal No. 07-139). 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]; see Hearst Corp., 50 N.Y.2d at 714-15; Application of a Child with a Disability, Appeal No. 07-139). To create a reasonable expectation of recurrence, repetition must be more than theoretically possible (Murphy v. Hunt, 455 U.S. 478, 482 [1982]; Russman v. Bd. of Educ., 260 F.3d 114, 120 [2d Cir. 2001]; Application of a Child with a Disability, Appeal No. 07-139). 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 (Russman, 260 F.3d at 120; Application of a Child with a Disability, Appeal No. 07-139). Mootness may be raised at any stage of litigation (In re Kurtzman, 194 F.3d 54, 58 [2d Cir. 1999]; Application of a Child with a Disability, Appeal No. 07-139).

In this case, petitioner has challenged respondent's development of the behavioral aspects of the student's September 2006 IEP; however, the hearing record is clear that both IEPs for the student for the 2006-07 school year expired by their own terms after one year (see Parent Exs. B at p. 2; C at p. 2). It is beyond dispute that the 2006-07 school year is now long past. I also note that the parties agreed that the student would continue to receive aversive behavioral interventions during the 2006-07 school year by virtue of pendency (Tr. pp. 167-69). I find that, as a practical matter, no meaningful relief can be offered to petitioner with respect to her challenge to the September 2006 IEP and that issue is moot.

However, I find that, under the unique circumstances of this case, petitioner's claim falls within the narrow exception for reviewing moot cases that are capable of repetition yet evading review. The opportunity to completely litigate this matter was particularly short, especially since a new IEP was developed for the student well before the completion of the impartial hearing (Parent Exs. B at p. 2; C at p. 2; Answer Ex. I at p. 2). I also find that there is a reasonable expectation that the same controversy will arise again between the parties and that review may thereafter be forestalled. Respondent convened a CSE meeting for the 2007-08 school year on May 3, 2007, and recommended against the use of aversive behavioral interventions for the student (Answer Ex. I at p. 9). The parties again disagreed over that recommendation, and although the parties appear to have mutually agreed to suspend resolution of their dispute, implement the student's May 2006 IEP, and effectuate a temporary withdrawal of the claim (Answer Ex. II at pp. 3-4), respondent has taken the position that petitioner is free to reassert her claim for the 2007-08 school year (Answer ¶ 93). Furthermore, I note in particular that the student recently turned 21 years old, and will become ineligible for services under the IDEA at the end of the current school year (Parent Ex. B at p. 1; see Educ. Law § 4402[5]; 8 NYCRR 200.5[a][5][iii], 200.13[c]). I find that there is a reasonable expectation that the same dispute will recur between the parties during the 2007-08 school year and that it is highly likely that student will become ineligible for the protections of the IDEA before petitioner's claims could be fully reviewed (see Honig, 484 U.S. at 322-23; Christopher P. v. Marcus, 915 F.2d 794, 803 [2d Cir. 1990]). Therefore, I will review the matter under the exception to the mootness doctrine.

I will now address the parties' contentions with regard to the District Court injunctions. The parties do not dispute that the student is named as a plaintiff in the suit filed in the District Court and that preliminary injunctions prohibiting enforcement of several aspects of Section 200.22 of the Commissioner's regulations have been issued. In bringing their dispute over the injunctions to this forum, the parties would have me determine the extent to which respondent, if at all, is bound by the District Court's injunctions. For the reasons describe below, I must decline to do so.

Jurisdiction over preliminary injunctions issued by the lower federal courts rests with the district courts and circuit courts of appeals (see 28 U.S.C. § 1292[a][1]; Fed. R. Civ. P. 65; see, e.g., Weight Watchers Intern., Inc. v. Luigino's, Inc., 423 F.3d 137, 141-42 [2d Cir. 2005]; Wilder v. Bernstein, 49 F.3d 69 [2d Cir. 1995]; Pediatric Specialty Care, Inc. v. Arkansas Dept. of Human Services, 364 F.3d 925 [8th Cir. 2004]). No provision of the IDEA or the Education Law confers jurisdiction upon a state educational agency or a local educational agency to resolve disputes over injunctions issued by a judicial tribunal. Consequently, I find that I do not have the jurisdiction to resolve the parties' dispute regarding the extent to which respondent may be bound or may have violated the injunction(s) issued by the District Court. Moreover, the impartial hearing officer similarly lacked jurisdiction to decide the applicability and scope of the District Court's injunction, and therefore I will annul that portion of his decision which ruled that the injunction is not applicable. Turning next to petitioner's claims of bias on the part of the impartial hearing officer, the Commissioner's regulations provide that an impartial hearing officer shall not have a personal or professional interest which would conflict with his or her objectivity in the impartial hearing (8 NYCRR 200.1[x][3]; Application of a Child with a Disability, Appeal No. 01-046). An impartial hearing officer should avoid giving the appearance of impropriety (Application of a Child with a Disability, Appeal No. 07-008; Application of the Bd. of Educ., Appeal No. 03-015; Application of a Child with a Disability, Appeal No. 02-027; Application of a Child with a

