The University of the State of New York

The State Education Department
State Review Officer

No. 07-139

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 Board of Education of the Syosset Central School District

Appearances:
Law Office of Andrew K. Cuddy, attorney for petitioner, Andrew K. Cuddy, Esq., of counsel

Law Offices of Vanessa M. Sheehan, attorney for respondent, Bonnie L. Gorham, Esq., of counsel

DECISION

Petitioner appeals from the decision of an impartial hearing officer which found that the educational program respondent's Committee on Special Education (CSE) recommended for her son for the 2006-07 school year was appropriate and denied her request for reimbursement of private evaluations. The appeal must be dismissed.

During the impartial hearing that spanned ten hearing dates from January 2007 to September 2007, the student attended respondent's school. The student's eligibility for special education programs and services as a student with a speech or language impairment is not in dispute in this appeal (Tr. p. 865; see 34 C.F.R. § 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

The hearing record reflects that the student received special education, speech-language therapy, and occupational therapy (OT) through early intervention and later through the Committee on Preschool Special Education (CPSE) (Dist. Ex. 39 at p. 1). The student underwent numerous evaluations prior to his transition to respondent's CSE. Collectively, the evaluations offered a variety of diagnoses and diagnostic impressions, which were sometimes contradictory (Parent Exs. 31 at p. 2; 32 at pp. 12-13; 33 at p. 2; 34 at p. 1).[1] While at least one evaluator diagnosed the student as having a pervasive developmental disorder not otherwise specified (PDD-NOS) and an

[1] The hearing record contains multiple duplicative exhibits. For purposes of this decision, only Parent exhibits were cited in instances where both a District and Parent exhibit were identical. I remind the impartial hearing officer that it is her responsibility to exclude evidence that she determines to be irrelevant, immaterial, unreliable or unduly repetitious (8 NYCRR 200.5[j][3][xii][c]).

attention deficit hyperactivity disorder (ADHD) (Parent Ex. 31 at p. 2), other evaluators ruled out these conditions (Parent Exs. 32 at p. 12; 34 at p. 1). One evaluator diagnosed the student with a developmental language disorder (Parent Ex. 32 at p. 12), while another evaluator indicated the need to rule out specific learning disabilities (Parent Ex. 33 at p. 2).

The results of standardized testing conducted in spring 2005 indicated that the student's cognitive functioning was in the average range (Parent Exs. 20 at p. 2; 32 at p. 5). Additional assessments revealed weaknesses in the student's ability to attend, expressive and receptive language abilities, social development and fine motor skills (Dist. Exs. 21 at p. 3; 24 at pp. 2, 4, 5, 7; Parent Exs. 20 at pp. 3-5; 21 at pp. 5-7; 22 at p. 4). The student exhibited sensory processing and modulation difficulties (Parent Ex. 21 at pp. 6, 8). Petitioner noted that the student had frequent ear infections but that vision and hearing problems were "not an issue" (Dist. Ex. 23 at p. 2). The student demonstrated uncooperative and non-compliant behavior, particularly in the home environment (Dist. Exs. 21 at pp. 2-3; 23 at pp. 3, 5; Parent Exs. 32 at p. 13; 34 at p. 1).

On June 1, 2005, a CSE meeting was held to transition the student from CPSE to CSE and to develop the student's individualized education program (IEP) for the 2005-06 school year (Parent Ex. 5). The resultant IEP indicated that the student had at least low average cognitive abilities, but that his ability to function in the classroom was minimized by distractibility and self-directed impulsive behaviors (id. at p. 5). The student's non-compliance was noted to be a serious concern (id.). The IEP indicated that the student had been diagnosed with an ADHD and PDD and that although he enjoyed interacting with peers and adults he was sometimes unaware of dangerous situations and may disregard limits and disrupt play activities (id.). The student was noted to demonstrate significant delays in fine motor skills and sensory processing, as well as weak self-help skills (id. at p. 6). The IEP indicated that the student required a program with a small teacher-to-student ratio and minimal distractions in order to progress academically (id.). The CSE recommended that the student be classified as having a speech or language impairment and be placed in a 12:1+1 special class for kindergarten (id. at pp. 3, 4). In addition, the CSE recommended that the student be provided with a 1:1 teacher assistant and receive related services of speech-language therapy five times weekly for 30 minutes and OT two times weekly for 30 minutes (id. at p. 4). The IEP also included a recommendation for parent training once weekly for one hour (id.). IEP goals and objectives related to the student improving his study skills, reading, writing, mathematics, speech-language, social/emotional/behavioral, motor and basic cognitive/daily living skills (id. at pp. 6-8).

Between September and December 2005, petitioner and the student's teacher regularly communicated through the use of a communication notebook (Parent Ex. 117). In the communication notebook, petitioner expressed concern regarding the student's fine motor development (id. at pp. 2, 8, 10-11, 14), and the manner in which he was being disciplined in school (id. at pp. 15, 16, 17). Petitioner further noted that the student's main disability was his poor central auditory processing (id. at p. 16). Petitioner also wrote about an incident occurring outside of school where the student spelled long and complex words backwards (id. at p. 18). Petitioner questioned whether this was a sign of dyslexia and inquired how to have the student tested (id.).

In December 2005, petitioner requested a meeting with respondent to discuss several concerns about her son's educational program, including mainstreaming the student in a general

education classroom (Parent Exs. 98; 99; 117 at p. 20). On December 23, 2005, petitioner met with the school principal to discuss her concerns (Parent Exs. 82; 87; 95).

Also in December 2005, petitioner sought and obtained a private central auditory processing evaluation of the student (Parent Ex. 28). The evaluating audiologist concluded that the student presented with an auditory processing disorder in the areas of figure ground listening, discrimination, temporal integration, phonemic awareness, understanding basic concepts, following directions and short term memory (id. at pp. 9-10). She further determined that a receptive language disorder was present (id. at p. 10). The audiologist opined that the identified deficits would impact the student's ability to perform in the classroom and interfere with his ability to learn to read and that the student was not ready to be mainstreamed (id.). Among other things, the audiologist recommended that the student undergo a trial with a personal FM trainer; that the student be taught reading using a multisensory, specific phonemic awareness approach; and that petitioner consider auditory integration training (id. at pp. 10-11).[2] The audiologist also recommended that petitioner consider an evaluation of visual tracking ability by a developmental optometrist/ophthalmologist (id. at p. 11). Subsequent to the central auditory processing evaluation, the student was seen by his otolaryngologist (ENT) who reported that the student continued to have eustachian tube dysfunction with redacted eardrums bilaterally (Parent Ex. 102C at p. 2). The physician reported that the student's hearing was borderline normal with a conductive component (id.). He opined that the abnormal auditory processing evaluation was difficult to interpret because of the student's underlying conductive hearing loss (id.).

Although the student's 2005-06 IEP indicated that petitioner was to receive once weekly parent training (Parent Ex. 5 at p. 4), due to an oversight on the part of respondent, the service was not initially provided (Parent Ex. 88 at p. 2). On January 4, 2006, the student's special education teacher notified petitioner that the classroom behavior consultant would be contacting her regarding parent training (Parent Ex. 89 at p. 2).

By letter to the school principal dated January 5, 2006, petitioner summarized her understanding of their December 23, 2005 meeting (Parent Ex. 95). Petitioner asserted that attempts to mainstream the student constituted a change in placement for which a reevaluation was required (id. at p. 1). She indicated that she had not attended any meeting at which a change in placement was discussed nor was she in agreement with a change in placement (id.). Petitioner further asserted that written statements from the student's teachers, shared with her during the December 23, 2005 meeting, did not constitute the necessary reevaluation (id.; see Parent Ex. 96). She requested a reevaluation, as well as a "thorough" OT evaluation, of the student and provided written consent for both (Parent Exs. 93; 94; 95 at p. 1). Petitioner authorized her son to attend the general education classroom each day for non-academic activities, provided that he be accompanied by his 1:1 aide (Dist. Ex. 95 at p. 2).