Disability, Appeal No. 00-063; Application of a Child with a Disability, Appeal No. 99-061; Application of a Child with a Disability, Appeal No. 99-025; Application of a Child with a Disability, Appeal No. 98-73; Application of a Child with a Disability, Appeal No. 98-55; Application of a Child with a Disability, Appeal No. 94-32). An impartial hearing officer, like a judge, must be patient, dignified and courteous in dealings with participants in the impartial hearing process and must perform all duties without bias or prejudice in favor or against any person, and shall not, by words or conduct, manifest bias or prejudice, according each party the right to be heard (Application of a Child with a Disability, Appeal No. 07-090; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child Suspected of Having a Disability, Appeal No. 01-021; see 8 NYCRR 200.1[x][3], [4][v]). At all stages of the hearing, an impartial hearing officer may "assist an unrepresented party by providing information relating only to the hearing process" (8 NYCRR 200.5[j][3][vii]). An impartial hearing officer must render a decision that is based solely upon the hearing record (8 NYCRR 200.5[j][5][v]; see Application of a Child with a Disability, Appeal No. 00-063; Application of a Child Suspected of Having a Disability, Appeal No. 00-036; Application of a Child with a Disability, Appeal No. 98-55). The Commissioner's regulations do not impair or limit the authority of an impartial hearing officer to ask questions of counsel or witnesses for the purpose of clarification or completeness of the record (8 NYCRR 200.5[j][3][vii]).

After reviewing the entire hearing record, including the impartial hearing officer's interaction with the parties and the language of his decision, I find that the evidence does not weigh in favor of petitioner's contention that the impartial hearing officer acted with bias or prejudice against petitioner. Although the impartial hearing officer posed an unusually large number of questions, sometimes to the point of interrupting the flow of the proceedings, his questions often led to further clarification and development of the hearing record. In addition to asking questions of petitioner's witnesses, the impartial hearing officer asked numerous questions from the witness called by respondent (see, e.g., Tr. pp. 201-13). Although petitioner disagreed with the conclusions reached by the impartial hearing officer, that disagreement does not provide a basis for finding that the impartial hearing officer acted with bias (Application of a Child with a Disability, Appeal No. 07-078; Application of a Child with a Disability, Appeal No. 06-102; Application of a Child with a Disability, Appeal No. 06-013; Application of a Child with a Disability, Appeal No. 96-3; Application of a Child with a Disability, Appeal No. 95-75).

Petitioner also alleges that the impartial hearing officer tampered with evidence. Regarding the exhibit in question, the hearing record reveals that it was petitioner who initially entered the incomplete version of the exhibit into evidence (Tr. p. 55; Parent Ex. E). The hearing record also shows that both the parties and the hearing officer at times experienced confusion when numbering and labeling exhibits and the complete exhibit was received as evidence (Tr. pp. 274-76, 321-23). A review of the hearing record shows that the impartial hearing officer made no effort whatsoever to prevent petitioner from entering the evidence in question into the hearing record (Tr. pp. 321, 323). In light of the forgoing, I find that any discrepancy in the number of pages of the exhibit was an oversight by the impartial hearing officer, and that the evidence does not reveal actual bias in rendering his decision.

Turning next to the September 2006 CSE's proposal to remove aversive behavioral interventions from the student's IEP, the IDEA requires that a CSE "consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior" when a

student's behavior impedes his or her learning, or that of others (20 U.S.C. § 1414[d][3][B][i]; see 34 C.F.R. § 300.324[a][2][i]; see also Application of the Bd. of Educ., Appeal No. 07-120; Application of a Child with a Disability, Appeal No. 07-015).