By letter dated January 10, 2006, petitioner formally requested a CSE meeting (Parent Ex. 91). In a separate letter to the school principal also dated January 10, 2006, petitioner requested

[2] The audiologist identified a mild conductive hearing loss bilaterally and stated that all results should be taken with caution due to the influence of the conductive hearing loss (Parent Ex. 28 at pp. 3-4). The audiologist noted that the auditory system does not fully mature until age seven and that the student's skills could improve with maturation, time and intervention (id. at p. 10).

information regarding her son's mainstreaming, including when it took effect; the frequency, duration and time of day of the mainstreaming; the kind of classroom accommodations that had been implemented; and whether the student's aide had been accompanying him during mainstreaming (Parent Ex. 90). By letter to the school principal dated January 11, 2006, petitioner alleged that respondent failed to provide parent training by a member of her son's IEP team and requested "prior written notice" from respondent on its "refusal" to comply with the student's IEP as it related to parent training (Parent Ex. 89). In response to petitioner's requests, respondent notified petitioner in writing that it had scheduled a CSE meeting for January 31, 2006 (Parent Ex. 11; see also Parent Ex. 88 at pp. 1-2).

In a response dated January 18, 2006, respondent's director of pupil personnel services (director), attempted to address petitioner's concerns raised in previous correspondence (Parent Ex. 88). The director summarized his understanding of petitioner's December 23, 2005[3] meeting with the school principal, which he understood to include an agreement between the parties to begin mainstreaming the student in January during special area classes (id. at p. 1). The director noted that no mainstreaming would occur until the CSE had approved it (id.). The director acknowledged that petitioner had informed him of recent central auditory processing evaluations that had been conducted of the student and the director proposed that the CSE discuss the central auditory processing evaluations, mainstreaming and parent training at the upcoming January 31, 2006 CSE meeting (id. at pp. 1-2). In response to petitioner's request for a reevaluation, the director opined that petitioner was misinformed regarding the need for a reevaluation prior to a change in placement (id. at p. 2). However, he indicated that an OT evaluation had been conducted and that the CSE could discuss whether the student required additional evaluations (id.).

In a written response dated January 20, 2006, petitioner alleged that respondent unlawfully decided to change the student's placement to provide mainstreaming without a CSE meeting (Parent Ex. 87). Subsequently, in a letter dated January 25, 2006, petitioner asserted that respondent's director had denied her request for a complete reevaluation and requested "prior written notice" regarding her "request to re-assess [her] son before attempting to make any changes on his school placement" (Parent Ex. 83). By letter dated January 26, 2006, the director responded to petitioner's assertions, stating among other things, that the student had not been mainstreamed; that mainstreaming would not occur unless authorized by the CSE; that the proposed mainstreaming did not constitute a change in the student's placement but rather a "modest program change;" and that the CSE would discuss petitioner's request for a reevaluation which had not been previously denied as petitioner claimed (Parent Ex. 82).

Prior to the January 31, 2006 CSE meeting, the student's speech-language therapist reported in a progress report dated January 22, 2006 that the student was "progressing very nicely" toward his IEP goals (Parent Ex. 19). She noted that the student's ability to follow directions of increasing length and complexity had greatly increased and that the student demonstrated strong auditory comprehension skills (id.). The therapist further noted that the student was able to answer questions related to a story presented orally; to produce complete sentences to describe items in a category; and to respond well to listening skills strategies (id.). According to the therapist, the

[3] Respondent's January 18, 2006 letter refers to December 12, 2005 as the date when petitioner met with the school principal (Parent Ex. 88 at p. 1), which respondent subsequently acknowledged was an inadvertent error and agreed with petitioner that the meeting actually occurred on December 23, 2005 (Parent Exs. 82; 87).

student could make excellent eye contact and his conversational skills had improved greatly (id.). The therapist indicated that the student's social skills appeared to be age appropriate (id.).

Respondent also conducted an OT evaluation as requested by petitioner (Parent Ex. 18). In a report dated January 25, 2006, the student's occupational therapist stated that the student had made steady progress since September 2005 (id. at p. 4). She noted that the student's fine motor skills were stronger and that his prewriting and writing abilities were developing in such areas as pencil control, letter/number formations and drawing (id. at pp. 3-4). The therapist stated that the student's visual perceptual skills appeared age appropriate (id. at p. 4). Based on the results of standardized testing the occupational therapist reported that from a functional perspective the student was able to accurately interpret visual information during age appropriate tasks (id. at p. 3). She noted that the student was able to reliably name letters and numbers, adhere to the boundaries of space during coloring and maze work, and spatially plan materials for craft activities (id.).

The CSE convened on January 31, 2006 (Dist. Ex. 2 at p. 1; IHO Ex. I). As detailed in the meeting transcript, the January 2006 CSE discussed the student's progress as reported by his teachers and therapists (IHO Ex. I at pp. 5-17, 19-21), differences between the student's performance at home and in school (id. at pp. 17-19, 20-22, 35-36), parent training (id. at p. 18), results of the central auditory processing evaluation obtained privately by petitioner (id. at pp. 25-34) and mainstreaming (id. at pp. 35-38). Due to time constraints the CSE was unable to finish its discussion on mainstreaming (id. at pp. 39-41). No determinations were made and no IEP was developed (Parent Ex. 4 at p. 2). The CSE members agreed to continue the discussion the following week (IHO Ex. I at pp. 39-43). Respondent notified petitioner by letter dated January 31, 2006 that it had scheduled a CSE meeting for February 9, 2006 (Parent Ex. 10).

The CSE reconvened on February 9, 2006 (Parent Ex. 4; IHO Ex. II). Meeting minutes summarized discussion from both the January and February CSE meetings (Parent Ex. 4 at p. 2). According to the minutes, respondent's team members reported that the student was progressing well and that his performance was markedly improved compared with reports of his performance from the previous year (id.). Petitioner indicated that she had not observed similar progress in the student's home behaviors and schoolwork (id.). The CSE reviewed the private auditory processing evaluation provided by petitioner (id.). Meeting minutes indicated that results from the private testing suggested a student with much greater language and attention deficits than those observed in school (id.). CSE members noted that auditory processing evaluations are typically conducted on children age seven or above, that the evaluator did not obtain any information from school staff, that the evaluator did not reference any gains made by the student in school, and that the evaluator noted the presence of fluid in the student's ears (id. at pp. 2, 3). Meeting minutes indicated that these factors, among others, led the February 2006 CSE to conclude that the evaluation recommendations should not be implemented; however, the CSE determined careful monitoring with periodic review of the findings appeared warranted (id. at p. 3). Petitioner reported that at home the student was often highly resistant and produced work of low quality (id.). The CSE explored the possible reasons for the student's differing behavior at home and school and recommended that parent training focus on helping the student transfer his compliant behavior from school to home (id.; IHO Ex. II at pp. 16-46). Regarding mainstreaming, the CSE agreed that following the February school recess, the student would be mainstreamed in the general education kindergarten class for the morning calendar activity and for afternoon center time three

times per week (Parent Ex. 4 at p. 3; IHO Ex. II at pp. 5-16). In order to provide the student a respite from being formally evaluated, the February 2006 CSE agreed at that time not to provide any further evaluation of the student and to revisit the student's need for formal evaluation later in the spring prior to the student's annual review (Parent Ex. 4 at p. 3; IHO Ex. II at pp. 47-49, 57-63). The student's IEP was amended to reflect the CSE's recommendation for mainstreaming (Parent Ex. 4 at p. 4) and observations of his improvement in attention and behavior, as well as fine motor, sensory processing and self-help skills (id. at pp. 5-6).