In June 2006, the Commissioner's regulations relating to behavioral interventions were amended, resulting in additional procedures, restrictions and oversight of the use of aversive behavioral interventions for students with disabilities.[6, 7] Definitions of "aversive behavioral intervention" and "behavior intervention plan" were added (8 NYCRR 200.1[*lll*], [mmm]), and certain educational institutions approved by the Commissioner of Education were prohibited, subject to certain exceptions, from employing corporeal punishment and aversive behavioral interventions (8 NYCRR 19.5, 200.22[a][3]). The Commissioner's regulations were also revised to include additional procedures for assessing a student's behavior and developing an FBA (8 NYCRR 200.4[d][3][i], 200.22[a]; see also 8 NYCRR 201.3). According to a letter issued by the Office of Special Education Programs (OSEP) of the United States Department of Education, school districts may employ FBAs for several purposes, some of which may apply to a school or program as a whole and some of which are necessarily focused on evaluating an individual student (see Letter to Christiansen, 48 IDELR 161 [OSEP 2007]).[8] When using an FBA for an individual student for the purpose of assessing the behavioral component of his or her IEP, an FBA is defined as "the process of determining why a student engages in behaviors that impede learning and how the student's behavior relates to the environment" (8 NYCRR 200.1[r]), and includes, 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"

(id.; see Application of the Bd. of Educ., Appeal No. 07-120). When developing behavioral interventions for students with a disability, an FBA must

> "be based on multiple sources of data including, but not limited to, information obtained from direct observation of the student,

[6] The June 2006 amended regulations were adopted through emergency rulemaking procedures and were thereafter revised several times. The final regulations became effective in October 2007 and several subsections have been reorganized and renumbered. For convenience, I will refer to the final regulations unless otherwise noted.

[7] In developing an IEP and considering "special factors," when a student's behavior impedes learning, federal regulations (34 C.F.R. § 300.324[a][2][i]) and New York State regulations (8 NYCRR 200.4[d][3]) require consideration of strategies to address that behavior as part of the development of the IEP. Federal regulations (34 C.F.R. §§ 300.530[d][1][ii], 300.530[f][1][i]) and New York State regulations (8 NYCRR 201.3) also address preparation of, or review of, an FBA and BIP in disciplinary situations. In addition, as presented in the instant case, New York State regulations (8 NYCRR 200.4[d][3][i], 200.22[a],[b]), but not federal regulations, require consideration of an FBA and BIP in certain non-disciplinary situations.

[8] Different procedural safeguards may apply, depending on the purpose or the scope of an FBA.

> information from the student, the student's teacher(s) and/or related service provider(s), a review of available data and information from the student's record and other sources including any relevant information provided by the student's parent"

(8 NYCRR 200.22[a][2]). According to the Commissioner's regulations, an FBA must be based on more than the student's history of presenting problem behaviors (id.). An FBA must also include a baseline setting forth the "frequency, duration, intensity and/or latency across activities, settings, people and times of the day" so that a BIP may be developed that addresses "antecedent behaviors, reinforcing consequences of the behavior, recommendations for teaching alternative skills or behaviors and an assessment of student's preferences for reinforcement" (8 NYCRR 200.22[a][3]; see Application of the Bd. of Educ., Appeal No. 07-120).

If a CSE determines that a student needs a BIP, the CSE must consider the development of the student's BIP relying upon, among other things, the student's FBA (8 NYCRR 200.1[mmm], 200.22[b]; see 8 NYCRR 201.2[a], 201.3[a]; see also Application of the Bd. of Educ., Appeal No. 07-120). The revised BIP provisions outline procedures for progress monitoring as well as use of time out rooms and emergency interventions, such as physical force and physical restraints (8 NYCRR 200.22[b][4], [c]-[d]).