Following the February 9, 2006 CSE meeting, petitioner continued to seek evaluation and treatment of the student's diagnosed auditory processing disorder and had the student evaluated by a second audiologist. In a letter to the student's special education teacher dated February 28, 2006, petitioner indicated that the student would be evaluated for auditory integration training and requested that the teacher complete a checklist and performance scale for the audiologist prior to the evaluation (Dist. Ex. 70). The special education teacher completed the checklist as requested; however, she noted that the performance scale was not appropriate for a five-year-old student and returned the form, without completing it, to the audiologist (Dist. Ex. 71). The evaluation took place on March 22, 2006 at the Hearing and Learning Center at Beth Israel Medical Center (Parent Ex. 27). There were notable differences between the checklist completed by petitioner and the one completed by the student's teacher, with petitioner's checklist indicating many more areas of concern (Dist. Ex. 18 at pp. 6, 10). The audiologist reported that testing was accomplished with good reliability and indicated normal hearing bilaterally (id. at p. 1; Parent Ex. 27 at p. 1). Based on the results of standardized testing, the audiologist diagnosed the student with an auditory processing disorder (Parent Ex. 27 at p. 2). Among other things, the audiologist recommended auditory integration training and the use of a personal, wearable FM trainer in the classroom and other difficult listening situations (id. at p. 3).

Petitioner sent three letters dated March 23, 2006 to respondent (Parent Exs. 76; 77; 78). In the first letter, petitioner requested a CSE meeting, indicating that she had new medical evidence regarding her son's auditory processing that she would like to present to the CSE (Parent Ex. 78). To allow the student time to adapt to mainstreaming, and in light of the April school recess, petitioner requested that the CSE meeting take place the second week in May (id.). In the second letter, petitioner questioned the special education teacher's partial completion of the checklist and performance scale for the second audiologist, noting that the findings of the first audiologist had been rejected due to lack of teacher input (Parent Ex. 77). Petitioner also indicated that she would be sending the special education teacher an ADHD questionnaire to complete and return to the student's psychologist (id.). In the final letter, petitioner requested "prior written notice" regarding respondent's refusal to provide the student with an FM trainer (Parent Ex. 76). Petitioner also indicated that she disagreed with respondent's OT evaluation and requested an independent educational evaluation (IEE) at district expense (id.).

In a response dated April 6, 2006, respondent's director indicated that he would attempt to schedule a CSE meeting for the second week in May, as requested by petitioner, but noted that due to timing, petitioner's new medical evidence would be addressed at the same meeting in which the CSE conducted the student's annual review (Parent Ex. 75). Citing the April school recess and a family trip scheduled by petitioner, the director indicated that respondent required time prior to the student's annual review to assess the student's adjustment to the general education kindergarten class and to conduct any needed reevaluations (id.).

By letter dated May 1, 2006, respondent sought parental consent to conduct a reevaluation of the student (Parent Ex. 74).

As recommended by the first audiologist in December 2005, petitioner sought a developmental vision evaluation of the student (Parent Ex. 25). In a May 1, 2006 letter to the audiologist, an optometrist reported that she had diagnosed the student with oculomotor dysfunction, accommodative insufficiency and binocular vision disorder (id. at p. 2). The optometrist characterized the student's oculomotor deficits as severe and his accommodative and binocular vision deficits as moderate (id.). The student's visual motor skills were judged to be average to above average (id.). The optometrist reported that she advised the student to use reading glasses for all reading, near work and classroom activities (id.). In addition, she recommended a comprehensive vision therapy program for the student (id.).

By letter dated May 4, 2006, petitioner advised the school principal that the student was scheduled to undergo intensive sessions in auditory integration therapy from May 8 2006 through May 19, 2006 and that the student would not attend school during this time (Parent Ex. 72). In a response dated May 5, 2006, respondent's director stated that the student's absence would impact the proposed timetable for reevaluating the student and suggested that if possible petitioner reschedule the therapy for the summer months (Parent Ex. 71). The director further requested that petitioner respond as soon as feasible to respondent's request for parental consent to conduct a reevaluation (id.).

In a handwritten note to the student's special education teacher, dated May 16, 2006, petitioner provided respondent with consent to perform a reevaluation (Dist. Ex. 31 at p. 1). In a letter dated May 22, 2006, petitioner withdrew her consent (Parent Ex. 70).

By letter dated May 31, 2006, respondent's director requested an explanation from petitioner regarding her decision to withdraw consent, so that the parties could work together to remove any problems or obstacles to the reevaluation process (Parent Ex. 69). He noted that his office would proceed to arrange a date for the student's annual review, given that resolving the reevaluation process may require time (id.). The director noted that in the event that the reevaluation could not be completed prior to the annual review meeting, the CSE would make recommendations based on all available and relevant information, including updated progress reports by the student's teachers and related services personnel (id.). Respondent would then reconvene the CSE and revisit all recommendations after the reevaluation had been completed (id.). The director concluded that respondent's preference was to "promptly clear obstacles and complete the reevaluation prior to the annual review meeting" (id.).

In a response dated June 7, 2006, petitioner posed numerous questions regarding the reevaluation process and provided respondent with additional reports of the student, including the March 22, 2006 audiological evaluation, the May 1, 2006 letter from the optometrist, and an April 1, 2006 letter from the audiologist who conducted the December 2005 audiological evaluation of the student[4] (Parent Ex. 65 at pp. 1-2). Petitioner requested that vision therapy services be added to the student's IEP and that a qualified behavioral specialist conduct a functional behavioral

[4] In her April 1, 2006 letter, the audiologist confirmed her diagnosis of an auditory processing disorder and questioned respondent's unwillingness to provide the student with an FM trainer (Dist. Ex. 17 at p. 27).

assessment (FBA) of the student (id. at p. 2). Petitioner indicated that she did not consent to a psychoeducational evaluation of the student for the following reasons: she did not know the name of the test to be administered, the student had already been subjected to many tests and she was concerned about testing him again so soon (id.). Petitioner indicated that she would consent to achievement tests in reading, math and writing provided she was given the exact name of each test and the results of the test prior to the annual review meeting (id. at p. 3). Petitioner included in her letter a list of topics that she planned to present at the student's annual review, which included the student's progress in the mainstream setting, the student's progress toward kindergarten standards, the development of an appropriate placement for the student and the provision of summer services (id. at p. 4). Attached to petitioner's June 7, 2006 letter was a list of 31 questions that petitioner requested the student's regular education teacher answer regarding the student's mainstreaming experience (id. at pp. 5-7).

In a June 10, 2006 memorandum to the student's team members, respondent's director indicated that it appeared unlikely that respondent would receive petitioner's consent to evaluate the student prior to the annual review, which was scheduled for June 22, 2006 (Parent Ex. 64). The director requested that each team member prepare a written summary of the student's progress or lack thereof, as well as their recommendations for the CSE (id.). Team members composed summaries as requested (Dist. Ex. 6; Parent Exs. 13; 14; 15; 16; 17). The school psychologist reported that the student had demonstrated excellent progress in the academic, social and emotional realms (Parent Ex. 17). The student's speech therapist indicated that student had improved greatly in all speech-language areas; however, continued to require some intervention to further develop his language abilities (Parent Ex. 14 at p. 2). According to the student's occupational therapist, the student made notable gains in the addressed skills areas, which included attention control, fine motor skills, graphomotor abilities, eye-hand coordination and bilateral integration (Parent Ex. 15 at pp. 1, 3). The student's special education classroom teacher reported that the student had shown improvement in all subject areas (Parent Ex. 16 at p. 1). She related the student's progress to the kindergarten learning standards and described how the student had met many of the standards for reading, writing and mathematics (id. at pp. 1-3). The teacher recommended that the student increase his mainstreaming time in a general education first grade classroom (id. at p. 3). The regular education kindergarten teacher reported that the student functioned well during mainstreaming and that it appeared the student was ready both socially and academically for increased mainstreaming the following year (Parent Ex. 13 at p. 2). The behavioral consultant who provided parent training reported that the student had progressed nicely in completing homework and adhering to rules (Dist. Ex. 6 at p. 2).

On June 14, 2006, respondent's director responded to the concerns raised by petitioner in her June 7, 2006 letter (Parent Ex. 61). The director indicated that prior to the CSE meeting petitioner would be provided with written progress reports from the student's teachers and therapists and that the summary of the regular education teacher would address in substance petitioner's 31 questions regarding mainstreaming (id. at p. 1). The director provided petitioner with the names of achievement tests to be used in a reevaluation, acknowledged receipt of the private evaluations from petitioner, and indicated that respondent would not be conducting an FBA since the student had not displayed any pattern of behavior at school that interfered with learning (id. at pp. 1-2). The director questioned petitioner's refusal to provide consent for a psychoeducational evaluation given the differing diagnoses offered in the previous evaluations and

the student's significant progress (id. at p. 2). The director further indicated that the student's need for extended school year (ESY) services would be addressed at the CSE meeting (id. at p. 3).

On June 15, 2006 petitioner sought a private educational analysis of the student (Dist. Ex. 64). According to evaluation results the student's reading and language abilities were at or above expected levels; however his auditory attending and psycho-motor readiness skills were reported to be below expected levels (id. at pp. 1-2).

By letter dated June 14, 2006 and letter dated June 16, 2006, respondent provided notice to petitioner of the scheduled June 22, 2006 CSE meeting (Parent Exs. 7; 8).

The CSE convened on June 22, 2006 for the student's annual review (Parent Exs. 2; 101). Participants included respondent's director who was also the CSE chairperson, respondent's school psychologist; the student's special education teacher, regular education teacher, occupational therapist, speech therapist, and behavioral consultant; a parent advocate; and petitioner (Parent Ex. 2 at p. 2). The CSE recommended for the 2006-07 school year the student's placement in a special class for three hours and 45 minutes per day, which was the average amount of time spent in the special class after subtracting the time spent in lunch, related services and mainstreaming (id. at p. 5). Related services recommendations included speech-language therapy once weekly in a group of 4:1 and once weekly in a group of 5:1, as well as OT twice weekly in a group of 3:1 (id.). The student's IEP afforded him preferential seating and additional time to complete tasks (id.). Support for school personnel on behalf of the student included explaining the needs of the pupil to classroom teachers including special areas teachers, providing the teacher with a summary of key IEP points and reviewing with the teacher strategies that have worked (id.). Testing accommodations allowed testing to be administered in a place with minimal distractions (id. at p. 6). The student's IEP included goals related to study skills, reading, writing, speech-language, and motor development (id. at pp. 8-10).

Meeting minutes from the June 22, 2006 CSE meeting indicated that none of respondent's staff noted the kind of language processing issues that would be predicated by the presence of a central auditory processing disorder (Parent Ex. 2 at p. 3). The CSE declined to recommend vision services because there was no evidence that there was an apparent impact on school performance (id.). According to meeting minutes, the consensus of the June 2006 CSE was that the student no longer required the 1:1 teaching assistant and that the provision of parent training, which was predicated on the possible presence of a PDD, should be discontinued insofar as nothing in the student's school performance suggested the presence of a PDD (id. at p. 4). Meeting minutes further indicated that the CSE did not find evidence of the kind of severity of a disability or the likelihood of significant regression to warrant the student's eligibility for 12-month ESY services (id.). Petitioner disagreed with the CSE's recommendations, stating they were insufficient to meet the student's needs and did not take into account the private evaluations that petitioner presented (id. at p. 3). Meeting minutes indicated that petitioner stated that she was considering requesting an impartial hearing (id. at p. 4). The director, who was also the CSE chairperson, indicated that it was the "strong preference" of respondent to reach agreement without resorting to an impartial hearing and stated that respondent would be open to follow-up discussions, informal discussion or additional CSE discussion to try to reach a plan acceptable to both the school and the family (id.).

A copy of the IEP generated by the June 22, 2006 CSE was sent to petitioner on or about June 30, 2006 (Parent Ex. 3). In the accompanying cover letter, the director noted that petitioner's "strong disagreement" with the CSE's recommendations along with respondent's willingness to engage in further discussion were detailed in the comment section of the IEP (id. at p. 1). He requested that petitioner contact him if she would like to arrange for a follow-up meeting (id.).

On or about August 29, 2006, petitioner requested an impartial hearing (Parent Ex. 1).[5] By letter dated September 1, 2006, respondent's director stated that respondent was making arrangements to follow the student's February 9, 2006 IEP until the hearing process was concluded (Parent Ex. 55).

By letter dated September 21, 2006, petitioner, through her attorney, amended her request for an impartial hearing (Parent Ex. 1 at p. 1). Petitioner asserted that respondent failed to provide an appropriate IEP tailored to the student's needs, failed to offer the student a free appropriate public education (FAPE) for the 2006-07 school year, failed to provide appropriate speech-language services, failed to provide "prior written notice" in accordance with regulatory requirements, failed to provide appropriate assistive technology, failed to provide ESY services, failed to provide vision therapy, failed to provide parent training, and failed to properly consider and implement the recommendations of numerous private physicians and evaluators (id. at pp. 1-3). Among other things, petitioner requested a 1:1 aide for the student, specialized reading instruction, additional speech-language services, an FM trainer, ESY services, vision therapy and parent training (id. at pp. 3-4). Petitioner also requested reimbursement for her privately obtained central auditory processing evaluations, vision and reading evaluations of the student (id. at p. 4).

Following a preliminary conference that was held on October 23, 2006 and subsequent motions by the parties, the impartial hearing began on January 25, 2007. After a total of ten days of testimony, the impartial hearing concluded on September 5, 2007. At the impartial hearing, both parties presented documentary and testimonial evidence. Petitioner presented the testimony of respondent's director of pupil personnel services who was also the chairperson of the CSE meetings, the student's parents, and the private optometrist who conducted the developmental vision evaluation of the student. Respondent presented the testimony of the student's behavioral consultant who provided parent training, the student's special education teacher, the student's regular education teacher, the student's gym teacher, the student's occupational therapist, respondent's speech pathologist who provided the student speech-language services, and respondent's director of pupil personnel services. At the conclusion of the impartial hearing, the parties were provided 30 days to submit written argument and the impartial hearing officer granted petitioner's requests for three additional extensions (IHO Decision at p. 2).

In a 47-page decision dated November 23, 2007, the impartial hearing officer determined that petitioner did not meet her burden to establish that respondent failed to provide the student with an IEP reasonably calculated to confer educational benefit (IHO Decision at p. 38). Specifically, the impartial hearing officer found that the CSE complied with the procedural requirements set forth in the Individuals with Disabilities Education Act (IDEA) and that even if a procedural violation had occurred, it did not impede the student's right to a FAPE or cause a

[5] Petitioner's initial request for an impartial hearing is not contained in the hearing record.

deprivation of educational benefits (id. at p. 41). Although the impartial hearing officer noted that it appeared that respondent did not provide prior written notice regarding the initiation date for mainstreaming the student, she considered such a violation de minimus and noted petitioner's frequent communication with respondent about mainstreaming and the discussion of mainstreaming at the January and February 2006 CSE meetings (id. at pp. 40-41). Moreover, the impartial hearing officer found that the documentary evidence showed that petitioner "actively communicated" with respondent through the use of a communication book, written correspondence and telephone calls; that petitioner enumerated issues she wanted discussed by the CSE in certain correspondence; and that petitioner "exhibited a sophisticated knowledge of the IDEA" (id. at p. 40). Based on the foregoing, the impartial hearing officer concluded that petitioner had the opportunity to meaningfully participate in the development of her son's IEP (id. at pp. 39-41).