Prior to determining whether to include a child-specific exception to the general prohibition against the use of aversive behavioral interventions in a student's BIP, the amended Commissioner's regulations set forth a process requiring the CSE to submit an application seeking a recommendation from a state-level panel of experts (8 NYCRR 200.22[e][3]-[6]). The panel must then notify the school district and the Commissioner, and "[t]he CSE shall determine, based on its consideration of the recommendation of the panel, whether the student's IEP shall include a child-specific exception allowing the use of aversive interventions" (8 NYCRR 200.22[e][7]-[8]). When a student's IEP containing a child-specific exception expires, and the student's IEP is thereafter amended or a subsequent IEP is adopted to no longer include a child-specific exception, the school district need not notify the panel but shall submit a revised copy of the student's IEP to the Commissioner (8 NYCRR 200.22[e][11]). The Commissioner's regulations also set forth program standards with which certain educational institutions, including out-of-state residential schools approved by the Commissioner of Education, must comply if they employ aversive behavioral interventions (8 NYCRR 200.22[f]).[9]

[9] As discussed above, the District Court, with respect to the student plaintiffs and subject to numerous conditions, issued injunctions restricting enforcement of several aspects of the amended regulations (Parent Ex. E). The affected sections include the program standards set forth in 8 NYCRR 200.22[f][2][vi] [limitation of aversive behavioral interventions to self-injurious or aggressive behaviors], 8 NYCRR 200.22[f][2][ix] [prohibition against using aversive behavioral interventions while a student is in mechanical or physical restraints], 8 NYCRR 200.22[f][4] [licensing and certification requirements], and the application requirement for the state-level panel recommendation applicable to students having aversive behavioral interventions on their IEP set forth in 8 NYCRR 200.22[e][1][ii] [effective September 19, 2006] (Parent Ex. E). On February 14, 2008, the Second Circuit Court of Appeals vacated the injunction relating to State requirements for licensing and certification and remanded the matter to the District Court for further findings (see Parent Ex. E at pp. 11-12; see also 8 NYCRR 200.22[f][4]). I note that a decision in this administrative appeal may be rendered without relying on the regulatory subsections in question.

In this case, respondent's school psychologist reported that the September 2006 CSE compared the student's behavior between May and September 2006 based on reports and other documents from JRC and petitioner (Tr. pp. 262-63, 265). The hearing record includes clinician notes from June 19, 2006 through September 2006 when the first injunction was issued (Dist. Ex. 7 at pp. 4, 5); a quarterly progress report covering the period from June 18, 2006 through September 16, 2006 (Parent Ex. O); charts detailing the student's behavior between May and September 2006 (Parent Ex. J); and the student's report card for the 2006-07 school year (Parent Ex. K at p. 7). The student's behavior modification treatment plan in effect at the time of both the May 2006 and September 2006 CSE meetings proposed the use of aversive behavioral interventions for all categories of interfering behavior (Tr. pp. 273-76; Parent Ex. P at pp. 20-22);[10] however, the hearing record is unclear whether aversive behavioral interventions were actually used to address the student's inappropriate behaviors in all of the categories.

The quarterly progress report from JRC indicates that, based on the emergency Commissioner's regulations promulgated in June 2006, JRC suspended certain GED applications between June and September 2006 that had been used to decelerate the student's behaviors falling into the major disruptive and non-compliant categories (Parent Ex. O at p. 2). Clinician notes indicated that during this time period there was a "clear increase" in the student's behaviors in the major disruptive category as well as an increase in the student's behaviors in the noncompliant category (Dist. Ex. 7 at pp. 4, 5).[11] Charts showing the frequency of the student's behaviors in the major disruptive and noncompliant categories without GED applications supported this conclusion (Parent Ex. J at pp. 3, 4). In addition, the quarterly progress report indicated that there was also an increase in behaviors for which the student did not receive GED applications as a consequence, specifically in the category of interfering behaviors (Parent Ex. O at p. 2).[12] The student's behavior charts also suggested that, during the same period, the student's behaviors in the aggressive and health dangerous categories, for which he continued to receive GED applications as a consequence, had declined and his destructive behaviors remained low (Parent Exs. J at pp. 5-7; O at p. 2). The student's report card indicated that he made "remarkable academic progress" during the first quarter of the 2006-07 school year, which began June 18, 2006 and ended September 16, 2006 (Parent Ex. K at p. 7).

At the impartial hearing, three participants from the September 25, 2006 CSE meeting, including petitioner, testified (Tr. pp. 151, 199, 662); however, the hearing record is unclear as to what data, documents, or other information the September 2006 CSE reviewed or relied upon in

[10] The aversive behavioral interventions approved by the Massachusetts Probate and Family Court include a contingent food program, specialized food program, GED and GED-4 with concentric and distanced electrodes, movement limitation as a decelerator and use of a helmet (Parent Ex. P at pp. 14-20).