The impartial hearing officer further noted that petitioner withdrew her consent for evaluations, causing respondent's CSE members to base their opinions on "subjective assessments" of the student (IHO Decision at p. 38). The impartial hearing officer found that the CSE did not refuse to evaluate the student (id. at pp. 38-39). She found petitioner's testimony regarding respondent's failure to evaluate the student "disingenuous" given petitioner's participation and agreement at the January and February 2006 CSE meetings to defer additional testing (id. at p. 39).

The impartial hearing officer also found that the student presented differently at home and at school and that respondent appropriately developed an IEP for the student based on the student's developmental needs presented at school (IHO Decision at pp. 29-34, 36). Referencing the student's special education teacher's testimony that the student made improvements in reading and math as well as the student's success within a mainstream environment, the impartial hearing officer determined that the student made meaningful and substantive educational progress (id. at p. 37). She further determined that the student did not require ESY services (id. at pp. 37-38).

Regarding the developmental vision evaluation and audiological evaluations obtained by petitioner, the impartial hearing officer found that respondent "did not perfunctorily dismiss these evaluations" (IHO Decision at p. 36). The impartial hearing officer noted that respondent's personnel did not observe the conditions described by the evaluators in their reports (id. at p. 34) and that the private evaluators did not seek the input of school personnel (id. at p. 35). The impartial hearing officer further noted that not one of the teachers or therapists who had "the most intimate knowledge of the student" opined that the student would benefit from an FM trainer, vision therapy, or a 1:1 aide (id. at p. 37). Although she found the testimony of respondent's speech-language pathologist credible regarding the "integrity and value of [the private audiologist's] diagnosis of an auditory processing disorder," the impartial hearing officer was not persuaded that the student required the modifications recommended by the private audiologist (id. at p. 35). As far as the private optometrist's recommendation for the student to undergo vision therapy, the impartial hearing officer held that respondent was under no obligation to "provide services prophylactically" (id.). The impartial hearing officer declined to award reimbursement for the private evaluations because: (1) petitioner was seeking reimbursement for evaluations that she had previously agreed to defer; (2) there is no indication that petitioner requested optometric or reading evaluations prior to petitioner's request for an impartial hearing; (3) petitioner failed to present proof-of-payment for the evaluations; (4) and equitable considerations, particularly

petitioner's withdrawal of consent for the reevaluation, precluded the requested reimbursement (id. at pp. 41-42).

Lastly, the impartial hearing officer found that petitioner's claims relating to the 2006-07 school year were not moot because the pendency provisions currently in place render the controversy "capable of repetition, yet evading review" (IHO Decision at pp. 42-43).

This appeal ensued. Petitioner asserts that the impartial hearing officer erred in finding that respondent offered the student a FAPE because respondent (1) disregarded petitioner's private evaluations in favor of its staff's subjective impressions; (2) failed to provide petitioner with prior written notice; (3) failed to provide the student an FM trainer; (4) failed to provide vision therapy services; (5) impermissibly recommended discontinuing the 1:1 aide and parent training; (6) failed to offer appropriate speech-language services; (7) failed to offer ESY services; and (8) failed to order reimbursement for "the auditory, speech/language, and behavioral optometry evaluations."

In its answer, respondent requests that petitioner's appeal be dismissed and the impartial hearing officer's decision be upheld in its entirety. Respondent contends, among other things, that the impartial hearing officer correctly determined that petitioner failed to sustain her burden of proof at the impartial hearing, correctly found that respondent offered the student a FAPE, and correctly denied petitioner's requests for reimbursement of private evaluations. Respondent further argues that it is not required to maximize the potential of a student. Respondent also asserts several affirmative defenses, including that the petition fails to state a claim for which relief can be granted, that the petition fails to comply with 8 NYCRR 279.4(a), and that petitioner's memorandum of law fails to comply with 8 NYCRR 279.8(a)(2). Petitioner submitted a reply and denied respondent's procedural defenses relating to the sufficiency of the petition and form of the memorandum of law.

At the outset, I will address the procedural issues in this appeal. A petition for review must comply with section 279.4(a) of the State regulations, which provides, in pertinent part, that: "[t]he petition for review shall clearly indicate the reasons for challenging the impartial hearing officer's decision, identifying the findings, conclusions and orders to which exceptions are taken, and shall briefly indicate what relief should be granted by the State Review Officer to the petitioner" (8 NYCRR 279.4[a]). In the instant case, respondent argues that petitioner fails to provide any particulars explaining why she challenges the impartial hearing officer's decision and instead merely restates the allegations set forth in her amended due process complaint notice. Petitioner is represented by counsel. The petition contains conclusory allegations that the impartial hearing officer erred and fails to identify the relief sought on appeal. Petitioner submitted a memorandum of law along with her petition for review; however, I note that the memorandum is not a substitute for a properly drafted petition for review (see 8 NYCRR 279.4, 279.6; Application of a Child with a Disability, Appeal No. 07-112; Application of a Child with a Disability, 06-096; Application of the Bd. of Educ., Appeal No. 05-031). In the exercise of my discretion, I decline respondent's request to reject the petition on sufficiency grounds; however, I remind petitioner's counsel to ensure compliance with Part 279 of the State regulations in the future.

Respondent requests that I reject petitioner's memorandum of law for failure to conform to part 279 of the State regulations. State regulations provide in pertinent part that memoranda of law shall be typewritten in black ink, with double spaced text and font that is a minimum of 12-point type (8 NYCRR 279.8[a][2]). Documents that fail to comply with the form requirements of the State regulations may be rejected in the sole discretion of a State Review Officer (8 NYCRR

279.8[a]). In the exercise of my discretion, I decline respondent's request to reject petitioner's memorandum of law.

Next, I find that the substantive portion of this appeal relating to petitioner's request below for a 1:1 aide, parent training, and increased speech-language services has now been rendered moot because petitioner had received these requested services throughout the 2006-07 school year by virtue of pendency. 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]). 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 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). 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). 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]). 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). Mootness may be raised at any stage of litigation (In re Kurtzman, 194 F.3d 54, 58 [2d Cir. 1999]).

Here, the hearing record reveals that by virtue of pendency the student received the speech-language services, parent training and the 1:1 aide that were sought by petitioner for the 2006-07 school year (Tr. pp. 92, 988-90; see IHO Ex. VII at pp. 37-39). A determination on these three discrete issues would have no actual effect on the parties. A State Review Officer is not required to make a determination which will have no actual impact upon the parties (Application of the Bd. of Educ., Appeal No. 06-044; Application of a Child with a Disability, Appeal No. 02-086; see also Application of the Bd. of Educ., Appeal No. 04-006; Application of a Child with a Disability, Appeal No. 02-011; Application of a Child with a Disability, Appeal No. 97-64). Moreover, it is

beyond dispute that the 2006-07 school year is now long past. Consequently, petitioner's claims relating to these three issues have been rendered moot by the passage of time, as the June 2006 IEP has expired by its own terms, and a new IEP, based upon the student's needs for the 2007-08 school year, should have been devised to supersede it. Under these circumstances, I conclude that the issues relating to the provision of parent training, the provision of a 1:1 aide for the student, and the frequency of speech-language services have been rendered moot and do not fall within the narrow exception for reviewing moot cases that are capable of repetition yet evading review. Accordingly, I need not discuss the merits of these three issues.

I now turn to petitioner's remaining contentions that respondent failed to provide the student with a FAPE for the 2006-07 school year.

The central purpose of the 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).[6]

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]).

The IDEA directs that, in general, an impartial hearing officer's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with

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[6] 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]).

sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 130 [2d Cir. 1998]; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see 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 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).

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]).[7]

Returning to the instant case, I will first address petitioner's contention that respondent failed to provide prior written notice.[8] A school district must provide parents with "prior written notice" whenever it proposes or refuses "to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child" (20 U.S.C. § 1415[b][3]; 34 C.F.R. § 300.503[a]; 8 NYCRR 200.1[oo]). Federal and State regulations set forth the minimum content requirement of the prior written notice, including a description of the action proposed or refused; an explanation of why the school district proposes or refuses to take the action; a description of each evaluation procedure, assessment, record, or report the school district used as a basis for the

[7] On August 15, 2007, New York State amended its Education Law to place the burden of proof upon the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement would continue to have the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404 [1][c], as amended by Ch. 583 of the Laws of 2007). The amended law took effect for impartial hearings commenced on or after October 14, 2007. In this case, the amended law does not apply because the impartial hearing was commenced before the effective date of the amendment.

[8] The petition merely alleges in general terms that respondent "fail[ed] to provide the parents with prior written notice of changes in the child's program and placement" (Pet. ¶ 25). Petitioner provides no further particulars. Given petitioner's lack of specificity, I have limited my review to the impartial hearing officer's decision on prior written notice for mainstreaming.

proposed or refused action; a statement that the parents have protection under the procedural safeguards; sources for the parents to contact to obtain assistance; a description of other options the CSE considered and the reasons why those options were rejected; and a description of the factors relevant to the school district's proposal or refusal (34 C.F.R. § 300.503[b][1]-[7]; 8 NYCRR 200.5[a][3][i]-[vii]).

I concur with the impartial hearing officer's finding that the hearing record indicates that the parties discussed mainstreaming through their multiple correspondences and at the January and February 2006 CSE meetings. The hearing record reflects that petitioner agreed at the February 2006 CSE meeting to begin mainstreaming the student in March 2006 and that the student's IEP was updated to include mainstreaming (Parent Ex. 4 at pp. 3, 4). However, upon reviewing the hearing record, I concur with the impartial hearing officer that respondent failed to comply with the IDEA's procedural requirement to send prior written notice of its proposal to change the student's placement to include mainstreaming (34 C.F.R. § 300.503[a][1]; 8 NYCRR 200.1[oo], 200.5[a][1]). However, under the circumstances presented in this case, I find that there is insufficient evidence in the hearing record to demonstrate that the lack of prior written notice impeded the student's right to a FAPE, significantly impeded petitioner's opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or caused a deprivation of educational benefits to the student (20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]). Respondent is cautioned, however, to ensure that it complies with its obligation to provide prior written notice when required (34 C.F.R. § 300.503[a]; 8 NYCRR 200.1[oo], 200.5[a][1]).

I also concur with the impartial hearing officer's decision that the hearing record does not show that the student was eligible for ESY services. According to State regulations, "[s]tudents shall be considered for [ESY] special services and/or programs in accordance with their needs to prevent substantial regression" (8 NYCRR 200.6[j][1]; Application of a Child with a Disability, Appeal No. 07-039; Application of the Bd. of Educ., Appeal No. 04-102; see 34 C.F.R. § 300.106 [defining ESY]; 8 NYCRR 200.4[d][2][x] [noting that a student's IEP shall indicate whether the student is eligible for a special service or program on a 12-month basis]). State regulations define substantial regression as "the student's inability to maintain developmental levels due to a loss of skill or knowledge during the months of July and August of such severity as to require an inordinate period of review at the beginning of the school year to reestablish and maintain IEP goals and objectives mastered at the end of the previous school year" (8 NYCRR 200.1[aaa]). The Office of Vocational and Educational Services for Individuals with Disabilities (VESID), published a guidance memorandum, dated February 2006, which states the following regarding ESY services:

> A student is eligible for a twelve-month service or program when the period of review or reteaching required to recoup the skill or knowledge level attained by the end of the prior school year is beyond the time ordinarily reserved for that purpose at the beginning of the school year. The typical period of review or reteaching ranges between 20 and 40 school days. As a guideline for determining eligibility for an extended school year program a review period of eight weeks or more would indicate that substantial regression has occurred.

(http://www.vesid.nysed.gov/specialed/publications/policy/esy/qa2006.htm; see also Application of a Child with a Disability, Appeal No. 07-089).

For the reasons set forth below, I find that the June 2006 CSE's decision not to recommend ESY services is supported by the hearing record. Although petitioner argues that the student experiences substantial regression when absent from school, the hearing record demonstrates the student's continued progress throughout the 2005-06 school year and lack of significant regression over extended school breaks. At the June 22, 2006 CSE meeting, petitioner argued that when the student was absent from school he required time to readjust (Parent Ex. 101 at p. 37). Respondent's director stated that there was no evidence that the student presented a pattern of undo regression over school breaks (id.). The director further indicated that the student did not demonstrate the severity of behavior or disability that would qualify him for summer services (id. at pp. 37-39). The student's classroom teacher opined that due to the student's excessive absences and illnesses during the second half of the year his progress was more limited relative to the first half (Parent Ex. 16 at p. 3). The June 22, 2006 CSE discussed, and the resultant IEP indicated, that by the end of the school year the student's rate of progress had slowed, but that decline was attributed to the student's frequent absenteeism in February, April and May (Parent Exs. 2 at p. 3; 101 at pp. 9-10, 33). Based on the foregoing, I concur with the impartial hearing officer that the hearing record demonstrates that the student achieved significant progress notwithstanding his excessive absenteeism during the second half of the 2005-06 school year (IHO Decision at p. 38). Accordingly, the hearing record does not establish that the student would have experienced substantial regression to warrant ESY services.

I turn next to petitioner's assertion that respondent disregarded the evaluations provided by petitioner in favor of its own staff's "subjective impressions" (Pet. ¶ 24). As part of the CSE's review, a CSE must consider an evaluation report submitted to the CSE by a parent, provided the private evaluation meets the school district's criteria (34 C.F.R. § 300.502[c][1]; 8 NYCRR 200.5[g][1][v][a]). Although a CSE is required to consider private evaluation reports, it is not required to follow their recommendations (see, e.g., Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 145 [N.D.N.Y. 2004]). In determining whether a CSE adequately "considered" a private evaluation report, in the absence of a statutory or regulatory definition, the Second Circuit Court of Appeals has looked to the plain meaning of the term (T.S. v. Bd. of Educ., 10 F.3d 87, 89 [2d Cir. 1993] [finding that an evaluation report was adequately "considered" when it was read by the director of special education, portions of the report were read and summarized for the CSE, and the CSE minutes showed discussion about the issues raised in the report]). In developing the recommendations for the IEP, the CSE must consider "the results of the initial or most recent evaluation; the student's strengths; the concerns of the parents for enhancing the education of their child; the academic, developmental and functional needs of the student, including, as appropriate, the results of the student's performance on any general State or district-wide assessment programs; and any special considerations" (8 NYCRR 200.4[d][2]; see 34 C.F.R. § 300.324[a]).

Although school districts must provide an opportunity for parents to participate in the development of their child's IEP, mere parental disagreement with a school district's proposed IEP and placement recommendation does not amount to a denial of meaningful participation (see Sch. for Language and Communication Development v. New York State Dep't of Educ., 2006 WL 2792754, at *7 [E.D.N.Y. Sept. 26, 2006] ["Meaningful participation does not require deferral to parent choice"]; Perricelli, 2007 WL 465211, at *1). The IDEA guarantees an "appropriate"

education, "not one that provides everything that might be thought desirable by loving parents" (Tucker, 873 F.2d at 567 [internal quotation omitted]; see Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132).