[11] The student's quarterly progress report also noted that there had been a change in the way the student's behaviors were recorded insofar as inappropriate verbal behaviors were moved into the major disruptive category in order to track them separately (Parent Ex. O at p. 2).

[12] As detailed in the student's behavior modification treatment plan, JRC requested authorization to use a contingent food program as a consequence for the student's interfering behaviors and inappropriate verbal behaviors (Parent Ex. P at pp. 21-22). The student's progress report covering the period from June to September 2006 indicated that "even though the regulations did not effect [the student's] interfering behaviors, they also increased" (Parent Ex. O at p. 2). It is unclear if the contingent food program was employed during this time period.

determining that aversive behavioral interventions should be removed from the student's IEP. The student's treating clinician at JRC recalled that the last formal FBA of the student was written in September 2006 (Tr. pp. 405-06). JRC's director of clinical services indicated that a copy of the FBA should have been provided to the CSE; however, he indicated that he did not personally forward it nor could he confirm that anyone else had provided it to the September 2006 CSE (Tr. pp. 639-41). The September 2006 FBA was not entered into evidence, and I find that the hearing record does not support a determination that the September 2006 CSE received or considered an FBA in developing the student's BIP and determining whether aversive behavioral interventions should be removed from the student's IEP.

The hearing record includes a behavior modification treatment plan from JRC, written in October 2003, that contains information on the student's behavior between May 25 and July 7, 2003 (Parent Ex. P at p. 6). The student's behavior modification treatment plan, which the hearing record suggests was reviewed by the CSE, identifies behavior categories and lists examples of "topographies" or types of behavior that might be exhibited in each category (Tr. p. 275; Parent Ex. P at pp. 4-5). However, none of the exhibits in the hearing record; including the student's October 2003 behavior modification treatment plan, progress reports, behavior charts, or notes from his treating clinician, identify the specific behaviors that the student demonstrated on any given day, nor do they identify the contextual factors that contributed to a particular behavior (8 NYCRR 200.1[r]). While the student's behavior modification treatment plan contains a general hypothesis regarding the function of the student's various behaviors, the hypothesis is not linked to specific behavioral incidents or occurrences subsequent to October 2003 (Parent Ex. P at pp. 8-10). According to respondent's school psychologist, the CSE collected enormous amounts of information at the meeting, reviewed the student's records and interviewed everyone present (Tr. pp. 208, 264, 304). However, upon further examination, the psychologist admitted that she could not recall or confirm which specific reports or records were reviewed (Tr. pp. 243-46). Accordingly, I find that the documents that the September 2006 CSE had before it did not provide the level of specificity needed to determine why the student engages in behavior that impedes his learning and how the student's behavior relates to his environment. The evidence regarding the information before the September 2006 CSE does not show that an FBA was developed in compliance with the Commissioner's regulations prior to reaching its recommendation to substantially modify the student's BIP (see 8 NYCRR 200.1[r], 200.22[a][2]-[3]).

Respondent's school psychologist testified that an application to the state panel for a child specific exception would be made if the CSE was "seriously" considering the use of aversive behavioral interventions and that the CSE would be guided by the needs of the student (Tr. p. 258). The hearing record shows that the participants at the September 2006 CSE were sharply divided over the issue of whether the student should continue to receive aversive behavioral interventions, with the JRC staff and clinicians and petitioner advocating in favor of continuation and respondent's staff asserting that aversive behavioral interventions should be discontinued (Tr. pp. 155-56, 178-79, 183-85, 210-11, 217-18, 257-58, 267-68). The parties do not dispute that the student's May 2006 IEP included the use of aversive behavioral interventions (Parent Ex. C). Under these circumstances, in which the information before the September 2006 CSE pointed to a history of using aversive behavioral interventions with the student and a variety of possible behavioral intervention strategies that could be employed going forward, I find that the CSE, which was not in consensus, was required to carefully consider both the IDEA's emphasis on positive

behavioral supports as well as the other strategies that were being raised by petitioner, the student's teachers and his treating clinicians (34 C.F.R. § 300.324[a][2][i]; see 8 NYCRR 200.4[d][3][i]).