Under the circumstances of this case and for the reasons set forth herein, where the hearing record indicates frequent communication between the parties, that the student exhibits different behavior at home than at school, that petitioner attended the January, February and June 2006 CSE meetings, that the CSE discussed the private evaluation reports submitted by petitioner, and that the CSE considered and listened to petitioner's concerns, there is no basis to find that respondent improperly rejected the recommendations of the private evaluators.

The hearing record demonstrates that the June 22, 2006 CSE considered the following evaluations submitted by petitioner during the 2005-06 school year: an April 2006 central auditory processing disorder evaluation addendum,[9] a March 2006 audiological evaluation, a February 2006 vision evaluation, and a December 2005 auditory processing evaluation (Parent Ex. 2 at p. 4). In addition, the CSE considered numerous documents generated by respondent during the 2005-06 school year including a January 2006 OT evaluation and progress reports written in June 2006 that contained a behavior consultation summary, a mainstream progress report, a parent training summary, an educational progress report, a speech-language progress summary, a psychologist's memo to the CSE, an OT progress summary and an attendance report (id.; see Parent Ex. 64). Additional records were also available for review (Parent Ex. 101 at p. 2).

At the June 22, 2006 CSE meeting, the director noted that petitioner had exercised her right not to consent to a formal evaluation by the school team (Parent Ex. 101 at p. 11). He indicated that the CSE would assess the student's progress and make plans using the summary reports from respondent's staff, along with the evaluations submitted by petitioner (id.). In doing so he noted that respondent had not formally evaluated the student and that had some impact on how respondent was able to judge the student's progress (id.). In conclusion, the director indicated that he hoped the parties could have further conversation and at some point agree upon an evaluation process (id. at p. 12).

Meeting minutes show that the parties discussed the private evaluations and respondent's staff indicated that they did not observe at school the impairments identified by the private evaluators (Parent Ex. 2 at p. 3). During the June 2006 CSE meeting, petitioner disagreed with descriptions of the student's abilities as detailed by respondent's staff (Parent Ex. 101 at pp. 18-20, 28-30). Petitioner acknowledged during the June 22, 2006 CSE meeting that the student was compliant at school but noted that he continued to demonstrate behavioral issues at home and in the community (id. at pp. 15-17). Petitioner agreed that the student's educational needs were not the same as when he had entered respondent's school the previous year (id. at p. 18). Petitioner argued that the recommendations from her privately obtained evaluations were not reflected in the CSE's proposed program (id. at pp. 14-17, 42, 49).

Petitioner specifically challenges on appeal the CSE's decision not to provide the student with an FM trainer or vision therapy services as recommended by the private evaluators. Although

[9] Due to a typographical error the date of this exhibit is misidentified in the student's IEP as June 30, 2006 (Tr. p. 246).

there are numerous audiological evaluations and correspondence letters between physicians in the hearing record, it appears that petitioner submitted two of these evaluations to the June 22, 2006 CSE for consideration: a March 22, 2006 audiological evaluation and an April 1, 2006 addendum written by the first audiologist (Parent Ex. 2 at p. 4). Petitioner had previously submitted the December 2005 audiological evaluation to the CSE for review and CSE meeting transcripts indicate that information from the student's ENT may also have been provided to the CSE (Parent Ex. 101 at p. 14; IHO Ex. II at pp. 65-66). The December 2005 audiological evaluation was discussed at the January and February 2006 CSE meetings (IHO Exs. I at pp. 25-28, 30-34; II at pp. 67-70), while the recommendations of the student's ENT were discussed at the February meeting (IHO Ex. II at pp. 65-68). The audiologist who conducted the December 2005 evaluation, diagnosed the student with an auditory processing disorder and recommended, among other things, a trial with an FM trainer (Parent Ex 28 at pp. 10-11). Respondent's director, who was also the CSE chairperson, articulated numerous reasons why the CSE was reluctant to adopt the findings and recommendations of the audiologist including the age of the student at the time of the evaluation, the evaluator's acknowledgement of a mild conductive loss due to fluid in the student's ears, and the results of language testing which revealed that globally the student's language skills were in the average range (Parent Ex. 4 at pp. 2-3; IHO Ex. I at pp. 25-28, 33).

Both the March 2006 audiological evaluation and the April 2006 addendum to the December 2005 audiological, submitted by petitioner for the June CSE to consider, included the diagnosis of an auditory processing disorder and the recommendation for use of an FM trainer (Parent Exs. 27 at pp. 2, 3; 28 at pp. 9, 10). The transcript of the June 22, 2006 CSE meeting indicates that based on their observations of the student, respondent's staff disagreed with the findings of petitioner's private evaluations (Parent Ex. 101). The student's speech therapist stated that she had not seen any evidence of an auditory processing problem in a small group, the classroom or the regular class (id. at p. 27). The student's regular education teacher and occupational therapist concurred, indicating that they had not seen evidence of an auditory processing disorder (id.). The director reiterated the reasons why he felt the findings contained in the private audiological evaluations, including the recommendation for an FM trainer, were inappropriate, noting that this had been previously discussed at the February 9, 2006 CSE meeting (id. at pp. 12-14). The director stated that he found the audiological report calling for an FM trainer "simply not persuasive," noting the difference between "what is done in an office when it is so different at school" (id. at p. 35). He opined that it was fine to monitor the student but that the recommendations made by the audiologist did not seem called for in the school setting (id.). The director further stated that it was not appropriate to apply "even one" of the audiologist's recommendations if they were based on what respondent viewed as "an incorrect and inappropriate formulation" about the student (id. at p. 43). However, the student's IEP did include program accommodations including preferential seating and additional time to complete tasks and a testing accommodation that allowed for tests to be administered in a place with minimal distractions (Parent Ex. 2 at pp. 5-6). These accommodations were consistent with recommendations found in the first audiological evaluation conducted in December 2005 (Parent Ex. 28 at pp. 10-11). The student's June 22, 2006 IEP indicated that the CSE felt it was appropriate to continue careful monitoring of the student throughout the next school year to determine if any of the serious issues predicated by the outside evaluations subsequently emerge in the school setting (Parent Ex. 2 at p. 3).

Petitioner was also referred for a developmental vision evaluation by the first audiologist, who noted that the student had difficulty tracking during her evaluation (Parent Ex. 28 at p. 8). The student was evaluated by an optometrist, who memorialized her findings in a letter dated May 1, 2006 to the audiologist (Parent Ex. 25). The optometrist indicated that she conducted a vision examination and standardized testing and concluded that the student showed severe oculomotor deficits and moderate accommodative and binocular vision deficits (id. at p. 2). The optometrist's recommendations for the student included reading glasses and a comprehensive vision therapy program (id.).

Petitioner provided the vision report to the June 22, 2006 CSE (Parent Exs. 65 at p. 2; 101 at p. 11). With regard to vision training, the director stated that for respondent to provide an "unusual service" for a student making excellent progress with existing approaches would go beyond an appropriate education (Parent Ex. 101 at pp. 35-36, 42). However, he noted a willingness to monitor the student (id. at p. 42). According to meeting minutes, the CSE did not hear any evidence that there was an impact on the student's school performance and therefore vision services would not fall under the category of appropriate services to be provided by respondent (Parent Ex. 2 at p. 3). At the impartial hearing, the optometrist acknowledged that many of the tests she used to assess the student were normed on older students (Tr. pp. 1651, 1653-54, 1663-65, 1672). Further, the optometrist confirmed that the student's case history was provided by petitioner (Tr. pp. 1585, 1630), that she assumed that the behaviors described by petitioner were present in school (Tr. pp. 1638, 1673-82) and that the student's performance in school would not alter her diagnosis or recommendations for treatment (Tr. pp. 1639-40, 1643-44, 1705-06, 1719, 1722-24). Many of the scores obtained by the optometrist using standardized measures indicated that the student was functioning in the average range (Parent Ex. 25 at pp. 1-2). The optometrist confirmed this during testimony (Tr. pp. 1646-50, 1657-58, 1663-65, 1681-83).