I also note that if respondent is correct in its assertion that the District Court's injunction does not apply, then consideration of the strategies raised by petitioner and JRC would require respondent to submit an application for a recommendation for a child-specific exception.[13] Assuming, without deciding, that the District Court's injunction regarding the child-specific application does not apply to respondent, the Commissioner's regulations in effect at the time of the September 2006 CSE called for respondent to submit an application prior to October 1, 2006 because the student's May 2006 IEP authorized the use of aversive behavioral interventions (Parent Ex. C; see 8 NYCRR 200.22[e][1][ii] [effective September 19, 2006]).[14] Furthermore, even if the Commissioner's regulations, as amended, could not be applied in the current case, I find that respondent's assertion that it did not need to consider the use of aversive behavioral interventions is undermined by the fact that petitioner and the staff at JRC, all of whom had regular contact and observed the student's behavior, strongly opposed removal of the aversive behavioral interventions from the student's IEP (34 C.F.R. § 300.324[a][2][i]). In contrast, respondent's school psychologist, was not personally familiar with the student, had little experience with aversive behavioral interventions, and had difficulty recalling what documentation the CSE may have relied upon in reaching a conclusion regarding the use of aversive behavioral interventions (Tr. pp. 214, 220, 222, 236-38, 243-46).

In view of the forgoing, I find that it was incumbent upon respondent to ensure development of an FBA in accordance with the Commissioner's regulations (8 NYCRR 200.1[r], 200.22[a]), and give careful consideration to specific details regarding the student's behaviors before finalizing recommendations in the student's IEP (34 C.F.R. §§ 300.324[a][2][i], 300.325[c]; 8 NYCRR 200.4[d][3][i]). The evidence in this case does not support the conclusion that either an appropriate FBA was conducted or that the September 2006 CSE gave appropriate consideration to the behavior intervention strategies identified by petitioner or the staff at JRC. Consequently, I find that the impartial hearing officer's decision must be annulled to the extent that it found that the September 2006 IEP was appropriate (IHO Decision at p. 22).

Petitioner requests that I find that the May 2006 IEP is appropriate for the student going forward. I decline to do so. The student's IEP must be reviewed periodically, but not less frequently than annually (20 U.S.C. § 1414[d][4][A]; 34 C.F.R. § 300.324[b][1]). The May 2006 IEP is nearly 21 months old, and has expired by its own terms, and any evaluative data, including behavioral information, upon which the May 2006 CSE relied is equally dated (Parent Ex. C at p. 1). Furthermore, for the 2006-07 school year, the student continued receiving the aversive behavioral interventions in dispute by virtue of pendency (Tr. pp. 166-67). I also note that JRC's director of clinical services testified in September 2007 that it may be appropriate to begin the

[13] Due to the jurisdictional issue discussed previously and the discussion below regarding respondent's requested relief, it is unnecessary for me to decide whether respondent is obligated to submit an application for a child-specific exception for the student.

[14] This subsection of the regulation was subsequently amended after the October 1, 2006 deadline for submitting applications elapsed with regard to students already receiving aversive behavioral interventions pursuant to their IEP (8 NYCRR 200.22[e][3]-[4]).

process of removing use of the GED with the student in 2008 (Tr. p. 630). Moreover, the CSE must now offer any proposed revisions to the student's IEP amid the backdrop of the amended Commissioner's regulations and the effects, if any, of the continuing federal litigation surrounding this issue.

Although I have determined that the September 2006 CSE did not have adequate information before it when developing the student's IEP, the hearing record suggests that information with an appropriate level of specificity can be made available to the CSE. The student's clinician at JRC testified that she knew when the student received GED applications, and that she received "reports, information, what the behavior was, what occurred, what surrounded that event" (Tr. p. 379). She also testified that when students received GED applications as a consequence of their behavior it was marked down on a reporting sheet (Tr. p. 388). She noted that everything, including the school, the residences and the vans and buses, is videotaped and monitored, and that anytime a GED application was given to the student it had to be "pre-verified" (Tr. p. 389). I encourage the parties to consider reviewing these materials when developing recommendations for this student in the future.

I have considered petitioner's remaining contentions and find that it is unnecessary to address them in light of my decisions herein.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the impartial hearing officer's decision dated November 24, 2007 is annulled to the extent that it determined that the injunction issued by the District Court does not apply, and to the extent it found that the student's September 25, 2006 IEP was appropriate.

Dated: **Albany, New York**
March 7, 2008

ROBERT G. BENTLEY
STATE REVIEW OFFICER