Based on the foregoing, I find that respondent adequately considered and discussed petitioner's private evaluations. I also concur with the impartial hearing officer's determination that petitioner did not show that an FM trainer or vision therapy were necessary to ensure that the student receives educational benefit.

Finally, I turn to petitioner's assertion that the impartial hearing officer erred in failing to order reimbursement for the auditory, speech-language and behavioral optometry evaluations that petitioner privately obtained. Although I will proceed to review the impartial hearing officer's determination declining to award reimbursement for these private evaluations, I note that the petition on appeal does not specifically request relief in the form of reimbursement for the auditory, speech-language and behavioral optometry evaluations that petitioner privately obtained.

The hearing record indicates that on December 17, 2005 the student was seen for a private auditory and language processing evaluation (Parent Ex. 28). Petitioner testified that she obtained the evaluation on her own initiative due to her concerns regarding the student's spelling (Tr. p. 721). In a January 5, 2006 letter summarizing her meeting, petitioner indicated that she wanted her son to be reevaluated prior to being mainstreamed in a general education kindergarten, which she characterized as a change in placement (Parent Ex. 95 at p. 1). Petitioner provided her consent for respondent to perform a "full" evaluation of her son, as well as a request and consent to perform an OT evaluation of the student (Parent Exs. 93; 94; 95 at p. 1). Five days later petitioner formally requested a CSE meeting (Parent Ex. 91). In a January 18, 2006 response, the director indicated

that an OT evaluation had been conducted and noted that the parties could discuss at the CSE meeting whether petitioner was seeking, or if there was a need for, additional evaluations (Parent Ex. 88 at p. 2). The director opined that the student had already undergone many evaluations and stated that in his professional opinion the student should be spared additional evaluations unless there was a need for them (id.).

The transcript from the February 9, 2006 CSE meeting indicates that the CSE discussed the need for further evaluation based on petitioner's request, as well as the need to clarify the nature of the student's disability given the various diagnoses he had received over the past year (Parent Ex. 4 at p. 3; IHO Ex. II at pp. 3, 47-50, 56, 57-63, 69-70).

Petitioner shared her privately obtained auditory processing evaluation with the January and February CSEs and the evaluation was discussed (IHO Exs. I at pp. 25-28, 30-34; II at pp. 67-70). According to meeting minutes, it was agreed that no further evaluations would be done at that time; however, minutes indicated that the need for further evaluations should be discussed later in the spring, prior to the student's annual review meeting (Parent Ex. 4 at p. 3). As recommended by the first audiologist in December 2005, petitioner obtained a developmental vision evaluation of the student in January and February 2006 (Parent Ex. 25).

At the February 9, 2006 CSE meeting, petitioner indicated that she had been in touch with a second audiologist who would be "seeing [the student] in a couple of weeks" (IHO Ex. II at p. 67). In a letter to the student's teacher dated February 28, 2006, petitioner indicated that the student would be evaluated for auditory integration training and requested that the teacher complete a checklist and performance scale for the audiologist prior to the evaluation (Dist. Ex. 70). In March 2006, petitioner requested a CSE meeting, scheduled for the second week in May, to discuss new medical evidence that she had relating to her son's auditory processing disorder (Parent Ex. 78). At the impartial hearing petitioner testified that she did not ask the district to conduct its own audiological or developmental vision evaluations because she thought they were medical evaluations that were the responsibility of parents (Tr. pp. 722-23).

In a letter dated April 6, 2006, respondent's director indicated that he would attempt to schedule a CSE meeting for the second week in May, as requested by petitioner, but noted that due to timing petitioner's new medical evidence would be addressed at the same meeting in which the CSE conducted the student's annual review (Parent Ex. 75). The director indicated that prior to the annual review, respondent would require time to assess the student's adjustment to the general education kindergarten class and to conduct any needed reevaluations (id.). By letter dated May 1, 2006, respondent sought parental consent to conduct a reevaluation of the student (Parent Ex. 74).

In a handwritten note to the student's special education teacher, dated May 16, 2006, petitioner provided respondent with consent to perform a reevaluation (Dist. Ex. 31 at p. 1). In a letter dated May 22, 2006, petitioner withdrew her consent (Parent Ex. 70).

By letter dated May 31, 2006 the director requested an explanation from petitioner regarding her decision to withdraw consent, indicating that respondent's preference was to "promptly clear obstacles and complete the reevaluation prior to the annual review meeting" (Parent Ex. 69). In a response dated June 7, 2006, petitioner posed numerous questions regarding

the reevaluation process (Parent Ex. 65). Petitioner indicated that she did not consent to a psychoeducational evaluation because she did not know the name of the test to be administered and because the student had been subjected to too many tests and she was concerned about testing him again so soon (id. at p. 2). Petitioner indicated that she would consent to achievement tests in reading, math and writing provided she was given the exact name of each test and the results of the test prior to the annual review meeting (id. at p. 3).

The director responded on June 14, 2006, providing petitioner with the names of achievement tests to be used in a reevaluation (Parent Ex. 61 at p. 1). The director questioned petitioner's refusal to provide consent for a psychoeducational evaluation given the differing diagnoses offered in the previous evaluations and the student's significant progress (id. at p. 2). On June 16, 2006, petitioner sought a private educational analysis of the student (Dist. Ex. 64). The transcript from the June 22, 2006 CSE meeting confirms that the CSE considered petitioner's privately obtained evaluations and discussed the need to come to agreement on a plan for respondent to evaluate the student (Parent Ex. 101 at pp. 11-16, 33, 35, 42-44).

Federal and State regulations provide that a parent has the right to an independent educational evaluation (IEE) at public expense if the parent disagrees with an evaluation obtained by the school district (34 C.F.R. § 300.502[b][1]; 8 NYCRR 200.5[g][1]). If a parent requests an IEE at public expense, the school district must, without unnecessary delay, ensure either an IEE is provided at public expense or initiate an impartial hearing to show that its evaluation is appropriate or that the evaluation obtained by the parent does not meet the school district criteria (34 C.F.R. § 300.502[b][2]; 8 NYCRR 200.5[g][1][iv]). In the instant matter, petitioner did not disagree with any evaluation conducted by respondent. Rather, petitioner had the student privately evaluated on her own initiative (see Kozak v. Hampton Township Sch. Dist., 655 A.2d 641, 648 [Pa. Commw. 1995] [declining to award reimbursement for privately obtained evaluations where parents sought those evaluations on their own initiative and not because of any disagreement with an evaluation conducted by the school district]). Although the hearing record shows that the CSE considered the private evaluations, as previously discussed, ultimately the CSE declined to adopt many of the private evaluators' recommendations. Also, as set forth above, it appears from the hearing record that petitioner impeded respondent from performing the previously agreed to reevaluation of the student (see Holmes v. Millcreek Township Sch. Dist., 205 F.3d 583, 592 [3d Cir. 2000]). Accordingly, I agree with the impartial hearing officer that petitioner is not entitled to reimbursement for the auditory, speech-language and behavioral optometry evaluations that she privately obtained.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
February 25, 2008

PAUL F. KELLY
STATE REVIEW OFFICER